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Koontz v. St. Johns River Water Management District Yet Again Badly Splits Yet Another Court: Tell Us Something We Didn't Expect

by Sidney F. Ansbacher, Esquire, Upchurch, Bailey and Upchurch, P.A.

A panel of the Fifth District Court of Appeal split 2-1 in *St. Johns River Water Management District v. Koontz,* Case No. 5D006-1116, 2014 WL 1703942 (Fla. 5th DCA, April 30, 2014)(*Koontz V*) in its interpretation on remand of *Koontz v. St. Johns River Water Management District,* No. 11-1147, 2013 WL 3184628, 133 S. Ct. 2586, 540 U.S.— (June 25, 2013). (*Koontz IV*) I wrote a lengthy article on *Koontz IV* in the ELULS Reporter last year. S. Ansbacher, *Koontz v. St. Johns River Water Management District,* 35 ELULS Rptr. 1 (Sept 2013) (Ansbacher).

Koontz IV weighed whether a fee in lieu of mitigation to pay for off-site St. Johns River Water Management District needs was subject to the *"Nollan/Dolan"* test. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The *Nollan/Dolan* test requires development exactions to be "roughly proportionate" to a project's individualized impact and to bear an "essential nexus" to a project's perceived impact.

Nollan created the "essential nexus" standard. The Court held that a permit condition would not constitute a taking if it served the same purpose as would a permit denial. A condition that does not bear an "essential nexus" to the development impact,

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From the Chair

by Nicole C. Kibert

"It is only the farmer who faithfully plants seeds in the Spring, who reaps a harvest in the Autumn."

B. C. Forbes

Spring greetings from ELULS! Your Executive Council has been working hard throughout the spring to facilitate a smooth summer and fall for ELULS activities. We would love to tell you about these activities in detail and help you get more involved in the section.

A great way to get involved is to attend the ELULS Annual Update from August 6-9, 2014 at Amelia Island Plantation. Our Executive Council will meet on August 6th in the afternoon. The CLE committee, led by David Bass, has planned an outstanding program this year which will take place over two days, August 7-8. In addition, we invite you to attend our substantive committee lunch meetings (Energy; Land Use; Natural Resources; and Pollution Assessment, Remediation, Management and Prevention) on August 7th. You are also invited to attend the meetings of our other committees: Affiliate, CLE, Florida Bar Journal, Internet, Law School Liaison, Membership, Public Interest Representation, Section Reporter and Young Lawyers, which take place on

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CHAIR'S MESSAGE
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August 9th. In addition to ELULS meetings, the Annual Update will have several networking receptions, live music from The Non-Essentials and an EcoWalk. We'll be sending out detailed information about the Annual Update soon via the section listserve. If you are interested in being a section sponsor starting the with 2014 Annual Update, please visit http://eluls.org/our-sponsors/ or contact our Section Administrator, Calbrail L. Bennett, at (850) 561-5623 or cbennett@flabar.org.

ELULS has a strategic plan that was drafted under the leadership of immediate Past Chair, Erin Deady. Part of that plan was to review quantitative data points to evaluate effectively how the section is doing. Our total membership has declined over the past few years though our affiliate and student membership has remained stable. Our Membership Committee is working hard to both retain existing members while recruiting new members. Members are the lifeblood of the section and it crucial that the section stabilize our membership. We are interested in hearing any feedback you may have in that regard. Please feel free to email me at nicole.kibert@gmail.com. Similar to what other sections of the Florida Bar are experiencing, the section has experienced a decline in revenue based primarily on lower attendance and a modification to the manner in which expenses are allocated between the Florida Bar and the section. Live attendance at ELULS programs is an important revenue source for the section and we would like to invite you to attend our live programs, especially the Annual Update, and also to bring a colleague with you. If you can't attend in person, please purchase the CD or download. The aftermarket sales of our live CLE programs make up for expenses of the live programs. We are lucky that our section enjoys a close relationship with our sponsors and that support remains stable. The Affiliates Committee is working closely with our sponsors to make sure we are meeting their needs.

ELULS has been busy with activities including these highlights:

The Affiliates Committee hosted a lovely reception on March 27th at N2 Wine Bar in The Hyatt Place Pineapple Grove which included a presentation from Carolyn Ansay, South Florida Water Management District General Counsel. Thank you to our sponsors for making these receptions possible.

The Natural Resources Committee hosted a very successful and information webinar on April 16th entitled, "What's New and What's Next for Clean Water Act Jurisdiction." You can download the program from the Committee's webpage: http://eluls.org/natural-resources-committee/.

Our Environmental and Land Use Law Audio Webcast Series is underway. Here's the schedule of events:

- May 20, 2014 - Annual Legislative Wrap Up
  - Janet E. Bowman, Nature Conservancy
  - Gary K. Hunter, Jr., Hopping Green & Sams
- June 19, 2014 - Air Law Hot Topics: Fine Particulate Emission Limits, NSR Enforcement & More
  - Dorothy E. Watson, Foley & Lardner LLP
  - Peter Anderson, Geosyntec Consultants

Note: All webinar presentations are scheduled to occur between 12:00 noon and 1:00 p.m. Eastern. For more information, please review the program information sheet at: http://eluls.org/wp-content/uploads/2013/12/1626-Webseries.pdf.

As always special thanks to our 2013-2014 ELULS sponsors for their support this year.

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As always, you are welcome to attend meetings of the Executive Council. The remaining 2013-2014 meeting dates for the ELULS Executive Council are listed below:

- June 26, 2014 – Gaylord Palms Resort, Orlando (in conjunction with The Florida Bar Annual Convention)
- August 6, 2014 (4:00 p.m.) – Omni Amelia Island Plantation

Finally, please visit the section website http://eluls.org for information about section events and committee activities. I look forward to seeing you at the 2014 Annual Update at Amelia Island.

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

DEP Update

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

Rulemaking Update:
Chapter 62-555, F.A.C., Permitting, Construction, Operation, and Maintenance of Public Water Systems: On April 15, 2014, FDEP filed with the Department of State amendments to the cross-connection control rules in Chapter 62-555, "Permitting, Construction, Operation, and Maintenance of Public Water Systems." These rule amendments became effective on May 5 and significantly reduce the overall regulatory burden of cross-connection control requirements on community water systems (CWS) and their residential customers by:

(1) allowing a dual check device to be used as backflow protection at residential service connections from CWSs to premises where there is any type of auxiliary or reclaimed water system; and,

(2) allowing biennial instead of annual testing of backflow preventer assemblies required at residential service connections from CWSs.

The Department estimates that these proposed rule amendments could reduce equipment installation and operating costs for CWSs and their residential customers by a total of approximately $199 million over five years, or approximately $39.8 million per year.

Chapters 62-771 and 62-772, F.A.C., Petroleum Restoration Program: On May 30, 2013, the Division of Waste Management published a Notice of Rule Development to amend Chapter 62-771, F.A.C., and to create a new Chapter 62-772, F.A.C., in the Florida Administrative Register. Chapter 62-771, F.A.C., related to the priority ranking of petroleum contaminated sites, was amended for development of a definition of "Imminent Threat"; and to establish procedures to re-score a petroleum contaminated site based on site specific data. Chapter 62-772, F.A.C., was created to codify procedures for the competitive procurement of contractual services for the cleanup of state-funded petroleum contaminated sites, including the establishment of: minimum qualifications for contractors to perform rehabilitation activities, procedures for the evaluation of contractor performance, and procedures for the procurement of petroleum contaminated site rehabilitation services for state funded cleanup, including procedures to procure multiple agency term contractors. The Department held a rule workshop in Orlando, Florida on June 19, 2013. On October 4, 2013, the Department published a Notice of Proposed Rule and held a rule hearing on October 28, 2013. After receiving public comments and comments from the Joint Administrative Procedures Committee the Department published a Notice of Change on November 18, 2013 and on December 5, 2013. The rules were filed for adoption with the Department of State on December 27, 2013. A majority of the rule sections became effective on January 16, 2014. A bill to ratify Rule 62-772.300 and 62-772.400, F.A.C., has been passed by the legislature and will become effective once signed by the Governor.

Litigation:
Siting Board Hearing – IN RE: Florida Power & Light, Turkey Point Units 6 & 7 (DOAH): In June of 2009, the Department received a Site Certification Application from Florida Power and Light Company (FPL) for power plant site certification. The application seeks certification for: two additional nuclear generating units, each with an approximate electrical output of 1,100 MW; supporting buildings, facilities and equipment; off-site facilities including nuclear administrative building, training building, parking area; transmission lines and system improvements within Miami-Dade County; and other facilities as necessary.

The hearing began July 8, 2013, in Miami and ran for five consecutive weeks, with an additional three weeks thereafter, ultimately concluding on October 3, 2013. The Administrative Law Judge issued a recommended order on December 5, 2013, and the parties filed responses to the Recommended Order and exceptions to the responses. The Cabinet as Siting Board heard the Turkey Point matter on May 13. On May 19, 2014, the Final Order of Certification was issued. Notices of Appeal in the Third District Court of Appeal have been filed by the city of Miami, the city of South Miami, the city of Pinecrest, and Miami-Dade County.

FDEP v. Carisbrooke Shipping Ltd., (Southeast District/Coral Reef Conservation Program): On December 2, 2011, after experiencing engine failure, the marine vessel Gabon dropped anchor off Broward County waters. The anchor drop and drag caused approximately 684.56 square meters of coral reef damage. The Department and the responsible party attended pre-litigation mediation in Miami on March 27, 2014 at which the parties reached a settlement in the case. The parties executed a consent order that required the responsible party to pay the Department $350,000 in compensatory damages for the coral reef impacts and to pay all of the costs incurred in this matter, totaling $35,649.55.

FDEP v. BNK Real Estate, LLC, (Circuit Court, Leon County): A complaint was filed in November of 2011 against BNK Real Estate, LLC, (Defendant) for a failure to comply with a final order of the Department that required (1) the payment of $10,000.00 in civil penalties, (2) payment of $1,000.00 in costs, and (3) proper closure and assessment of an underground tank storage system in Charlotte County. Earlier in litigation, the Department obtained admissions from the Defendant indicating that the Defendant had not complied with any requirement of the Final Order.

Mediation was held on February 18, 2014 at which the parties reached a settlement in this case. The parties executed a Consent Final Judgment that provided for Defendant to complete the following: (1) compliance with the final order within 60 days, (2) $13,000.00 in civil penalties, (3) $2,000 in costs, and (4) payment of the Department's cost of mediation.

FDEP v. Wayne and Rose Thibodeau, (Circuit Court, Charlotte County): The Department filed a complaint against Wayne and Rose

continued...

Thibodeau (Defendants) in December 2011 for an unpermitted discharge of used oil, improper storage of hazardous waste, unauthorized open burning, and unauthorized operation of a solid waste facility. The Department obtained final judgment after default in March 2012. The Final Judgment required Defendants to remove and properly dispose of all solid and hazardous wastes, assess and remediate the property, properly manage used oil containers, cease unauthorized open burning, and pay $23,000 in civil penalties and $5,164.68 in Department costs. Subsequently, the Department filed for contempt in July 2012. The Court found Defendants in contempt and Defendant Wayne Thibodeau was incarcerated until he substantially complied with the Final Judgment by hiring and partially paying a licensed contractor to perform clean-up at the property. The Department filed for contempt again in April 2013 upon learning that the contractor could not proceed because they had never received the remaining payment to complete the work. The Court again found Defendants in contempt and incarcerated Wayne Thibodeau until he fully paid the contractor to proceed with the work.

On February 18, the Department filed for contempt for the third time after being informed by the contractor that they could not complete the source removal report or conduct the necessary assessment until Defendants had the excavated contaminated soils properly removed and disposed as mandated in the contract.

U.S., State, FDEP v. Miami-Dade County, (U.S. District Court for the Southern District): On April 10, 2014, a Miami Federal Judge Granted the Department, U.S. EPA ("EPA"), and Miami-Dade County's Motion to Enter a Consent Decree which calls for Miami-Dade County to invest 1.6 billion dollars in major upgrades to its wastewater treatment plants and wastewater collection and transmission systems in order to eliminate sanitary sewer overflows. The State of Florida and the Department are co-plaintiffs with the United States in the case against Miami-Dade County.

Under the terms of the consent decree, Miami-Dade will rehabilitate its wastewater treatment plants and its wastewater collection and transmission system within 15 years. The county will also develop and implement management operation and maintenance programs to help ensure the sewer system is properly operated and maintained in the future. By implementing these measures, Miami-Dade is expected to eliminate sanitary sewer overflows from its wastewater collection and transmission system and achieve compliance with its National Pollutant Discharge Elimination System (NPDES) permits.

Between January 2007 and May 2013, Miami-Dade reported 211 sanitary sewer overflows totaling more than 51 million gallons. Such overflows included a number of large volume overflows from ruptured force mains. At least 84 overflows, totaling over 29 million gallons of raw sewage, reached navigable waters of the United States. Miami-Dade's Central District wastewater treatment plant (WWTP) also experienced several violations of the effluent limits contained in its NPDES permit. EPA also documented numerous operation and maintenance violations at this same WWTP during inspections in September 2011, April 2012 and April 2013.

Miami-Dade estimates it will spend approximately $1.6 billion to complete the upgrades required by the consent decree and come into compliance with the Clean Water Act. Under the settlement, Miami-Dade will also pay a civil penalty of $978,100 ($511,800 to be paid to the United States and $466,300 to the Department) and be subject to stipulated penalties for delays in project completion or future sanitary sewer overflows. Further, Miami-Dade must complete a supplemental environmental project costing $2,047,200.

Miami-Dade's supplemental environmental project involves the installation of approximately 7,660 linear feet of gravity sewer mains through the Green Technology Corridor, an area that is currently using septic tanks. Businesses in the area have been unable to connect to the sewer system because sewer lines are lacking. Disconnecting industrial users from septic tanks will improve water quality in the Biscayne aquifer and nearby surface waters and prevent future contamination.

On April 9, 2014 the Court granted the Department's, EPA's, and the County's Motion to Enter the Consent Decree.

Other Significant Matters:

Numeric Nutrient Criteria (NNC) for Florida: As a result of a federal lawsuit, EPA made a necessity determination in 2009 that numeric nutrient criteria (NNC) are necessary for the majority of surface waters in Florida. In December 2010, EPA promulgated in 40 CFR 131.43 NNC for Florida's lakes, springs, streams outside of south Florida, as well as downstream protection values (DPVs) for lakes and a procedure for obtaining site specific alternative criteria. Subsequently, the Department adopted NNC for these waters and EPA has approved these criteria as being consistent with the Clean Water Act. EPA made amendments to the necessity determination in 2012 and 2013 that removed the requirement for numeric DPVs as well as a limited subset of waters from its 2009 determination. Section 3 of Chapter 2013-71, Laws of Florida, allows Florida's adopted NNC to become effective once EPA ceases further nutrient rulemaking in the State, EPA withdraws its federally-promulgated NNC in 40 CFR 131.43 and the Department notifies the Department of State that EPA has completed the actions set forth in Chapter 2013-71.

On April 2, EPA published in the federal register notice of its proposed repeal 40 CFR 131.43 and to cease further federal nutrient rulemaking in Florida.

Amendments to Impaired Waters List:

On January 27, the Department issued a final order that amended its impaired waters list for a handful of waters throughout the state. Included in these amendments were five water segments in the Everglades relating to dissolved oxygen. US Sugar, Florida Crystals, and the Sugar Growers Cooperative all filed motions for extension of time to file petitions on these five segments.

Ultimately, the petitioners withdrew their extension requests and did not file petitions challenging the impaired water list amendments. The amendments are now final.

June 2014 Florida Case Law Update

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

In the absence of evidence showing county commission decisions take effect immediately upon vote, the Bert Harris Act's requirement that claims be presented within one year of when a law or regulation is "first applied" may extend to the date a county commission's permit denial is reduced to a written decision, even when the decision to deny is formalized in writing a month after the oral vote. *P.I.E., LLC v. DeSoto County*, 39 Fla. L. Weekly D405 (Fla. 2d DCA Feb. 21, 2014).

In this case, P.I.E., LLC ("PIE"), and DeSoto County ("County") dispute the date by which the one-year limitation for presenting a claim under Florida's Bert J. Harris, Jr. Private Property Rights Protection Act (*see* sec. 70.001(11), F.S.) ("Act") should be measured when a county commission denies an excavation permit application by oral vote on one date, then later formalizes that vote in a written decision on a subsequent date.

PIE purchased fifty (50) acres of undeveloped property in DeSoto County in 2005, planning to use it initially for the excavation of sand and later for development. PIE submitted an application for an excavation permit in October 2006, and at the permit hearing on February 27, 2007, the county commission unanimously denied the permit application in an oral vote. A written decision formalizing the denial decided by the oral vote was issued more than a month later on March 28, 2007.

Among the pre-suit requirements of the Act, section 70.001(11), F.S., provides: "A cause of action may not be commenced under this section if the claim is presented more than [one] year after a law or regulation is first applied by the governmental entity to the property at issue" (emphasis added). Here, PIE submitted its presuit claim on March 26, 2008, just before the limitation would preclude seeking relief under the Act based on the written order date. At trial, PIE's amended complaint was dismissed with prejudice, in part based on the court's reasoning that the claim was untimely under the restrictions of sec. 70.001(11), F.S. Under de novo review on appeal, PIE argued that "first applied" should be interpreted "in the context of a legal system where orders on written pleadings and applications are reduced to writing, signed, and 'rendered' by filing in an appropriate public record," thus relying on the written order of March 28, 2007. Conversely, DeSoto County argued county regulations were "first applied" on the day the county commission voted (February 27, 2007).

The Second District Court of Appeal (2nd DCA) concluded that the record did not provide information by which to make a determination as to when a denial of a written application for a permit takes effect under the county's code. Consequently, the 2nd DCA reversed the lower decision, indicating it must accept PIE's position that the regulation was "first applied" in the written order on March 28, 2007, not in the oral vote on February 27, 2007. In doing so, the 2nd DCA emphasized its decision did not preclude DeSoto County from developing the factual record and seeking summary judgment on this issue if it can be established that ordinances take effect immediately upon oral vote. The trial court's dismissal of the separate takings count was affirmed for failure to state a cause of action under the theory presented.

QUESTION CERTIFIED TO FLORIDA SUPREME COURT: In an eminent domain proceeding, when the condemning authority engages in litigation tactics causing excessive litigation and the application of the statutory fee formula results in a fee that compensates the landowner's attorneys at a lower-than-market fee, when measured by time involved, is the statutory fee deemed unconstitutional as applied, entitling the landowner to pursue a fee under section 73.092(2)? *Orlando/Orange County Expressway Auth. v. Tuscan Ridge, LLC,* 39 Fla. L. Weekly D713 (Fla. 5th DCA April 4, 2014).

On appeal for the second time, the Fifth District Court of Appeal (5th DCA) considered whether a trial court properly determined that the Florida Legislature's mandated statutory fee formula for eminent domain case attorney's fees (*see* sec. 73.092(1), Fla. Stat., regarding attorney's fees, hereinafter the "statutory formula") was unconstitutional as applied in this case so as to justify the trial court's award under the alternative fee method prescribed by sec. 73.092(2), Fla. Stat. ("alternative fee method"). Previously, on the first appeal, the 5th DCA had reversed and remanded with instructions that the fee be calculated by the trial court pursuant to the statutory formula, unless the statute was declared unconstitutional, or in other words, resulted in less than the "full compensation" compelled by Art. X, Sec. 6, Florida Constitution.

Hearing the issue on remand, the trial court declared the statutory formula unconstitutional as applied based on the finding that "excessive litigation" caused by the Expressway Authority resulted in the landowner expending substantial attorney time that would not be fully compensated by the statutory formula of the statute. Thus, again the trial court turned to the alternative fee method available in sec. 73.092(2), Fla. Stat., to award a fee based on the number of attorney hours and a reasonable hourly rate, among other factors.

Relying on the Florida Supreme Court's decision in *Pierpont v. Lee County*, 710 So.2d 958, 960 (Fla. 1998), which described circumstances under which the statutory formula may be unconstitutional as applied, the 5th DCA determined none of the circumstances apply in the immediate case. Based on the 5th DCA's calculation, the statutory formula resulted in a $227,652.25 fee (or approximately $87 per hour for attorney and paralegal time), whereas the trial court's award employing the alternative fee method resulted in an $816,000 fee. Such an award, the 5th DCA held,

continued...

was error, noting the statutory fee did not appear patently unconstitutional. In reaching its conclusion, the 5th DCA emphasized that other statutory and procedural mechanisms, not the alternative fee method, are often remedies available when seeking compensation above the statutory formula in instances of excessive litigation. Where the Expressway Authority was allegedly abusive and unnecessary in the time spent deposing the landowner's experts, the landowner never sought sanctions available by statute and Florida Rules of Civil Procedure. When the Expressway Authority delayed the trial by introducing an expert witness for a new, albeit late, theory based on false factual assumptions, the landowner again did not seek sanctions when the testimony was excluded and did not avail itself of the options for requests for admissions that could enable recovery of additional fees for proving or disproving matters not admitted under Rule 1.380, Fla. R. Civ. P. Instead, the landowner turned to the court and sought relief from the statutory fee formula, which the 5th DCA determined the court obliged in error.

Notwithstanding its opinion remanding with instructions to enter a judgment in the amount derived from the statutory formula, the 5th DCA proceeded to certify the question above to the Florida Supreme Court as one of great public importance.

***Koontz V*: On remand from the Florida Supreme Court, the Fifth District Court of Appeal adopted and reaffirmed its earlier *Koontz IV* opinion as entirely consistent with the decision of the United States Supreme Court in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013).** *St. Johns River Water Mgmt. Dist. v. Koontz*, 2014 Fla. App. LEXIS 6371 (Fla. 5th DCA Apr. 30, 2014).

In *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2856 (2013), the U.S. Supreme Court reviewed a decision of Florida Supreme Court that decided a certified question submitted by the Fifth District Court of Appeal (Fifth DCA) in *Koontz IV* (*see St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009), which as rephrased by the Florida Supreme Court, had asked: "DO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTIONS TAKING UNDER THE HOLDINGS OF *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, 483 U.S. 825 [107 S.Ct. 3141, 97 L.Ed.2d 677] (1987), AND *DOLAN V. CITY OF TIGARD*, 512 U.S. 374 [114 S.Ct. 2309, 129 L.Ed.2d 304] (1994), WHERE THERE IS NO COMPELLED DEDICATION OF ANY INTEREST IN REAL PROPERTY TO PUBLIC USE AND THE ALLEGED EXACTION IS A NON LAND--USE MONETARY CONDITION FOR PERMIT APPROVAL WHICH NEVER OCCURS AND NO PERMIT IS EVER ISSUED?" The Florida Supreme Court had concluded that *Nollan* and *Dolan* do not apply when a government denies a permit (thus failing to impose conditions), and when the conditions are unrelated to a specific interest in real property. On review, the U.S. Supreme Court reverses, holding that the government must explain whether the conditions it imposes on land use approvals are roughly proportionate and directly related to the harm it hopes to avoid, minimize, or mitigate even when the government denies the relevant permit and even when its demand is for money. Having provided the appropriate legal standard, the U.S. Supreme Court sent the *Koontz* case back to the Florida Supreme Court for the Florida Supreme Court to apply it to the proposed Koontz development of approximately 3.7 acres of a 15 acre parcel in central Florida. The Florida Supreme Court, in turn, sent the case back to the intermediate appellate court – the Fifth DCA – so that it might apply the legal standard and decide any outstanding state law issues.

On April 30, 2014, a split panel of the Fifth District issued its fifth opinion in the case (*Koontz V*). In a short opinion, a two-judge majority of the Fifth DCA adopted and reaffirmed "in its entirety" the Fifth DCA's earlier decision in the case – *Koontz IV* – the decision the Florida Supreme Court initially overturned. There, the Fifth DCA had affirmed the trial court's award of $376,000 in damages for a "temporary taking" of Koontz's property during the time that the Water Management District withheld a permit. The dissent in the most recent Fifth DCA case explains that the Fifth DCA's decision to adopt the prior opinion rests on tenuous grounds and is inconsistent with the U.S. Supreme Court's decision. Specifically, the dissent notes that all nine justices of the U.S. Supreme Court seemingly agreed that the Water Management District did not "take" any property, in the constitutional sense, when Mr. Koontz decided not to accept the permit. Thus, the dissent concludes, the Fifth DCA's most recent decision is inconsistent with the U.S. Supreme Court's decision. An appeal of Koontz V, if sought by the Water Management District, may again place this case before the Florida Supreme Court for consideration.

Denial of a property owner's motion to enforce the provision of a takings order requiring the replacement of trees and landscaping is not appealable as a non-final order under Rule 9.130(a)(3)(c)(ii), Fla. R. App. P, when the motion seeks replacement, not immediate possession, of property. *Walker v. Fla. Gas Transmission Co.*, 39 Fla. L. Weekly D660 (Fla. 1st DCA Mar. 27, 2014).

An order of taking impacting property owned by the Walkers included an attached schedule which required, among other things, the replacement of trees, landscaping, grasses, shrubbery, and crops on the Walkers' property. These landscape features had been clear cut and were effectively non-existent on the property pending replacement under the order's schedule. To ensure the replacement of the trees and landscape, the Walkers filed a motion in the trial court seeking to enforce the pertinent provision of the order. The motion was denied. The property owners proceeded to appeal under Rule 9.130(a)(3)(c)(ii), Fla. R. App. P., which specifics the circumstances in which certain non-final orders may be appealed to the district courts of appeal in Florida. Most relevant here, Rule 9.130(a)(3)(c)(ii), Fla. R. App. P., provides that appeals to the district courts of appeal of

non-final orders are limited, in part, to those that *determine the right to immediate possession of property*. According to the First District Court of Appeal, however, claiming a contractual right to replacement of unspecified property is distinguished from the claim of immediate possession to identifiable property (i.e. – trees, if existing on the property) when seeking an appeal of a non-final order. Because the property in this case, trees and landscaping, was not present or identifiable on the property, the First DCA held the Walkers did not meet the immediacy requirement of the appellate rule, and therefore, the First DCA did not have jurisdiction to review the non-final order.

Where a deed from Trustees of Internal Improvement Trust Fund provides clear and unambiguous language in the reservation of an easement, further review of minutes of the Trustees' meeting when the easement reservation was considered is inappropriate for determining applicability of the reservation. *Dep't of Transp. v. Majorland, LLC*, Fla. L. Weekly D623 (2nd DCA March 26, 2014).

On appeal of final summary judgment in favor of Majorland, LLC (Majorland), the Department of Transportation (DOT) seeks review of the trial court's determination regarding the applicability of an easement reservation contained in the deed of Majorland's predecessor in title. In the 1945 deed of Majorland's predecessor in title (1945 deed), the Trustees of the International Improvement Fund (TIIF) conveyed several parcels of land and further reserved to the State two sets of rights in the land. Both reservations appeared under a single preface clause of the deed stating "AS TO LANDS IN TRACTS OR COMPOSITE TRACTS AGGREGATING TEN (10) ACRES OR MORE:." The first reservation listed in the 1945 deed secured a reservation of title to the State for a portion of petroleum and mineral rights and the rights of exploration on the land. The second reservation listed in the deed, which is pertinent to the appeal, secured an easement for a state road right of way 200-feet wide on either side of the center line of any state road existing on the date of the deed, including any parcel of the deed located within 100 feet of the center line.

Majorland acquired one of the parcels of the 1945 deed in 2000, and thereafter, learned of the 1945 deed reservations when it sought to replat the property for development. Because the Majorland parcel was less than 10 acres, Majorland argued neither reservation should apply to its property based on the preface clause appearing above the reservations. However, the DOT argued the right-of-way reservation applied to all tracts of the 1945 deed, not just the tracts described by the preface clause regarding parcels of 10 acres or more. The trial court concluded neither reservation applied to Majorland's property based on the clear language and structure of the reservations in the 1945 deed, and additionally, based on a similar and controlling decision of the First District Court of Appeal in Mann v. State Road Department, 223 So.2d 383 (Fla. 1st DCA 1969), which likewise had determined the ten-acre-or-more qualifier in a Murphy Act deed also applied to the second reservation listed in the deed for a right-of-way easement.

In the appeal, DOT argued the application of the Mann case here because the First DCA in Mann did not consider minutes of TIIF meetings when the two deed reservations were first introduced. As argued by DOT, minutes of one TIIF meeting shows the right-of-way reservation was adopted without any mention of a limiting parcel size qualifier, whereas the petroleum and mineral rights reservation was adopted with the qualifying parcel size language and with no further mention of a right-of-way reservation. The Second DCA observed these deed reservations may be unrelated based on the TIIF minutes, but indicated that consulting these minutes in the context of otherwise clear and unambiguous deed language is inappropriate. Accordingly, the Second DCA affirmed the decision below.

Without a proper delegation of authority, any local ordinance relating to mangrove regulation, even if merely requiring compliance with state regulations, is effectively preempted by the clear and controlling language of the Mangrove Act. *Town of Jupiter v. Byrd Family Trust*, 39 Fla. L. Weekly D237 (Fla. 4th DCA Jan. 29, 2014).

On second-tier certiorari review, the Town of Jupiter (Town) sought review of a circuit court decision reversing in part a magistrate's code enforcement order that had imposed finds on the Byrd Family Trust (Trust) for the unauthorized removal of mangrove trees. On the narrow scope of second-tier certiorari review, the Fourth District Court of Appeal (Fourth DCA) found no departure from a clearly established principle of law, thus denying the Town petition.

In 2010, the Trust removed approximately 109 mangrove trees from its property without a permit. Responding to a complaint, the Town issued a stop work order on the property to prevent further mangrove removals, and thereafter issued a Notice of Violation to the Trust. The Trust challenged the special magistrate's jurisdiction to regulate mangroves by filing a Motion to Dismiss the Notice of Violation. However, the special magistrate found that the Town has jurisdiction to enforce state law relating to mangroves, and subsequently, issued a Violation Order finding the Trust had violated a section of the Jupiter Town Code requiring adherence to state statutes regulating the alteration of mangroves. The Violation Order imposed a fine of $15,000 for each mangrove tree removed and a total fine of $1,635,000.

On first-tier certiorari at the circuit court, the Trust prevailed on its jurisdictional argument, and the circuit court held that the Town was without authority to regulate or enforce mangrove trimming and removal. The Town sought second-tier certiorari review in the Fourth DCA. The Fourth DCA incorporated the circuit court's analysis and opinion in denying the petition for second-tier certiorari review. Of particular significance in the analysis, the courts emphasized the plain language of the Mangrove Act mandates that local governments seeking to regulate mangroves locally may request delegation of authority from the Florida Department of Environmental Protection (FDEP), but absent such delegation, all other mangrove regulation is preempted. In fact, the Mangrove Act even abolished all local regulation then in effect within 180 days of adoption of the Act. The Town

continued...

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never sought such delegation, and instead attempted through its code to require all trimming or removal of mangroves to subscribe to the regulations of FDEP. According to the court, even where the Town did not establish new mangrove regulations apart from requiring compliance with state standards, the assessment of the local fine against the Trust is an act of regulation preempted by the Mangrove Act. Once preempted, the Fourth DCA noted, a single $15,000 fine is as improper as 109 $15,000 fines. Calling the Town's ordinance an attempt to sidestep the statutory requirement for requesting delegation, the Fourth DCA denied the petition for second-tier certiorari review.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of June 5, 2014. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Herrin v. City of Deltona, Case No. SC 13-2003. Petition for review of 5th DCA decision confirming the trial court's summary judgment in favor of the City of Deltona and rejecting the plaintiff's claim that the City violated the Florida Sunshine Law by not allowing Herrin to speak at the Deltona City Commission meeting, ruling that the public did not have the right to participate in the City's decision making process. 38 Fla. L. Weekly D1767a (5th DCA 2013). Status: Petition denied on May 28, 2014.

DOT v. Clipper Bay Investments, LLC, Case No. SC 13-775. Petition for review of 1st DCA decision determining that the Marketable Record Title Act's exception for easements in 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. 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 to all of the land north of the I-10 fence line in Clipper Bay, except for the portion used by Santa Rosa County. 38 Fla. L. Weekly D271a (Fla. 1st DCA 2013). Status: Oral argument held on April 8, 2014.

SFWMD v. RLI Live Oak, LLC, Case No. SC12-2336. Petition for review of 5th DCA decision reversing in part the 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 determining the amount of civil penalties 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 May 22, 2014, the Florida Supreme Court answered the rephrased question in the negative and held that where the Legislature statutorily authorizes a state governmental agency to recover a "civil penalty" in a "court of competent jurisdiction" but does not specify the agency's burden of proof, the agency is not required under Osborne to prove the alleged violation by clear and convincing evidence, but rather by a preponderance of evidence. 39 Fla. L. Weekly S345b (Fla. May 22, 2014).

FIRST DCA

Florida Fish and Wildlife Conservation Commission v. Wakulla Fishermen's Association, Inc., et al., Case No. 1D13-5115. Appeal from final judgment enjoining any and all further enforcement of the net ban amendment as set forth in Article X, §16 of the Florida Constitution, and restricting the Commission's authority to adopt rules to regulate marine life with respect to the use of a "gill net" or an "entangling net" pursuant to Article IV, §9, and Rules 68B-4.002, 68B-4.0081 and 68B-39.0048, Fla. Admin. Code. Case No. 2011-CA-2195 (2d Cir. final judgment entered October 22, 2013). Status: Oral argument held May 15, 2014.

Putnam County Environmental Council v. SJRWMD, Case No. 1D13-2669. Petition for review of FLWAC final order denying the Council's request for review pursuant to s. 373.114, Fla. Stat., of the Fourth Addendum to *SJRWMD's* Water Supply Plan, relating to identification of withdrawals from the St Johns and Ocklawaha Rivers as alternative water supplies. Status: Reversed on April 25, 2014, 39 Fla. L. Weekly D881a.

Family Oriented Community United et al. v. DEP, Case No. 1D12-590. Appeal of DEP final order approving a site investigation and cleanup plan over the objections by neighbors that the plan does not comply with the requirements of the Global RBCA Rule, Chapter 62-780, Fla. Admin. Code. Status: Notice of Appeal filed February 3, 2012; all briefs filed by September 4, 2012.

THIRD DCA

Padron v. Ekblom and DEP, Case No. 3D13-2446. Appeal from final order adopting recommended order determining that Ekblom's application to install a boat lift on an existing dock in a man-made body of water is exempt from the need for an ERP. Status: Oral argument to be held on June 16, 2014.

FOURTH DCA

Conservation Alliance of St. Lucie, et al. v. DEP, Case No. 4D13-3504. Appeal from a final order adopting a recommended order of dismissal, which dismissed for lack of standing a challenge to a settlement agreement resolving an enforcement action relating to alleged contamination of soil and groundwater at a bleach-manufacturing and chlorine-repackaging facility. DOAH Case No. 10-3807 (Final Order entered August 21, 2013). Among other things, the order concludes that petitioners were "foreclosed from asserting their interests under subsection 403.412(6), Florida Statutes, in a proceeding where DEP took enforcement action." Status: Notice of appeal filed September 19, 2013. Oral argument to be held on July 8, 2014.

Conservation Alliance of St. Lucie County and Roman v. DEP, Case No. 4D13-2925. Appeal from final order adopting recommended order determining that the petition for hearing was filed untimely and that petitioners failed to demonstrate standing to request a hearing. Status: Notice of appeal filed August 8, 2013. Oral argument to be held on July 15, 2014.

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: Reversed on January 29, 2014. 39 Fla. L. Weekly D230a.

Law School Liaisons

Florida International University Law School Update

Submitted by Lauren Dellacona, Student President of the FIU Environmental Law Society

The Florida International University College of Law is pleased to provide this update for the Environmental & Land Use Law Section June Section Reporter.

FIU Law is pleased to announce that Ms. Kalyani Robbins will be joining its faculty this fall. Professor Robbins has established herself as one of the emerging scholars and leaders in the field of environmental law and natural resources law. She has served on the faculty at the University of Akron School of Law since 2008 where she taught Environmental Law, Natural Resources Law, Criminal Law and Criminal Procedure. Robbins has produced scholarly works in research areas of Biodiversity and Ecosystem Management, Environmental Policy, Climate Change, Renewable Energy, Eco-Federalism and the Intersection of Law, Science and the Environment. Professor Robbins will be teaching a Biodiversity Seminar and Environmental Law in the fall.

In addition to Professor Robbins, FIU Law is pleased to offer environmental and land use courses by Professor Ryan Stoa (Ocean and Coastal Law), Professor Pearl (Toxic and Environmental Torts), Professor Lehtinen (Administrative Law), Professor Coffey (Land Use and Planning), and Professors Porter and Slap (Environmental Law Clinic).

Over the course of the 2013-14 academic year students participating in the Environmental Law Clinic assisted in the representation of Biscayne Bay Waterkeeper, Tropical Audubon Society, and other local public interest organizations in a variety of matters. Most recently, the Clinic joined with a team of attorneys in a Clean Water Act citizen suit against Miami-Dade County in a first in the nation effort to compel the County to implement climate impact protection and adaptation measures as it rebuilds its three coastal wastewater treatment plants at a cost of $1.6 billion pursuant to a Consent Decree negotiated with the Department of Justice. Other Clinic students are assisting a group of public interest activists with administrative challenges to FDEP's permitting of wildcat oil exploration wells in the Everglades and seismic oil exploration testing in primary panther habitat.

Finally, the FIU Environmental Law Society (ELS) is wrapping up a year which was devoted to community service and outreach. In one of the more popular events, for example, the ELS brought friends and members to Oleta River State Park, located on Biscayne Bay, where they participated in a beach cleanup, cleared invasive species of plants from bike paths, and rebuilt walking paths throughout the park. Additionally, in commemoration of Earth Day, on April 22, 2014, the ELS hosted a Water Rights Panel Discussion. Teaming with the school's Real Property, Probate and Trust Law Society, the groups brought together three expert panelists to discuss how water rights and law impact property rights, development and agriculture in South Florida.

Nova Southeastern University (Shepard Broad Law Center) Report

by Richard Grosso, Professor of Law

The Environmental and Land Use Law Program at Nova Southeastern University's Shepard Broad Law Center enjoyed a robust semester during the winter of 2014.

During the winter 2014 semester, four students participated in the Environmental and Land Use Law Practice Clinic, directed by Professor Richard Grosso, and assisted by adjunct Professor Robert Hartsell, Esq. As usual, this full-time, 12 credit clinic began with an initial three – week intensive set of courses, during which the students received intensive instruction in the *Advanced Environmental and Land Use Law*, *Environmental and Land Use Practice and Procedure*, and *Environmental Science and the Lawyering Process* courses. This semester's field trips included an all-day driving and walking tour of several sites of Everglades and other environmental litigation or controversy, observing a meeting of the Governing Board of the South Florida Water Management District, and other out of classroom experiences. Students also attended a groundbreaking ceremony for an Everglades Storm Water Treatment Area that will treat polluted agricultural runoff. While there, they met with several public officials, including Department of Environmental Protection Secretary Hershel Vinyard, Everglades National Park Superintendant Dan Kimball, and Shannon Estenoz, the Director of Restoration Initiatives for the United States Department of the Interior, all of whom generously discussed with the students their respective roles in environmental law and policy.

During the clinical component of the semester, three interns worked for the in–house clinic, where they performed work for several public interest and public sector lawyers throughout the state under the supervision of Clinic Director Grosso. A fourth student "externed" with Robert Hartsell, PA in Pompano Beach. The students drafted litigation memos, complaints and legal memoranda and brainstormed strategy under the federal Endangered Species Act.

Law School Liaisons continued....

They researched and draft motions, responses, complaints under federal and state law. They made public comment at a NEPA Scoping hearing. The interns engaged in numerous legal strategy calls with lawyers and clients. The substance of their work related to the Endangered Species Act, sea level rise and erosion issues, water quality in the Indian River Lagoon lawsuit, property rights, including the Harris Act, and draft state legislation.

On February 6 and 7 the Law Center hosted a major Symposium, entitled "New Directions in Energy Law and Policy, Climate Disruption and Sea Level Rise". This interdisciplinary conference, co-sponsored by the Center for Progressive Reform and Nova Southeastern University Law Center, featured presentations by nationally prominent scientists, law professors, federal, state and local government officials, and representatives of NGOs on the threats posed by climate disruption and sea level rise nationally and in Florida, and ways in which national and state energy law and policy can be applied now and reformed in the future to better mitigate and adapt to those threats. The symposium was well attended and well received, and the blending of perspectives and disciplinary expertise was provocative and informative. The proceedings may be viewed at http://www.nsulaw.nova.edu/events/symposium.cfm. Professors Blackwelder, Mintz and Grosso, assisted by several students, coordinated, moderated and spoke on panels, and several students attended throughout the two – day event, learning from and meeting with experts from around the country.

The Law School's Environmental and Land Use Law Society was very active this semester. The Society hosted a Career Panel, featuring, among others, Sara Fain, Esq., Executive Director of the non-profit Everglades Law Center, Inc., and Shannon, Estenoz, the Director of Restoration Initiatives for the United States Department of the Interior. Several ELS students travelled to Gainesville to attend the Annual Public Interest Environmental Conference at UF Law. The Society also went on an overnight camping trip to the magical Fisheating Creek Campground, just north of Lake Okeechobee.

Earlier this Spring NSU Law sent a 3-member team to the National Environmental Law Moot Court Competition in White Plains, NY, where 70 schools competed over complex environmental enforcement issues.

Our professors had an active semester beyond the academic program. Associate Professor Brion Blackwelder served on the Broward County Water Advisory Board, as a member of the political committee of the Florida Chapter of the Sierra Club, and as President of the South Florida Wildlands Association, Inc. and taught Ocean and Coastal Law for the NSU Oceanographic Center. Professor Richard Grosso, in addition to directing the clinic and representing and advising clients in various forums, participated in a documentary and televised panel discussion on sea level rise in southeast Florida that has aired on local and national public television stations. He also spoke, along with his fellow panelists, at a sea level rise public forum on Miami Beach. Professor Joel Mintz participated in a distinguished expert committee of the National Academies that advised the U.S. Army and its contractors on ways to safely dispose of the Nation's stockpile of assembled chemical weapons. He also participated actively in the work of the Washington, DC-based Center for Progressive Reform, served on the board of a not-for-profit environmental law firm, the Everglades Law Center, Inc. and co-led a work group of members of the American Law Institute (ALI) that proposed an ALI project on environmental law. Nova Southeastern University named Professor Mintz the Shepard Broad Law Center Professor of the Year "in recognition of significant contributions to research and scholarship and exceptional instruction."

A Summer 2014 Update from the Florida State University College of Law

by David Markell, Associate Dean for Environmental Programs and Steven M. Goldstein Professor

The Florida State University College of Law is delighted that the latest *U.S. News & World Report* has again ranked our Environmental Law Program among the best in the United States. We are pleased to provide this update on the Spring 2014 semester's events for the Environmental Law & Land Use Section *Newsletter*.

Events

The College of Law has had a very busy spring. In February, we hosted a significant conference on the future of environmental law with a particular focus on the capacity of agencies to address current policy challenges in the absence of new legislation. Entitled *Environmental Law Without Congress: An Interdisciplinary Conference on Environmental Law*, this important conference, organized by **Professor Shi-Ling Hsu**, featured leading environmental law scholars from throughout the United States. **Professor Richard J. Lazarus,** the Howard and Katherine Aibel Professor of Law at Harvard Law School, delivered the keynote address. Other prominent scholars participating in the conference included **Daniel A. Farber**, the Sho Sato Professor of Law at the University of California, Berkeley, and former FSU professor **J.B. Ruhl**, now the David Daniels Allen Distinguished Chair of Law at Vanderbilt Law School. Panelists and audience participants discussed a variety of disciplinary perspectives on environmental lawmaking, and how it might look in the years ahead if Congress remains on the sidelines

The College of Law's Spring 2014 *Environmental Forum* on the Apalachicola-Chattahoochee-Flint River System explored the legal, scientific, and policy issues associated with the State of Florida's recently filed, and

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ongoing, effort to have the United States Supreme Court equitably apportion the waters of the System. Participants in the *Forum* included **Jonathan A. Glogau**, Florida Office of the Solicitor General, **Ted Hoehn**, Florida Fish and Wildlife Conservation Commission, and **Matthew Z. Leopold**, General Counsel, Florida Department of Environmental Protection. **Sarah Spacht** (College of Law '14) introduced the program and **Professor David Markell** served as moderator.

Shannon Dolson, James Parker-Flynn, Claire Armagnac, Jeremy Susac, Alex Brick, Jake Whealdon, George Reynolds, David Markell, Shi-Ling Hsu, Lauren Brothers, Kurt Schrader, Hannah Wiseman.

Harold "Bud" Vielhauer, Ted Hoehn Matthew Z. Leopold, Sara Spacht, Jonathan A. Glogau and David Markell.

A third significant event this spring was the College of Law's continuing legal and judicial education program on hydraulic fracturing. Organized by Professor Hannah Wiseman, "*The Evolving Law of Hydraulic Fracturing and Unconventional Oil and Gas*" featured **Timothy Riley** and **Richard Brightman** of Hopping Green & Sams, **Dale Calhoun** of G. David Rogers and Associates, **Floyd R. Self** of Gonzalez Saggio & Harlan, and **Professor Hannah Wiseman**.

The College of Law also welcomed three distinguished faculty members to campus for workshops this semester: Robert Ellickson, Walter E. Meyer Professor of Property and Urban Law, Yale Law School, John Nagle, John N. Matthews Professor, University of Notre Dame Law School, and Oren Perez, Professor of Law, Bar-Ilan University.

A final significant event this semester was our Spring 2014 *Environmental Colloquium*. The *Colloquium* honored our Environmental LL.M. students and several outstanding J.D. students and provided them with the opportunity to present their papers on environmental topics. Student participants and their topics are listed below:

Environmental LL.M. Presenters

- **Alex Brick,** *A Summary of Relevant Legal Issues for the Florida Solar Photovoltaic Business*
- **James Parker-Flynn,** *Resource Production Limits: Implementing Upstream Regulation of Fossil Fuels*
- **George Reynolds**, Nollan *and* Dolan *2.0:* Koontz v. St. Johns Water Management District *and Its Consequences*
- **Kurt Schrader,** *Coastal Risk Mitigation and Adaptation in Florida—The Problematic Incentives of Insurance Cross-Subsidy Schemes*
- **Jeremy Susac,** *Balance Energy Florida & The Role of Exporting LNG in the Newly-Drawn State of Saudi-America*
- **Joseph Whealdon,** *An Argument for the Implementation of a Carbon Tax Under Section 111(d) of the Clean Air Act*

Outstanding J.D. Student Presenters

- **Claire Armagnac,** *Worse than the Tourists: Non-Native Invasive Species in Florida, Lionfish, Pythons, and What New Laws and Federal Funding Can Do to Help*
- **Shannon Dolson,** *Finding A Way Back Into Darkness: Regulating Light Pollution in Florida and Beyond*
- **Lauren Brothers,** *Florida's Growing Problem: Addressing the Threat of Invasive Exotic Plants to Florida's Natural Areas in the Face of Climate Change*

Alumni Accomplishments and Honors

- **Justin B. Green** ('04) has been promoted to Program Administer of the Florida Department of Environmental Protection's Siting Coordination Office, which is in charge of licensing power plants in Florida.
- **Andrew Missel** ('14) will be clerking for Judge Mark Walker of the Northern District of Florida, beginning in August 2015.

We hope you will join us for one or more of our programs. For more information, 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. Please contact Assistant Dean for Placement Rosanna Catalano, rcatalano@law.fsu.edu, if you are interested in interviewing any of our students, either in-person or by videoconference.

Floyd R. Self, Dale Calhoun, Hannah Wiseman, Timothy Riley, and Richard S. Brightman.

Law School Liaisons continued....

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 two students, Chelsea Ann Dalziel and Jaclyn Marie Lopez.

An additional seven J.D. graduates received certificates in environmental and land use law. They are Nicholas Barshel, Amanda Broadwell, Brian Davis, Carly Grimm, Jon Morris, Zachary Rogers and Alexander Wilkins.

ELULP Students Plan Externships

Twelve ELULP students will work in externships this summer. They are Gentry Mander (2L), The World Bank, Guatemala City, Guatemala; Christopher Johns (2L), Harvard Food Law and Policy Clinic, Boston, MA; Elizabeth Turner (2L), U.S. Environmental Protection Agency, Office of General Counsel, Honors Program, Washington, D.C.; Melissa Fedenko (2L), U.S. Environmental Protection Agency, Office of Enforcement, Washington, D.C.; Bruce Groover (2L), Defenders of Wildlife, Washington, D.C.; Daniel Fontana (2L), Alachua County Environmental Protection Department, Gainesville; William White (2L), Hopping Green & Sams, Tallahassee; Nathalie Vergoulias (2L), Florida Inland Navigation District, Miami; Sara Frick (1L), Hillsborough County Environmental Protection Commission; Amanda Hudson (1L), Public Trust Environmental Law Institute; Adrian Mahoney (1L), Audubon, Miami; and Jennifer Lomberk (1L), Alachua County Forever, Gainesville.

UF Law Conservation Clinic Joins BioBlitz

UF law Conservation Clinic students joined the UF Watershed Ecology Lab and the Withlacoochee Gulf Preserve to hold a citizen science BioBlitz in Yankeetown, Florida, on March 15-16. The teams allowed citizens to work with naturalists, biologists and ecologists.

The activity featured ecological tours, biological flora and fauna inventories and education programs, and nature exhibits.

UF Environmental Moot Court Team Named Quarterfinalist

The UF law Environmental Moot Court team was named a quarterfinalist at the Pace Law National Environmental Law Moot Court Competition, which took place Feb. 20-22.

Elizabeth Turner (2L), Melissa Fedenko (2L) and Zachary Rogers (3L) competed against teams from more than 75 other schools, and were judged on oral argument performance and brief writing skills. This year's competition focused on issues in the Clean Water Act relating to citizen suits, navigability of waterways and point source definitions.

Rogers also received an award for Best Oralist Honorable Mention, among more than 200 participants.

First Rumberger Fellows Selected

UF law students Chris Johns (2L) and Elizabeth Turner (2L) were selected as the inaugural E. Thom Rumberger Everglades Foundation Fellows. The fellows program was led by Rumberger's law firm, Rumberger, Kirk & Caldwell, and UF law to honor the late attorney known for his work on landmark environmental and constitutional cases.

The two students were introduced to the Everglades Foundation Board in February. "For the rest of the day the staff and Board were talking about how proud they were to be part of preparing new environmental leaders," said Jon Mills, UF Law Dean Emeritus and Director of the Center for Governmental Responsibility. Mills serves on the Everglades Board and worked with Rumberger on numerous cases. He also worked to establish the Rumberger Fellowship.

ELULP Fellowships Awarded

Three ELULP students received fellowships from the ELULP program. Conservation Law Fellowships were awarded to Melissa Fedenko (2L) and Adrian Mahoney (1L). Bianca Lherisson (2L) was awarded the ELULP Minority Fellowship.

Costa Rica Summer Program Announced

"Conservation and Sustainable Development: Law, Policy and Professional Practice" is the focus of the UF Law Costa Rica Summer Program. This interdisciplinary policy-focused program consists of three linked courses integrating international and comparative sustainable development law and policy, contemporary issues in tropical conservation and development, and professional skills for practitioners.

The 2014 program will consist of a foundational course in international sustainable development law and policy; a topical course in water, wetlands and wildlife conservation, and a sustainable development practitioner skills course. All three courses are integrated through practicums based around current issues of conservation and development in Costa Rica and elsewhere, jointly developed by U.S. and Costa Rican faculty. Costa Rican law and graduate students as well as young professionals will also participate. The course will include lectures at the Organization for Tropical Studies headquarters, site visits to international and domestic institutions in San Jose such as the Inter-American Court for Human Rights, and field trips to biological field stations of topical relevance to the course.

Wolf Lecture Examines Property Rights, Climate Change

Professor Daniel A. Farber of the University of California at Berkley delivered the seventh annual Wolf Family Lecture at the UF Levin College of Law in March. He spoke on "Property Rights and Climate Change: Challenges and Opportunities."

Farber is the Sho Sato Professor of Law and the co-director of the Center for Law, Energy, and the Environment at UC Berkeley. A member of the American Academy of Arts and Sciences and a Life Member of the American Law Institute, Farber serves on the editorial board of Foundation Press and as editor-in-chief of *Issues in Legal Scholarship*.

The Wolf Family Lecture Series

Law School Liaisons continued....

was endowed by a gift from UF Law Professor Michael Allan Wolf, who holds the Richard E. Nelson Chair in Local Government Law, and his wife, Betty.

Environmental Conference Examines Sustainable Agriculture Issues

Former Florida Gov. Buddy MacKay and Colombia University Professor and Vertical Farm Project Director Dickson Despommier headlined the 20th annual Public Interest Environmental Conference at UF law in February.

Environmental and legal experts discussed "Feeding the Future: Shrinking Resources, Growing Population and a Warming Planet" with more than 200 participants in tracks on agricultural frontiers, natural resources, and legal/regulatory issues.

Jack Payne, senior vice president for agriculture and natural resources at the University of Florida's Institute of Food and Agricultural Sciences, kicked off the central theme with an opening talk on the current challenges and opportunities Florida agriculturists face. Sarah Bittleman, senior agricultural counselor for the Environmental Protection Agency, discussed how agriculturists, environmentalists and others can collaborate to meet common interests — an ongoing theme of the conference.

"Thirsty Agriculture, Thirsty Springs: Who Gets to Drink from the CUP?" kept with that theme of collaboration from its diverse panel members to its topic. Robert L. Knight, a scientist and president of the Florida Springs Institute; Wayne Flowers (JD 75), an attorney from Lewis, Longman & Walker, P.A.; and MacKay talked about agricultural water use and how it affects Florida springs. Agriculture is the second largest sector in Florida's economy and is one of the biggest competing interests for water, Flowers said. The question is, to whom should the limited number of consumptive (water) use permits go, and why? Making the case for agriculture as a top competing interest, Flowers noted that if agriculturists don't have access to water, food supply would go down and prices would shoot up. What use best serves the public interest?" he said. "Agriculture has a very important place."

Gov. MacKay, who worked on several water projects as the late Gov. Lawton Chiles' lieutenant governor, said the competition for water in Florida is not a new problem. He compared the current issue to when he was faced with Hillsborough and Pinellas counties sucking down water while competing for growth in the 1990s. Their overconsumption left nearby Pasco County nearly dry. "I have seen this movie before. I know the plot, and some of the players are even the same," MacKay said.

Pasco County represents Florida's springs, and Hillsborough and Pinellas represent today's competing interests, including agriculture — one of the biggest, he said. In order to protect the springs, the most endangered ecosystem in Florida, it's going to take more than policy framework or regulation. "When all else fails," MacKay said, "we're going to have to work together."

Nelson Symposium Tackles Election Law

Issues facing local and national elections were examined during the 13th annual Richard E. Nelson Symposium in February, presented by the University of Florida Levin College of Law, and co-sponsored by The Florida Bar's City, County and Local Government Law section, and Environmental and Land Use Law sections.

Elections experts addressed topics including voter identification laws, felon disenfranchisement, voter roll purges, campaign disclosure for ballot measures, ballot-box zoning, and the status of the Voting Rights Act after the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder*.

Symposium speaker Janai Nelson, professor of law at St. John's University School of Law, asked audience members to think about the election debacle of 2000 and consider what had changed in 13 years. "The very disturbing answer is that there are now more legal barriers to exercising voting rights than there were in 2000," Nelson continued. "Actual legal barriers — not sort of the procedural gaps and the administrative gaps that occur — I mean actual structural barriers. … And there are increasingly fewer legal protections."

Other presenters included Michael S. Kang, professor of law, Emory Law School; Kenneth A. Stahl, associate professor of law, Fowler School of Law, Chapman University; Terry Smith, professor of law, DePaul University College of Law; Mark H. Scruby, county attorney, Clay County; Ilya Shapiro, senior fellow, Cato Institute; Daniel A. Smith, professor, Department of Political Science, University of Florida; Nicholas M. Gieseler and Steven Geoffrey Gieseler, Gieseler & Gieseler, P.A., Port St. Lucie; Suh Lee and Emma Morehart, J.D. candidates, University of Florida Levin College of Law; and UF Law Professor Michael Allan Wolf.

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must fail. *Nollan*, 483 U.S. at 837. The *Nollan* Court summed up that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id.* The Court noted one must determine how proportionate the exaction is to the impact, but only in dicta. *Id*. at 838. *Dolan* buttressed the dicta in *Nollan* by requiring exactions to not just bear an essential nexus, but to also bear a "rough proportionality" to the development's expected impact. The resulting *Nollan / Dolan* test requires the government to "make some sort of individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. If either prong fails, the exaction fails. *Id.*

The Supreme Court amplified the standard in *Lingle v. Chevron U.S.A., Inc.*. 544 U.S. 528 (2005). It repudiated any implication that *Nollan / Dolan* required a governmental action to "substantially advance" a public purpose. *Lingle* held that the court should not analyze whether an exaction is based on a legitimate policy. The unconstitutional conditions doctrine, like the takings doctrine, assumes the underlying governmental action's legitimacy. The government must, however, meet both *Nollan / Dolan* criteria. *Lingle*, 544 at 547-48. *Lingle* explained that the doctrine bars government from "requir[ing] a person to give up a constitutional right – here the right to just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Id.* at 547.

The doctrine has existed for over a century. Richard Epstein traces its roots in the 19th Century, and yet acknowledges its amorphousness:

> Originating in the nineteenth century, the doctrine of unconstitutional exactions is no new judicial concoction in the post-New Deal Welfare state. Nor is the doctrine anchored to any single clause of the Constitution. Like the police power, it is a creature of judicial implication. It roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others.

R. Epstein, Unconstitutional Conditions, State Power, and the Limits of State Power, 102 HARV L. REV. 4, 11 (1988). Little surprise that scholars, courts, regulators and regulated questioned whether and how *Nollan / Dolan* applied to monetary exactions such as fees in lieu of mitigation. *See, e.g.*, C. Hall and L. Reynolds, Exactions and Burden Distribution in Takings Law, 47 WM. & MARY L. REV. 1513 (2006). As I explicate below, however, the Supreme Court seemingly answered that question in the affirmative in a one paragraph opinion the same year it decided *Dolan*. Two decades before *Koontz*. *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). Of course, *Ehrlich* was decided 5-4.

The *Koontz IV* Supreme Court held, 5-4, that the test applies to fee in lieu and other monetary exactions. The Court remanded the matter to the Florida Supreme Court to apply this standard, and the latter court remanded to the Fifth District. *Koontz V*'s 2-1 split indicates the Higher Court's schism in *Koontz IV* has not clarified the issue.

By now one would be shocked if any group, let alone a court, agreed on any aspect of *Koontz IV*. Or, frankly, on any aspect of what the case has ever been about. The most recent, and by no means the last, *Koontz* decision showed one Florida Fifth District Court of Appeal panel could not agree on what the *Koontz IV* Supreme Court majority even said. Whatever one might think of this era of split Supreme Court decisions, *Koontz V* bodes poorly for *Koontz IV's* precedential value.

Judge Torpy wrote the majority opinion in *Koontz V*. Judge Orfinger joined. The majority concluded: "[*Koontz IV*] concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and the permit is denied." *Koontz V* at 1, quoting *Koontz IV*, 133 S. Ct. at 2596. The *Koontz V* majority emphasized the *Koontz IV* majority's refusal to address Florida state issues in remanding the case to the Florida Supreme Court for resolution. *Id*. The Florida Supreme Court, in turn, remanded the matter to the Fifth District. *Id.*

The *Koontz V* majority held that the Supreme Court majority in *Koontz IV* "concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and the permit is denied." *Koontz V* at 1, citing *Koontz IV*, 133 S. Ct. at 2596. The majority held that all state claims were either resolved or waived. *Koontz V* at 1. The Fifth District panel majority opinion

continued....

expounded on and distinguished the state exhaustion of remedies issue under *Key Haven Associated Enterprises v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982), cited by *Koontz V* at 1, fn. 2. *Key Haven* held generally that one must exhaust administrative remedies before one may sue for inverse condemnation. Judge Torpy's opinion noted the enactment of s. 373.617, Fla. Stat., after the facts that led to *Key Haven* occurred. One of Koontz's principal claims was addressed under that statute.

The footnote does not explicate the statute. Florida Law 78-85 included s. 373.617, entitled "Judicial review relating to permits and licenses". The statute authorizes a person to file in circuit court within 90 days of a "final action of any agency with respect to a permit." The statute solely confines the circuit court "to determining whether [the] final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation." *Id*. at (2). If a court determines the agency action triggered the statutory standard for a taking, the court remands to the agency, which may agree to: issue the permit; pay monetary damages; or modify the agency decision to avoid an unreasonable exercise of police power. *Id*. at (3)(a)-(c). The agency must respond within 90 days, or "the court may order the agency to perform any of the alternatives specified in subsection (3)." *Id.* at 4. That statute, and two parallel ones passed along with it (ss. 253.763 and 403.90) have been interpreted to allow an inverse condemnation or administrative action. *See, Bowen v. FDER*, 448 So.2d 566 (Fla. 2nd DCA 1984) (citing the latter two statutes).

Judge Griffin vehemently dissented. She distinguished between takings of property and extortionate demand claims, quoting extensively from Judge Alito's majority opinion in *Koontz IV*:

> Extortionate demands for property in the land use permitting context run afoul of the takings clause, not because they take property, but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Koontz V at 43 (Griffin, J. diss.), quoting *Koontz IV*, 133 S. Ct. at 2596. Judge Griffin emphasized the *Koontz IV* majority's distinction between the remedies available under takings and extortionate demands:

> That is not to say, however, that there is no relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy – just compensation – only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of constitutional law but of the cause of action – whether state or federal – on which the land-owner relies. Because petitioner brought his claim under a state cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.

Id., citing *Koontz V* at 2597.

Judge Griffin stated that the *Koontz IV* majority therefore intended remand to determine any unconstitutional conditions damages to be determined by state courts interpreting s. 373.617. *Id.* at 4. She stated that statute provided no remedy under *Koontz IV*. The statute stated, and states, that damages are available for "'unreasonable exercise of the state's police power constituting a taking without just compensation.'" *Id.*, quoting s. 373.617. Judge Griffin emphasized:

> One thing that is clear throughout the years of litigation between the parties is that Koontz always contended that his property had been taken without just compensation and the District always contended that it never "took" anything from Koontz, neither property nor money. Now that the United States Supreme Court has clarified what an exactions taking is and what it is not, it is for the Florida courts to determine what, if any, remains for the violation of Koontz's rights by the District.

Id. Judge Griffin concluded that the procedural posture rendered impossible any summary disposition affirming a taking. *Id.* at 6. (Griffin, J. diss.)

One must note here that Koontz went to trial on a complaint under which he had eliminated a previously express unlawful exaction claim. Count VI of his First Amended Complaint, dated February 27, 1995, pled:

> 93. At all material times, as alleged in paragraph 15 above, the permit requirements which the Defendants imposed, or sought to impose, upon the Plaintiff were an unconstitutional exaction or attempted exaction, of Plaintiff's property. Specifically, in imposing such requirements upon Plaintiff's property as a condition to reasonable use of his property, the Defendants have violated the Plaintiff's rights generated under the Fourteenth Amendment and Fifth Amendment to the United States Constitution.

(Emphasis added) Paragraph 15 in that prior complaint, cited above, read:

> 15. At a meeting before the [District] Governing Board on May 10, 1994 to review KOONTZ' application the District staff, in particular, ELLEDGE, made it clear that the property could not be developed or utilized without the unconstitutional implementation of a mitigation plan which would require KOONTZ to enhance fifty acres of state owned property and clean and maintain drainage culverts situated off-site. In other words, the mitigation would require KOONTZ to pay an enormous amount of money to the State through the purchase of property and the expenditure of funds just to utilize his own property which would have a direct and consequential affect [sic] upon the remaining economical, viable use of his own property. Upon the circumstances, this mitigation plan and all mitiga-

> tion plans proposed by the SJRWMD at all material times would render any development or use of KOONTZ' property economically unviable, in light of the increased costs. In addition, the proposed mitigation requirements, at all material times, bore no rough proportionality to the proposed impact of the project, and were excessive in scope and duration. Furthermore, the SJRWMD did not, at any material time, engage in any meaningful quantitative determination of the proposed impacts of KOONTZ' project, and any quantitative determination made by the SJRWMD was arbitrary and capricious. Furthermore, and at all material times, the SJRWMD engaged in an unconstitutional and improper presumption against KOONTZ with respect to the projected adverse impacts to the subject property.

(Emphasis added).

The [Second] Amended Complaint was dated March 5, 1997. That complaint contained four counts. The Count VI, previously expressly addressing extortionate exactions, was eliminated. Various vestiges of the allegations remained, interspersed throughout the later complaint. Paragraph 10 in that complaint paralleled paragraph 15, but it eliminated the *Nollan / Dolan* language concerning proportionality, and emphasized that "this mitigation plan and all mitigation plans proposed by the SJRWMD at all material times would deny economically viable use of Koontz' property." Paragraph 8 alleged Koontz presented on-site mitigation "[u]nder duress and extortion…," but that was rejected, and reiterated at 14 that Koontz' rejected on-site mitigation was "coerced." Count III pled for a taking, but noted at paragraph 50 that the rules of the District "do not bear a reasonable relationship between the required dedication and the impact of the proposed development and are thus not roughly proportional."

I write one week later, as we await the next, inevitable procedural step. To quote Robert Frost: "It is the future that creates his present. All is an interminable chain of longing."

BACKGROUND

One distinguished commentator has characterized the attempt to differentiate 'regulation' from 'taking' as "the most haunting jurisprudential problem in the field of contemporary land-use law … one that may be the lawyer's equivalent of the physicist's hunt for the quark." *San Diego Gas v. City of San Diego*, 450 U.S. 621, 649 n. 15 (1981). (Brennen, J. diss.) That, combined with Epstein's reference to Banquo's ghost, creates an unsettling theme. *Koontz IV* and *V* do little to exorcise the exactions/takings pantheon.

PRE-*KOONTZ* DECISIONS CONCERNING EXACTIONS AND FEES THAT ALLEGEDLY WENT TOO FAR

A review of pre-*Koontz IV* decisions shows why the Court's explication was arguably beneficial. Aside from the line of decisions addressed in my prior *Koontz IV* ELULS Reporter article concerning fees that were allegedly taxes, numerous decisions addressed the topic throughout the United States before *Koontz IV*. Most Courts held that fees need not match benefits provided, as long as they are "roughly proportionate."

For example, the Alabama Supreme Court in *St. Clair County Home Builders Assn. v. City of Pell City*, 61 So.3d 992 (Ala. 2010) upheld challenges to an ordinance that authorized sewer impact fees and capital-recovery fees for water connections. The Court emphasized that "the ordinance limits the use of the impact fees and the capital recovery fees collected to capital improvements to its water and sewer systems; the fees are not considered general revenue to be used for any purpose." The Court rejected the argument that the fees were arbitrary. It used a "substantial indirect benefit test." The standard did not require each owner to receive a proportionate, direct benefit. Rather, each person received a substantial, indirect benefit from being connected to sewer and water. The *St. Clair* Court distinguished *Dolan,* holding it did not apply at the legislative ordinance level, nor did the standard apply outside of dedication of property. *Id.* at 1008, quoting *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). Many commentators asserted that no functional difference existed between legislatively adopted and quasi-judicial exactions. *See, e.g.*, W. Martin, Order for the Courts: Reforming the *Nollan / Dolan* Threshold Inquiry for Exactions, 33 SEATTLE U. L. REV. 1494 (2012).

Courts around the country applied the "dual rational nexus test" to impact fees. *See, e.g., Homebuilder Assn v. City of Beavercreek,* 729 N.E. 2d 349 (Ohio 2000); *St. Johns County v. N. E. Fla. Builders Assn*. 583 So.2d 635 (Fla. 1991). The Ohio Supreme Court noted the *Nollan / Dolan* lineage: "The underlying basis of the 'dual rational nexus' test, the *Nollan* and *Dolan* cases, for instance, dealt with land use exactions that forced property owners to dedicate a certain portion of their land to public use. Although impact fees do not threaten property rights to the same degree as land use exactions or zoning laws, there are similarities." *Beavercreek*, 729 N.E. 2d at 355. Accordingly, a variation on *Nollan / Dolan* applied to many fees in numerous jurisdictions prior to *Koontz*.

Limits existed. For example, *Torsoe Bros. Const. Corp. v. Bd. of Trustees of Incorp. Village of Monroe, N.Y.*, 49 A.D. 2d 461, 375 N.Y. S.2d 612 (2d Dept 1975), hold that a $30,000 tie-in fee was an illegal tax. The fee did not just reflect the cost of accommodating the new user. The Court held that "[t]o the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental fractions they are invalid as an unauthorized tax."

U.S. v. Sperry Corp., 493 U.S. 52, 110 S. Ct. 387 (1989), was typical of pre-*Koontz IV* deference up to the Supreme Court level, albeit that it addressed federal fees. The fee in question there was a statute that authorized fees on awards the Iran-United States Claims Tribunal issued. The Supreme Court held such fees need only "fair[ly] approximat[e] … the cost of benefits supplied." The *Sperry* Court rejected a takings claim on two grounds: (1) "money is fungible"; and (2) a reasonable fee cannot be a taking regardless "if it is imposed for the reimbursement of the cost of government services."

A tax appeal decision also held that the obligation to pay money is "'not a taking of property.'" *Kitt v. U.S.,* 277 F. 3d 1330, 1336-37 (Fed. Cir. 2002), quoting, *inter alia*, *Atlas Corp. v. U.S.*, 895 F. 2d 745, 756 (Fed. Cir. 1990). *Kitt* was modified on other grounds at 288 F. 3d 1355.

The Supreme Court did apply *Dolan* to fee exactions in *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S. Ct. 2731 (1994). Ehrlich applied for

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a building permit to build a condominium project to replace a closed private athletic club. The city required the owner to pay various fees, particularly $280,000 to allow the city to replace the "lost" tennis courts. The Supreme Court vacated state court dismissal for failure to state a takings claim, and remanded for further proceedings consistent with *Dolan*. *Id*.

On remand, the California Supreme Court reversed and remanded an intermediate appellate decision, again after analyzing *Dolan*'s impact. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). The lengthy majority opinion expressly applied *Dolan* and *Nollan* to the fees in lieu of mitigation:

> [W]e conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the Federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving the Plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit denial.

Id. at 433. Accordingly, *Ehrlich* tersely applied *Nollan*/*Dolan* to monetary exactions, and the California Supreme Court on remand expounded on that application two decades before *Koontz*. One wonders why, then, the Supreme Court needed to accept jurisdiction in *Koontz*. Perhaps the majority felt compelled to explain its three sentence *Ehrlich* decision.

An article on *Nollan*/*Dolan* thoroughly analyzed the California Supreme Court *Ehrlich* ruling, concluding the court shows that *Nollan*/*Dolan* applied to monetary exactions. Christopher Goodin stated:

> The court ruled that *Dolan* applied to the discretionary in lieu fee, thus requiring a showing of nexus and proportionality, because discretionary decisions carry the threat of regulatory leveraging. The court reasoned as follows: First, *Dolan* is triggered by cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." Second, such circumstances are present chiefly in the discretionary context, which "present an inherent and heightened right that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation." Third, that type of manipulation was not present in ministerial "legislatively formulated," "broadly applicable fees," which are thus subject to a lesser standard of scrutiny.

C. Goodin, *Dolan v. City of Tigard* and the Distinction between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference." 28 U. HAW. L. REV. 139, 151 (2005).

REMEDIES PRIOR TO KOONTZ IV

In the breach, decisions prior to *Koontz* focused generally on the disparity between an appropriate fee exaction and the allegedly excessive amount. For example, the *Ehrlich* California Supreme Court majority said:

> We cannot say, on this incomplete record, what, if any, recreational fee the evidence might justify. Although in calculating its net cost as a result of upzoning the Overland Avenue parcel the city must take into account any relative benefit that Plaintiff's project would contribute to the public interest for which the fee is imposed, the record suggests that some exaction may be warranted. It is thus appropriate to return the case to the city to reconsider its valuation of the fee in light of the principles we have articulated. Remand to the city was apparently what occurred in *Dolan* itself after the case was returned to the Oregon Supreme Court. (*See Dolan v. City of Tigard*, (1994), 319 Or. 567, 877 P. 2d 1201 (the case is "remanded to the City of Tigard for further proceedings.")) … . The determination of such a fee will, of course, require the city to make specific findings supported by substantial evidence – that is, the city "must make some effort to quantify the findings" supported by substantial evidence – that is, the city "must make some effort to quantify the findings" supporting any fee, beyond "conclusory statements," although "[n]o precise mathematical calculation is required" either by the takings clause or the [state] Act. (*Dolan, supra,* 512 U.S. at ___, 114 S.Ct. at 2322).

Ehrlich at 449-50.

My prior ELULS article cited a series of prior Supreme Court decisions that held regulatory requirements that private funds be converted to public hands can constitute a compensable taking. Ansbacher, 1-20, and decisions cited therein. As I noted there, the dissenters in decisions holding no compensation due where "technical takings" of nominal amounts occurred are now joined in the Supreme Court majority. *Id.* at 20. Nonetheless, the Court had not previously expressly addressed whether compensation was due where no money changed hands before *Koontz IV*. *Id. Ehrlich* cited *Dolan* as authority, but remanded in three sentences.

ANALYSIS OF WHY UNACCEPTED WETLANDS FEE IN LIEU OF MITIGATION SHOULD BE SUBJECT TO TAX V. FEE ANALYSIS

Justice Kagan's dissent in *Koontz IV* explains the fundamental reason a takings analysis should not apply where an applicant refuses to accept an allegedly extortionate exaction. Nothing changes hands. *Koontz IV*, at 2609 (Kagan, J. diss.) Additionally, background principles of law establish that private property containing wetlands is subject to substantial, multi-level regulation. The questions of the degree of appropriate regulation is necessarily fact-specific. *See, Palazzalo v. Rhode Island*, 533 U.S. 606 (2001), distinguishing between the existence of wetlands regulation, versus overly burdensome wetlands regulation.

State and local government may

regulate private property under the police power. The Tenth Amendment reserves this power to the states. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), provides a good analysis of the police power and its application. That decision set forth the fundamental regulatory standard that a regulation that deprives an owner of any real economic use of a property takes that property. Just compensation is due. Merely burdensome regulation is not a compensable taking. Unfortunately, the necessarily fact-specific application of a panoply of judicial takings standards render difficult the determination of when a regulation has gone too far.

The *Palazzalo* Court held that a takings claim is ripe when the government will not authorize any wetlands development on the parcel. 533 U.S. at 613-26. Similarly, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), held that repeated rejections presented a jury question.

HISTORY OF TAX LAW

A recent Columbia article explicates the impact of the development of tax laws on English and United States political and legal institutions. A. Cockfield and J. Mayles, The Influence of Historical Tax Law Developments on Anglo-American Laws and Politics, 5 COL. J. OF TAX LAW 40 (2013). The authors argue that tax reform is central to our tradition. "Taxes have always been interwoven with a nation's fabric because a state needs revenues and resources to pursue its goals." *Id*. at 43. The Charter of Liberties in 1100, and the Magna Carta of 1215 and the Confirmation of Charters were "the world's first 'good' tax laws that restricted the ability of the king to tax his subjects as he saw fit… ." *Id*. at 42. The Declaration of Independence itself was largely a "democratic constraint [ ] on the use of state power to collect taxes." Regardless, our institutional opposition to taxation without representation, or without due process right to challenge taxation, exists side-by-side with the needs of a government to collect taxes. The article argues that the Constitution has lasted over 200 years, succeeding the Articles of Confederation that survived a mere seven, because the latter did not confer the power to tax and the Constitution did so. *Id*. at 64.

EXACTIONS

Modern exactions are virtually a century old. The Standard Planning Enabling Act of 1928 is the principal source. In the past half-century, exactions have been required for an increasingly large number of off-site impacts and perceived impacts. M. Kersten, Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits, 27 B. C. ENVTL. AFF. L. REV. 279 (2000). "Pay as you go" or "fee-in-lieu" are common methods. The most attenuated fees are "linkage fees," associated with the perceived secondary impacts of a development. These fees are commonly used to pay for affordable houses and the like for persons who will use or work at the proposed development. The more creative the exaction, the greater the risk of a *Nollan*/*Dolan* issue. *Id.* at 281-82.

Exactions at the local level are based on varieties of home rule and statutory delegation by jurisdiction. "Dillon's Rule," named for mid-19th Century Iowa Chief Justice John Forest Dillon, held that local government authority deraigns from legislature. 4 National Municipal Review 13, 14 (1915). The rule originated in his opinion in *Clinton v. Cedar Rapids & Missouri River R. R. Co.,* 24 Iowa 455, 475 (1868). He described the rule as follows:

> It is a general and undisputed proposition that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against a corporation, and the power is denied.

1 J. F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPS. 449-50 (5th ed. 1911).

Justice Thomas M. Cooley responded almost immediately by creating the "Cooley Doctrine," in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (Cooley, J. , conc.). The Cooley Doctrine held that local government had inherent authority. *Id.* The Supreme Court rejected the Cooley Doctrine in *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907).

The modern Fordham Rule derives from Jefferson Fordham, Model Constitutional Provisions for Municipal Home Rule (Chi. AMA 1953). The home rule authority he expounded is preeminent today. Municipalities and charter counties have substantial authority where not preempted, albeit their certain powers must be legislatively delegated. *But see*, G. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059 (1980), which argues essentially that modern cities are often "powerless."

As many as 48 states may be labelled "home rule" jurisdictions. J. Polley, Uncertainty for the Energy Industry: A Fractured Look at Home Rule, 24 ENERGY L. J. 261, 268 (2013). Florida is a home rule state under FLA. CONST. VIII, s. 1, and ch. 166 FLA. STAT. *See*, J. Wolf and S. H. Bolinder, The Effectiveness of Home Rule, FLA. B. J. 92 (June 2009).

Broadly speaking, exactions are authorized by the Tenth Amendment, which reserves power to the States except as specifically stated in the Constitution. Home rule and delegation grant many of these rights to local government. Local governments have become more creative over time, largely due to reduced federal and state funds while populations expand. J. Delaney, L. Gordon and K. Hess, The Needs-Nexus Analysis: A Unified Test for Validating Exactions, User Fees and Linkage, 50 LAW AND CONT. PROBLEMS 139 (1987). Florida is a bellwether state for infrastructure exactions due to its explosive growth and low tax structure. J.C. Juergensmeyer, Infrastructure and the Law: Florida's Past, Present and Future, 23 FSU J. LAND USE 7 ENVTL. L. 441 (2008).

HISTORY OF WETLANDS

Thomas E. Dahl and Gregory J. Allord's USGS publication explicates the history of wetlands loss in the United States. T. Dahl and G. Allord, History of Wetlands in the Coterminous United States. water.usgs.gov/nwsum/WSP2425/history.html. They say the future continental United States had

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The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

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about 221 million acres of wetlands in the early 1600s. Over half were lost by the mid 1980s. *Id.* The loss rate has dropped substantially since swampbuster and similar programs starting about a half-century ago. My prior Reporter article addresses this in great detail at the national and Florida levels at pp 22, et seq. *See generally,* USFWS, National Wetlands Inventory. www.fws.gov/wetlands/status-and-trends/index.html. Nonetheless, the battle between private property rights and wetlands resource protection continues.

HISTORY OF ENVIRONMENTAL MITIGATION

My *Koontz IV* article discussed at length the United States' and Florida's transition from seeing wetlands as obstacles to be filled to resources to be protected. *Id.* at 20. Two outstanding articles address the ethics and science of this transformation. D. Tarlock, Environmental Law: Ethics or Science?, 7 DUKE ENVTL. L & POLY F 193 (1996); M. Sagoff, Settling America or the Concept of Place in Environmental Ethics, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 349 (1993).

My prior ELULS Reporter article discusses the history of wetlands mitigation at great length. Roy Gardner provides a good summary in R. Gardner, Banking on Entrepreneurs: Wetlands, Mitigation Bankings and Takings, 81 IOWA L. REV. 527 (1996). Thomas Ledman addresses environmental mitigation fees at the local level in T. Ledman, Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation, 45 FLA. L. REV. 835 (1993). Regardless of the deference these two suggest, *Koontz IV* clearly applies *Nollan/Dolan* to such fees.

AS APPLIED IN *KOONTZ*

One expert explains *Koontz IV* as an unlawful exaction case, not a takings determination. Brian Hodges was co-counsel for Koontz before the Supreme Court. He quoted the *Koontz IV* majority: "'Extortionate demands for property in the land use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.'" *Koontz IV*, 133 So.2d at 2596 (e.a.b. Hodges), quoted by B. Hodges, *Koontz v. St. Johns River Water Management District* and Its Implications for Takings Law, 14 ENGAGE: S. FEDERALIST SOCIETY PRAC. GROUPS 39 at 6 (2013). Hodges says this means two things. First, a government may violate the unconstitutional exactions doctrine without a taking. Second, "where a permit is denied based on an owner's objection to an unlawful condition and the owner is not deprived of a property interest, a taking is not consummated, and just compensation may not be available as a remedy." *Id.*, citing *Koontz IV* at 2597. If Hodges is right, so too is Judge Griffin.