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• Michelle Diffenderfer, Chair • Thomas R. Gould, Co-Editor • Jeffrey A. Collier, Co-Editor

2008 Legislative Session Summary

by Eric T. Olsen, Hopping Green & Sams

The budget was the overarching issue in the 2008 Legislative Session. A 2008 state tax collection shortfall of \$4 billion following a 2007 shortfall of over \$2 billion made appropriating money for existing and new government programs difficult. In the end, the Legislature passed a balanced budget and adjourned at 6:00 p.m. on Friday, May 2nd.

Only 269 "general" bills passed both Houses of the Legislature. The main bills relating to environmental and land use issues that passed

included a lengthy energy bill, continuation of Florida Forever Funding, and elimination of treated domestic wastewater discharges to the ocean in certain southeast Florida counties. Legislation regarding growth management was debated, but did not pass. The following is a brief summary of the significant environmental and land related bills that passed in the 2008 Legislative Session:

CS/SB 192 - State Parks

CS/SB 192 decriminalizes viola-

tions of the Department of Environmental Protection, Division of Recreation and Parks' rules except for certain identified violations. The bill sets forth penalties for non-criminal infractions that include ejection from all properties managed by DEP and a fine of up to \$500. The bill provides that failing to timely pay a non-criminal penalty is a misdemeanor of the second degree. The legislation gives DEP the authority to use golf carts and utility vehicles on public roads within a state park when the posted

See "Legislative Session," page 26

From the Chair

by Michelle Diffenderfer



I am writing you for the last time as Chair from a cloud forest in Costa Rica. As I sit here watching the resident cheeky Co-atimundi (their very cute version of a raccoon) trying to steal plantain chips from the remainder of lunch, I realize how lucky I am to be part of such a varied and diverse section of lawyers. The Executive Council, other interested lawyers, consultants and law students came down here for a joint CLE program between the Costa Rican and Florida lawyers followed-on by our annual planning retreat. Everything has exceeded our expectations, and we have learned more about our Costa Rican counterparts and ourselves in this brief visit.

As we get ready for our Annual Update in Amelia Island and the coming Bar year, we continue to strive for greater member participation and better service.

This past year we established four new committees to provide better access to section activities, provided a lunch and learn webinar to diversify our CLEs, strengthened our online Treatise and decided to make the newsletter web-based only. You will continue to see improvements to our services following the themes of mentoring, technology and legal education as established at last year's retreat. With Gary Hunter taking the helm in August, you will continue to see our Section shine and opportunities for you to get involved expand.

It has been a great year, and I am truly honored to have been a part of

your lives. I now am looking forward to being a past chair and joining the ranks of the fossils! I hope to see you at Amelia.

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Legal Considerations of Green Development in Florida

by Jarrett D. Bingemann, LEED AP, Akerman Senterfitt, Tyler B. Everett, LEED AP, Akerman Senterfitt, and Heather M. Himes, LEED AP, Akerman Senterfitt

Public and private entities throughout Florida and the United States have recognized that green development is a necessary step in the evolution of the real estate development industry. This realization is evidenced by the green development programs and legislative efforts that are emerging across the state and county. Although the definition of what constitutes green (also “sustainable” or “high-performance”) development is evolving, the term is generally applied to development projects that have been designed and built with the goals of promoting resource efficiency (energy, water, etc.); minimizing the impacts on the surrounding environment; and promoting occupant health. This article will briefly discuss legal considerations concerning green development, summarize national and Florida-specific green development rating systems and standards, examine the dynamic green development regulatory landscape in Florida, and identify future trends in green development.

Legal Considerations

Parties that are involved in green development should be aware that there is a significant amount of legal risk associated with green development activities and services. In parts of the United States where green development is prevalent, there has been increasing amounts of litigation related to green development activities primarily because there is no universally accepted standard for what qualifies as green development and consumers that have paid a premium for green development activities have heightened performance expectations. Consequently, architects, engineers, planners and environmental consultants offering green development services may face accusations of fraud, negligence, breach of contract, or violations of unfair competition laws (such as the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2007), and Florida’s Deceptive and Unfair Trade Practices Act, Florida Statutes,

§§ 501.201-501.213 (2007)), if such parties fail to accurately define the scope of services in their marketing materials and service agreements; do not meet previously quantified green performance expectations; or do not attain final certification under the applicable rating system. Therefore, parties offering green development services should obtain legal counsel with experience in green development to confirm marketing materials, service agreements and insurance policies related to green development in order to mitigate the new and evolving risk of litigation in this area. Further, consumers and local governments that engage third parties to provide green development services should obtain legal counsel with experience in green development to explain the nature and extent of green development services being contracted, and the potential means of recourse in the event that their contractual expectations are not satisfied.

In addition to legal liability, green development will also impact many areas of Florida land use and local government law. Currently, despite efforts to promote green development, many jurisdictions have conflicting structural constraints in their zoning, land use and land development codes, especially in the areas of stormwater management design, transportation management, and landscape regulations, which effectively prohibit the use of green development strategies. Further, if local governments mandate that projects achieve certification from a rating system or standard as a condition of a development approval, despite the fact that certification may only be achieved following construction, there are questions as to how such mandates may be enforced or interpreted by the courts. For example, if a local government requires a project to achieve LEED certification as a condition of receipt of a zoning approval and the project ultimately does not obtain LEED certification, could the project lose its zoning after it is already constructed?

See, e.g., *Sindel v. Pincrest Lakes, Inc.*, 75 So.2d 191 (Fla. 4th DCA 2001). Finally, local governments must determine how they will ensure that green development projects will maintain their applicable rating or certifications once construction is complete and the operation and maintenance phase of the green development project begins.

As the aforementioned legal considerations gain increasing attention across the country and in Florida, it is important to understand that green development is comprised of intricate rating systems, standards, and programs, as well a dynamic regulatory landscape, which requires increasing specialization to avoid legal liability and ensure the success of a green development project.

National Rating Systems and Standards

The foremost green development rating system, Leadership in Energy and Environmental Design (“LEED”), was developed by the U.S. Green Building Council (“USGBC”) through an open, consensus-based process. Over the years, the USGBC has developed a series of LEED programs, each designed for a different type of construction. There are currently nine LEED programs: LEED for New Construction and Major Renovations; LEED for Existing Buildings; Operations & Maintenance; LEED for Commercial Interiors; LEED for Core & Shell; LEED for Schools; LEED for Retail; LEED for Healthcare; LEED for Homes and LEED for Neighborhood Development. Through the two-step certification process, a project earns points in the various categories such as sustainable sites and indoor environmental quality. If the project achieves a specified level of points, it will receive a rating of Certified, Silver, Gold or Platinum. Across the country, various LEED initiatives have been implemented in 72 cities, 22 counties, 16 towns, 27 states, 12 federal agencies, 10 public school jurisdictions and 35 institutions of

higher education. U.S. Green Building Council, <http://www.usgbc.org/> (last visited June 20, 2008). In addition, the USGBC has proposed a comprehensive revision to the LEED for New Construction (“LEED-NC”) rating system. LEED-NC Version 3.0, currently out for public comment, includes changes to technical components such as energy usage and greenhouse gas emission; changes to the point scale (From 69 to 110 total points available); and changes to the credits for addressing regional environmental challenges. Other major changes “include transparent weightings of LEED credits so the highest-priority credits achieve the most points, a new mechanism for incorporating bioregional credits, and a more nimble framework that supports rapid response to emerging environmental and human health issues.” U.S. Green Building Council, <http://www.usgbc.org/News/Press-ReleaseDetails.aspx?ID=3701> (last visited June 20, 2008).

Green Globes is an environmental design and management tool composed of an online assessment protocol, rating system and guidance for green building design, operation and maintenance. History of the Green Globes System, <http://www.thegbi.org/commercial/about-green-globes/> (last visited June 20, 2008). The Green Globes system is primarily used in the Canadian market, but is making its way into the U.S. green building movement. Green Globes is owned and operated by the Green Building Initiative (“GBI”). The Green Globes system operates similar to LEED in that a project earns points and achieves a rating based on the number of points received. Green Globes is designed for all commercial building uses, such as office, multi-family, health care, schools and universities, labs, industrial and retail. Green Globes can also be a better alternative for smaller projects as the cost for certification is significantly less than under the LEED system.

The National Association of Home Builders (“NAHB”) is nearing completion of its Green Building Standard (“GBS”), which will be the only American National Standards Institute (ANSI) accredited standard for green residential construction. The new GBS is based on the NAHB Model Green Home Building Guidelines, which were developed in 2004.

Unlike LEED for Homes, the NAHB GBS is designed so that local governments can use it as a foundation for their own green building program and can easily accommodate customization to reflect local geographic and climate conditions. Further, the GBS does not require use of a third party verification system or certifier. While the NAHB Research Center is providing education programs to certify the Green Certified Professionals (“GCP”) provided for in the GBS, certification by a GCP is not required. They are merely provided as a service to those local governments that don’t have the staffing to implement the program themselves.

Florida Specific Standards and Programs

In response to the unique climate and land characteristics in Florida, several Florida specific programs have been developed and are being utilized either independently or in concert with the national rating systems to allow development to occur in an environmentally sensitive manner.

The Florida Green Building Coalition (“FGBC”) was developed to provide a statewide green building program with environmental and economic benefits. The Florida Green Building Coalition, <http://www.floridagreenbuilding.org/db/> (last visited June 20, 2008). The FGBC has devoted considerable efforts to designing technical standards to provide third-party verification of a project’s green planning and actions. The FGBC has developed five standards: the Green Home Standard; the Green Development Standard; the Green High Rise Standard; the Green Local Government Standard for Green Cities and Counties and the Green

Commercial Buildings Standard. The benefit of these standards over LEED is that they are Florida-specific. Our climate and land characteristics were taken into account when developing these standards, making them more practical in their usage. For example, the LEED for Neighborhood Development requires certain prerequisites such as limitations on development in the floodplain that make it virtually impossible to achieve in Florida, making the FGBC Green Development Standard more practically applicable to neighborhood development in Florida.

The members of the USGBC Florida chapters have developed the Florida LEED Application Guide, which is still in draft form, but has been forwarded to regional USGBC for comment. This Application Guide is not a separate standard, but instead provides guidance and direction in applying the LEED for New Construction system to development in Florida. The Application Guide provides a point by point analysis of the LEED criteria with specific guidance based on the existing Florida regulatory system and unique land features. This Application Guide can be used by the USGBC when reviewing an application from a Florida project and by an applicant for the program in designing its project to meet the LEED criteria.

The Florida Water StarSM program is coordinated by the St. Johns River Water Management District and was designed to “encourage water efficiency in household appliances, plumbing fixtures, irrigation systems and landscapes.” Florida Water Star, <http://www.floridawaterstar.com/> (last visited June 20, 2008). The Water Star program offers incentives to

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GREEN DEVELOPMENT

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builders and home buyers for efficient new home construction that follows the program's guidelines. Homes are assessed on a point system to determine certification worthiness and are granted the "water star certified" label if they achieve the requisite number of points. Homes that achieve the water star certification typically save between 20-26% on their indoor water use and about 40% on their outdoor use. Florida Water Star for Home Buyers, <http://www.floridawaterstar.com/homebuyers/index.html> (last visited June 20, 2008).

Florida Yards & Neighborhoods is a University of Florida Extension program that encourages homeowners and professionals to create and maintain Florida-Friendly landscapes that protect the natural environment. According to the Florida Yards program's website, irrigation of lawns and landscaping in Florida represents the single largest use of water from our municipal water supplies. Why Go Florida Friendly?, <http://www.floridayards.org/> (last visited June 20, 2008). The Florida Yards program provides a sample Declaration of Covenants that implements the nine principles of Florida-friendly landscaping and can either be adopted independently or can be incorporated into a community's overall homeowner's association documents.

The Florida Energy Star certification program ("Florida Energy Star") is a subsection of the national Energy Star program, which is a joint effort by the U.S. Environmental Protection Agency and the U.S. Department of Energy and is designed to increase energy efficiency in homes. The Energy Star program provides guidelines for builders, tips for home buyers, realtors and product manufacturers. For residential construction, the Energy Star program provides different guidelines for each county in Florida based on the climate zone that it has been assigned. This information can be found on the Florida Energy Star website. Builder Option Packages for Florida, http://www.energystar.gov/index.cfm?c=bop.pt_bop_florida (last visited June 20, 2008). If a home meets the Energy Star criteria, it will

be at least 15% more energy efficient than homes built to the 2004 International Residential Code. Energy Star Qualified New Homes, http://www.energystar.gov/index.cfm?c=new_homes.hm_index (last visited June 20, 2008). The guidelines utilize a variety of tried and true energy efficient measures such as effective insulation, high performance windows and efficient heating and cooling equipment. Features of Energy Star Qualified New Homes, http://www.energystar.gov/index.cfm?c=new_homes.nh_features (last visited June 20, 2008). Commercial Buildings may also apply for the "Designed to Earn Energy Star" rating. Commercial Building Design, http://www.energystar.gov/index.cfm?c=new_bldg_design.new_bldg_design (last visited June 20, 2008). In order to achieve this rating, it is evaluated at the design phase and must achieve a rating of 75 or higher. Green Building and Energy Efficiency, http://www.energystar.gov/index.cfm?c=green_buildings.green_buildings_index (last visited June 20, 2008). Resources for achieving these energy performance goals include specifying Energy Star design in contract documents, providing benchmark performance in operating buildings and having consultants attend training sessions.

Related 2008 Florida Legislation

The 2008 legislative session saw more green and energy/climate change-related legislation than any previous session. It remains to be seen whether these bills will survive the Governor's veto (and some have already fallen victim), but as they represent a major shift in the environmental policy for this state we thought it worth while to discuss a sample of these bills.

CS/HB 697 covering the issue of Building Standards related to Energy Planning and Conservation Practices imposed new requirements on local governments to adopt comprehensive plan requirements in the Future Land Use, Traffic Circulation, Conservation and Housing Elements to address energy efficiency and greenhouse gas emissions in the next Evaluation and Appraisal Report. H.R. 697, 2008 Gen. Sess. (Fla. 2008). This bill has been signed into law by the Governor.

The Comprehensive Energy/Cli-

mate Change Legislation embodied in HB 7135 represents major legislation that moves Florida to the forefront of the various states' initiatives on climate change and green energy. H.R. 7135, 2008 Gen. Sess. (Fla. 2008). This legislation provides for a new Florida gas standard, requiring E10 statewide by 2010. It also establishes a cap and trade system that applies to major electric power-generating utilities in Florida as a first step. HB 7135 directs the Florida Department of Environmental Protection to develop rules for this cap and trade system by 2010, subject to the Legislature's approval and ratification. This bill also requires the Public Service Commission to develop a Renewable Portfolio Standard rule by February 2009, again subject to the Legislature's approval and ratification. This legislation also set an Enhanced Statewide Recycling Goal at 75% statewide recycling by 2020. It also requires gradually increasing energy efficiency requirements for new buildings: a 20% increase by 2010 and a 50% increase by 2019. Most relevant to this article, HB 7135 requires essentially all new or renovated state, local government or university buildings to meet LEED, Green Globes, FGBC or any other nationally recognized green building rating or certification. Finally, it creates a new state agency, the Florida Energy and Climate Commission. Like the previous bill, this bill has not yet been signed by the Governor.

SB 682 would have directed the Florida Department of Transportation ("FDOT") to establish a methodology for "planned, sustainable" Developments of Regional Impact ("DRI") that would recognize that these developments, when fully developed, will likely achieve internal capture rates greater than 30 percent. S. 682, Gen. Sess. (Fla. 2008). This bill would have been a major departure from FDOT's current modus operandi and would have given a real incentive to developers to commit to green development; however, the Governor vetoed this bill for reasons not related to this measure on June 17, 2008.

SB 2530, also entitled the "Florida Green Building Act," was stymied in committee, but would have been landmark in providing a corporate tax credit for private green buildings that met a minimum level of "green" certification through one of the nationally recognized green building programs. S. 2530, Gen. Sess. (Fla. 2008). It also

would have created the Florida Green Building Council. While this legislation was not successful this year, it is expected to surface again in the coming legislative session with a better chance of success.

Regional Actions

At the regional level, certain regional planning councils are beginning to take a more active approach to requiring green development to be incorporated into DRIs. For example, the East Central Florida Regional Planning Council (“ECFRPC”) issued a guidance letter that provides that certain recommended conditions *will be* included in the ECFRPC’s conditions for approval for a DRI. See Memorandum from the ECFRPC Staff to all DRI Applicants dated August 20, 2007 (“Memo”). Recommendation #1 of the Memo states that “Construction Standards shall meet the USGBC LEED program, the FGBC, the Green Globes program, or any other nationally recognized green building system that is approved by the Department of Management Services.” *Id.* The remaining three recommendations require compliance with the Energy Star and Water Star standards as well as implementation of “Dark Skies” measures. *Id.*

Local Initiatives

As a proactive measure, certain local governments in Florida have developed incentive programs to support green development in their jurisdictions. The City of Gainesville has a priority permitting program, an expedited review incentive, offers marketing materials and publicity and offers reduced building permit and plan review fees. City of Gainesville Green Building Program Procedures for Permitting and Certification, http://cityofgainesville.org/common/docs/bldg/bldg_GreenBuildingProcedures.pdf (last visited June 20, 2008). Sarasota County offers expedited review, priority permitting and until recently gave rebates on certain fees for green development projects. Sarasota County, Fla., Resolution No. 2006-174 (Aug. 22, 2006). Miami-Dade County also has an expedited review incentive. Miami-Dade, Fla., §8-6 (June 6, 2005). The City of Tallahassee currently offers gas and hydronic heat rebates. Go Green Tallahassee, <http://www.tal.gov.com/green.cfm>

(last visited June 20, 2008). Orange County is developing its “Orange to Green” program and is exploring expedited review for projects that will agree to pursue LEED certification. Help Make Orange County Green, <http://www.orangecountyfl.net/cms/AWARE/environment/orangetogreen/default.htm>, (last visited June 20, 2008).

Future Green Development Trends

While green development has only recently gained notoriety in Florida, other jurisdictions throughout the United States have developed a variety of green development programs, incentives, and mandates. For instance, the new “Green Dallas” program was adopted in April 2008 with a goal of being carbon neutral by 2030, which will require reducing current building energy usage by 50%. Green Dallas, <http://www.greendallas.net/index.html> (last visited June 20, 2008). Phase I of the program, which begins on October 1, 2009, focuses on energy efficiency and water conservation requirements for all residential and commercial developments, including a requirement that all buildings be 15% better than the 2006 International Energy Conservation Code, use Energy Star appliances and drip irrigation systems. Citywide Green Building Program, http://www.dallascityhall.com/pdf/OEQ/green_building_ordinance040908.pdf (last visited June 20, 2008). Phase II, which begins on October 1, 2011, focuses on expanding the initiatives for new buildings into a comprehensive green building standard requirement, requiring all new construction to be LEED-certifiable, although formal certification is not required. *Id.* The implementation of this program is key to its success and provides for an extensive training program for the “greening of City staff” and establishing specific green building plan review teams in the building inspection department. The “Green Dallas” program is particularly innovative because it involves a substantial partnership between a local government and the USGBC, which previously had not been effective. Consequently, if Dallas and the USGBC are successful in implementing the “Green Dallas” program, it will serve as an important case study for other local governments desiring

to implement a green development program with the aid of private green development entities.

Conclusion

Green development has been internationally recognized as a necessary step in the evolution of the real estate development industry. Across the United States and in Florida, state and local entities have begun to implement a wide variety of green development programs, involving incentives and mandates, to facilitate the adoption of green development practices. Further, architects, engineers, planners and environmental consultants have begun to offer green development services to satisfy this market demand. Because green development is an evolving concept that involves a cost premium, there are substantial legal considerations that should be considered prior to entering a green development services agreement or incorporating aspects of third party green development verification programs into a local government or planning commission’s development review process. While the legal considerations of green development may appear daunting at first, through the assistance of attorneys and professional consultants who understand the green development rating systems, standards, and programs available today; are actively involved in monitoring and facilitating the evolution of green development programs at a state and national level; and who have the expertise to manage the various land use, real estate, environmental, and financial green development expectations, all parties should benefit from this new era of development.

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Primer To Green Building

by L. Mary Thomas, Baker Hostetler

As the Learned Frog once said, “It’s not easy being green.” These woeful words are being echoed by developers throughout the U.S. It is simply not easy to be green these days because there is no singular definition of “green building” and there are numerous green building standards. With the recent impetus of state and local government regulation implementing green building requirements, many developers wish to develop green buildings but are confused about exactly how to accomplish this feat. This article will discuss the term “green building” and the most popular green building standards, specifically focusing upon the LEED rating system. Additionally, this article will discuss the benefits which may be reaped from building green.

What Does It Mean To Be Green

While there are numerous definitions for the term “green building,” one of the most comprehensive definitions states that green building is “the practice of increasing the efficiency with which buildings use resources—energy, water, and materials—while reducing building impacts on human health and the environment through better siting, design, construction, operation, maintenance, and removal.”¹ Although there are a multitude of green building definitions, the overarching theme behind the definitions is that green building is a process by which the decisions which are made throughout a building’s life cycle, ranging from building siting and choice of construction materials to monitoring of the building’s HVAC systems, are based upon reducing or eliminating the negative impacts of the building upon the environment and upon building occupants.

The most popular green building standards in Florida have been established by: the Florida Green Building Coalition (“FGBC”); the National Association of Home Builders (“NAHB”); and the United States Green Building Council (“USGBC”). The FGBC has established a statewide green building standard which includes five certification programs which are applicable to various types of buildings including

residential homes, high rises, and commercial buildings. The NAHB’s Model Green Home Building Guidelines, while nationwide in scope, are quite limited as they are only applicable to homes. The most widely recognized green building assessment system is the USGBC’s Leadership in Energy and Environmental Design (“LEED”) program. Not only is the LEED program nationwide, but it is applicable to a large range of building types.

LEED consists of specific rating systems which will be applied based upon the type of product being developed. The LEED rating systems include: New Construction (including schools); Existing Buildings; Commercial Interiors; Core and Shell; Homes (pilot program); and Neighborhood Development (pilot program). LEED for New Construction is applicable to the construction of commercial office space and major renovations which effect more than 50% of the floor area of a building or which affect more than 50% of the building occupants. LEED for New Construction is being developed to include retail, healthcare, and laboratory buildings. LEED for Existing Buildings applies to buildings that have been occupied for a minimum of twelve months and focuses upon improving already constructed buildings in regard to their operations and maintenance. LEED for Core and Shell addresses base building elements such as structure, envelope, and HVAC systems, while LEED for Commercial Interiors deals with tenant improvements. LEED for Neighborhood Development promotes smart growth, new urbanism, and green building through a focus on project location and design, while LEED for Homes seeks to achieve lower water and energy consumption and create a healthier indoor environment.²

LEED Rating System

A project must be awarded an established number of points in order to achieve LEED certification. A total of 69 points may be awarded to a project under the LEED rating systems. The following points are required to achieve the listed certification levels: Certi-

fied, 26-32 points; Silver, 33-38 points; Gold, 39-51 points; and Platinum, 52-69 points. As discussed further below, some points may be submitted to the USGBC for consideration during a project’s design phase, while other credits may only be submitted during the construction phase.

LEED Certification Process and Timeline

As soon as the decision to apply for LEED certification has been made, a project should be registered at LEED online and a project team administrator must be appointed to collect, review, and submit materials to the USGBC. It is preferable that the project team administrator be a LEED Accredited Professional (“LEED AP”) as a point may be obtained by utilizing a LEED AP and more importantly, a LEED AP will be able to competently guide the project team on the prerequisites, credits, and available methods to achieve the desired level of certification. LEED AP’s are well versed in the requirements for achieving LEED certification as they must pass a rigorous test of a specific LEED program in order to become a LEED AP. The third step in the LEED process is deciding whether submittals will occur in one or two phases: at the completion of the design phase and at the completion of the construction phase, or only at the completion of the construction phase. If credits are submitted after the design phase, then the USGBC will render a decision as to whether the credit is likely to be approved or denied subsequent to the USGBC’s final review of the project upon the completion of construction. It will be most beneficial to developers to submit all possible credits at the end of the design phase as this will provide an idea of what credits are likely to be awarded and will enable the developer to determine what further measures must be incorporated during construction in order to achieve the desired level of certification.³

The average time period for obtaining LEED certification is three months. Once the USGBC receives

the required documents from a project team after the completion of construction, it will conduct a preliminary review which takes 25 days. This review will state whether the credits sought have been achieved or denied. The project team then has 25 days to provide clarifications and corrections to the USGBC and USGBC has 15 days for its final review and certification. After this final review, the project team has 25 days to accept or appeal the certification before it becomes final. The USGBC's review of an appeal takes approximately 25 days and costs \$500. Expedited review of a project is available upon the payment of a \$10,000 fee in addition to the payment of the cost of certification. The expedited review will decrease the length of the review process by 50% from three months to forty-one business days.⁴

LEED Certification Fees

In order to achieve LEED certification, certification fees must be remitted to the USGBC. The costs of certification for LEED New Construction, Commercial Interiors, and Core and Shell for USGBC members is: \$1,750 if the building has an area less than 50,000 square feet; \$0.035 per square foot if the building has an area between 50,000 and 500,000 square feet; and \$17,500 if the building's area is greater than 500,000 square feet. For non-members, the fee is \$2,250 if the building's area is less than 50,000 square feet, \$0.045 per square foot if the area of the building is between 50,000 and 500,000 square feet, and \$22,500 if the building's area is greater than 500,000 square feet.⁵

LEED for New Construction Credits

LEED for New Construction is the LEED rating system which is applicable to new construction and major renovations. LEED for New Construction assesses six areas of a building's design and construction for which points may be awarded in order to obtain certification. These areas include: sustainable sites; water efficiency; energy and atmosphere, materials and resources; indoor environmental quality; and innovation in design.

The Sustainable Sites category focuses on minimizing the impacts of development upon the building site through measures such as: choosing a

site that does not have sensitive environmental conditions; minimizing the building footprint; and encouraging development on previously developed sites with existing infrastructure. A prerequisite to any points being awarded in this category is that an Erosion and Sedimentation Control ("ESC") Plan must be created and implemented, during the design phase of the project, for all construction activities. The plan will prevent the loss of soil during construction by stormwater runoff and/or wind erosion, protect topsoil by stockpiling it for reuse, prevent sedimentation of storm sewers and receiving streams, and prevent pollution of the air with dust and particulate matter. In order to implement the ESC Plan, the developer may employ measures such as: silt fencing, sediment traps, sediment basins, mulching, and temporary and permanent seeding. In the Sustainable Sites Category, points may be awarded for: avoiding the development of sites with sensitive site elements; designing buildings with minimum footprints; encouraging development in urban areas with existing infrastructure; locating projects in close proximity to public transportation; encouraging the use of alternative methods of transportation such as bicycles and fuel efficient vehicles; maximizing open space and protecting or restoring habitat; stormwater management; and reducing the heat island effect and light pollution. Strategies that developers may utilize to achieve these points range from decreasing impervious surface areas in order to decrease runoff to the surrounding areas to providing secure bike racks and shower and changing facilities in order to encourage the use of transportation which will not contribute to polluting the environment. Fourteen points may be earned in this category.

The intent of the Water Efficiency category is to "limit or eliminate the use of potable water, or other natural or subsurface water resources available on or near the project site, for landscape irrigation." Strategies that may be employed by the developer for achieving credits under this category include: utilizing captured rainwater and recycled wastewater; utilizing water conserving fixtures; and utilizing plant species that require a minimum amount of watering. Up to five points

may be awarded in this category.

The goal of the Energy and Atmosphere category is to ensure that the building's energy related systems are functioning properly and to encourage the installation of photovoltaic systems or bio-fuel based electrical systems. A prerequisite for this category is commissioning of the building's energy systems. Commissioning is the process whereby an individual appointed by the project team verifies that the building's energy systems are installed, calibrated, and performing according to the owner's project requirements, design, and construction documents. Points may be awarded for actions such as: zero use of CFC-based refrigerants in HVAC systems; designing the building to maximize energy performance; utilizing non-polluting and renewable energy sources; and developing a plan to evaluate building and/or energy system performance periodically throughout the building's lifecycle. Seventeen points are available in this category.

The Materials and Resources category focuses on reducing the waste produced by construction and utilizing recycled and reused materials. In order to achieve points, the developer may undertake measures such as: setting aside recycling areas for specific types of wastes; reusing an existing, previously occupied building but updating fixtures to maximize efficiency; recycling construction waste; utilizing regional materials produced within 500 miles of the project site; and incorporating salvaged materials into the building design. A total of thirteen points may be awarded.

The Indoor Environmental Quality category seeks to improve occupant health and comfort. Fifteen points may be awarded in this category. Measures which may be taken to achieve points include: prohibiting smoking in buildings or ensuring that pollutants from smoking areas are directly exhausted to the outdoors; utilizing materials that are low in contaminants; allowing individuals to control their climate systems and lighting systems; and introducing daylight and views into regularly occupied areas of the building.

The Innovation in Design category provides an opportunity for four points to be awarded for excep-

continued...

tional performance above the LEED requirements or for innovative performance, not specifically addressed in LEED, that provides quantifiable environmental and health benefits.⁶

Benefits of Green Building

Although the green building process may be a somewhat perplexing to developers, a developer may receive many benefits from building green. In addition to the intangible benefits, such as participating in improving the environment and human health, there are also numerous tangible financial benefits. Such benefits include: a higher demand and premium selling price for green homes; savings throughout a building's lifecycle in an amount which is many times beyond the initial investment for building green; energy and water savings; savings in the costs of operations and maintenance; reduced infrastructure costs; and increased worker productivity. Studies have shown that green homes sell faster and for a greater sales price than comparable homes. Data from 2007 shows that environmentally certified homes sold for 4.8% more and stayed

on the market for 24% less time than comparable homes.⁷ Data has also shown that commercial office buildings which are green sell at cost premiums of up to 2.1%.⁸ Some developers may fear that the costs of going green may exceed the benefits reaped from building green, but studies show that an upfront investment to incorporate green building features typically yields lifecycle savings of over ten times the initial investment. For example, an initial investment of \$100,000 to incorporate green building features into a 5 million dollar project would result in a savings of at least 1 million dollars over the life of the building. Savings from energy and water usage also result from building green. On the average, green buildings use 30% less energy than conventional buildings. For a 100,000 square foot office building, this reduction amounts to a \$44,000 per year savings with a twenty year net present value savings of over half a million dollars. The energy savings alone typically exceeds the average additional cost of green construction over conventional construction. Reduced infrastructure costs may be seen because green buildings have lower energy, waste disposal, environmental and emissions, and maintenance costs. Additionally, a green building may increase worker productivity which in turn will increase profits. A study at Herman Miller showed up to a 7%

increase in worker productivity from moving to a green, daylit facility.

Other tangible benefits of building green are incentives offered by local governments for green builders including: reduced permitting fees; expedited permitting; and free advertising. Leading local governments in Florida offering incentives for green building include: Sarasota County; the City of Gainesville, and Miami-Dade County. Sarasota County's incentives for green building include: fast track permitting for building permits, and marketing aid, including the placement of green building program participants on the county website, the erection of signs at the project site designating the project as a program participant and the publication of press releases naming participants. The City of Gainesville offers fast track permitting, a fifty percent reduction in building permit fees, and marketing incentives similar to those of Sarasota County. Miami-Dade County offers expedited review and approval. As time progresses, more local governments are developing or implementing incentives to encourage developers to build green.

Conclusion

The green building process may be daunting to developers due to the numerous green building standards which exist, however developers should seriously consider building green due to the benefits which may be attained and because of the fact that governmental entities are beginning to require or encourage aspects of green building in development. Green building is an evolving concept and although many resources which discuss green building are available, there are still many areas of the green building concept which are unsettled. In order to obtain further information regarding green building, the following websites may be useful: *www.usgbc.org*, *www.floridagreenbuilding.org/db*, *www.nahb.org*.

Endnotes:

¹ <http://en.wikipedia.org/wiki/Green-building>

² See New Construction Reference Guide, 3d Edition. USGBC, Oct. 2007.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ "Green Homes Sell Faster and Sell For More Than Comparables", Danielle Johnson, *Building Seattle Green*, April 2008.

⁸ Ca. Report.

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Florida Caselaw Update – June 2008

by Gary K. Hunter, Jr. and D. Kent Safriet

On first-tier certiorari review, a circuit court can only grant or deny a petition; it cannot enter any judgment on the merits. *Clay County, Fla. v. Kendale Land Dev., Inc.*, 32 Fla. L. Weekly D2870a (1st DCA Dec. 5, 2007).

Clay County sought certiorari review of a circuit court order granting Developer Kendale Land Development Inc.'s petition for writ of certiorari challenging an adverse administrative ruling. At the administrative hearing it was determined that Kendale's concurrency certificate had expired before it obtained all necessary preliminary permit approvals; however, the County agreed to allow Kendale to proceed with its project if it paid a fair share assessment. Kendale sought certiorari review in the circuit court as it believed the hearing officer's order departed from the "essential requirements of law."

Taking notice that the scope of certiorari review of quasi-judicial proceedings is often misapplied, the court described in some detail the limits of such certiorari review. On first-tier certiorari review, "a circuit court is limited to determining whether the administrative findings and judgment are supported by competent substantial evidence." As such, the 1st DCA posited that the only two options for a court exercising certiorari review are to "deny the petition or grant it, and quash the order at which the petition is directed." According to the court, a circuit court exercising certiorari review may not pass any judgment on the merits of the case or direct any lower tribunal to enter a specific order.

The 1st DCA held that the circuit court's order "departed from the essential requirements of law" because the circuit court "conducted an independent review of the record" and "fashion[ed] what it believed to be an equitable remedy." Because such action goes beyond determining whether the administrative action was supported by competent substantial evidence, the 1st DCA, keeping within the limits of certiorari review, quashed the circuit court's order and

remanded for further, consistent proceedings.

Stabilization of contamination is complete when its permanent nature is evident; progressively worsening damages, such as seepage, do not present successive causes of action so as to extend statute of limitation on inverse condemnation or continuing trespass action. *Suarez v. City of Tampa*, 33 Fla. L. Weekly D408 (2nd DCA Feb. 1, 2008).

Landowner holds the equitable interest in property which, from 1965-1966, was used as a landfill by the City of Tampa. When contamination prevented the sale of the property in 1988, a request was made for the City to remove the garbage. In response, the City refused to remove the garbage unless a governmental entity required it to do so. The landowner initiated this inverse condemnation and continuing trespass action in 2002.

The parties agreed that inverse condemnation actions are subject to a four-year statute of limitations which "runs from the time the cause of action accrues." Citing *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So. 2d 171 (2nd DCA 1995), the court stated that "knowledge of harm arising from governmental action ordinarily is sufficient to trigger accrual of a cause of action for inverse condemnation." Because it is recognized that actions for inverse condemnation may often involve "situations where a continuing trespass or nuisance ripens into a constitutional taking of property," the landowner alleged that the presence of garbage on her land, and its lingering environmental effects, constituted a continuing trespass and thus her suit was timely filed.

As to the inverse condemnation claim, the landowner argued that the four-year statute of limitations did not bar her claim because, under the doctrine of stabilization, the full extent of the contamination to her land could not be determined. The 2nd DCA found that the landowner's reliance on the doctrine of stabilization was misplaced in that stabilization is "not deferred until the progressive

environmental damage stops, but occurs when the environmental forces have substantially and permanently invaded the private property such that the permanent nature of the taking is evident and the extent of the damage is reasonably foreseeable." The court went on to state that once the damaging act is completed, the existence of continuing damages (e.g., seepage) does not provide a basis for "successive causes of action" stemming from the original act. Accordingly, the 2nd DCA conclusively determined that the contamination on the land had become stabilized some 36 years before the filing of the lawsuit in question, and thus the landowner did not bring her action within the four-year statute of limitations.

Regarding her continuing trespass claim, the landowner argued that because "the City's failure to remove the waste after [she] withdrew consent constitute[d] a continuing tort for trespass," the [four-year] statute of limitations would not run until the continuing tort ceased. The court noted that although a trespass may constitute a continuing tort under Florida law, and allow a landowner to recover for damages incurred in the limitations period, the facts in the instant matter did not warrant such a finding. Relying on *Garden St. Iron & Metal, Inc. v. Tanner*, 789 So. 2d 1148 (2nd DCA 2001), the court found that "the landowner's cause of action for trespass accrues, and the statute of limitations period begins, when [s]he retracts [her] permission for the use of the property." In this regard, the 2nd DCA found that the landowner's cause of action for trespass accrued no later than 1988 when she informed the City of her concerns about the contamination of the property. Informing the City of her concerns in this manner served as a retraction of her permission for the garbage to remain upon her property, and as such, the 2nd DCA found that the landowner's claim was barred by the applicable statute of limitations.

4th DCA holds that absence of written order is not a denial of due process where town council

continued...

decision was made before effective date of statutory provision requiring written order. *Wal-Mart Stores East L.P. v. Town of Davie*, 33 Fla. L. Weekly D482a (4th DCA February 13, 2008).

Following the circuit court's denial of its certiorari petition, Wal-Mart sought second-tier certiorari review of town council's denial of its application for site plan approval. On appeal, Wal-Mart alleged that its due process rights had been violated because the council did not issue a "written, signed and rendered decision of its denial." Because there was no written decision, Wal-Mart argued that the circuit court improperly reviewed the matter.

The 4th DCA noted that when reviewing circuit court appellate decisions, the scope is limited to determining "whether the circuit court afforded procedural due process and whether the circuit court applied the correct law." Effective on October 1, 2006, § 166.033, F.S., requires a municipality to give written notice of the denial of a development permit. Relying on the Florida Supreme Court's decision in *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838 (Fla. 2001), the 4th DCA held that because the council's decision to deny Wal-Mart's site approval application was made on June 19, 2006 and before the effective date of § 166.033, F.S., the absence of a written warning did not constitute a denial of due process. Because the circuit court provided Wal-Mart with proper due process and based its decision on competent substantial evidence, the 4th DCA denied Wal-Mart's petition.

Refusal to formally process a permit application because it fails to conform with town land use plan does not give rise to a federal constitutional claim. *Town of Southwest Ranches v. Kalam*, 33 Fla. L. Weekly D733 (4th DCA March 12, 2008).

Property owner sued the Town of Southwest Ranches, a town building official, and deputy attorney alleging that their refusal to allow him to build a home on his property effected a tak-

ing under 42 U.S.C. § 1983. Under the town's land use plan, if two contiguous parcels come under common ownership and net at least two acres, the new parcel can not then be subdivided if such subdivision would make either parcel less than two acres. Before Kalam purchased the property in question (lot 7), it was combined with the adjacent lot (lot 6), netting 3.80 acres. Under the town land use plan, the unified parcel could never be re-subdivided and developed as doing so would leave one of the parcels below the two-acre threshold and violate the town land use plan. Before Kalam obtained rights to lot 7, however, the unified parcel was subdivided leaving lot 7 with less than two acres in violation of the town land use plan. In an attempt to rectify the violation, the previous owner of lot 7 purchased ten feet of land from lot 6, vesting lot 7 with 2.01 net acres. This result did not ameliorate the violation because, contrary to the town land use plan, lot 6 was left with less than two net acres. After acquiring lot 7, Kalam applied for a building permit and was thereafter denied.

In §1983 actions, government officials enjoy a qualified immunity in the performance of discretionary functions "unless a reasonable person would have known that the questionable conduct violated clearly established law." In determining whether the qualified immunity defense exists, the court set forth a burden-shifting analysis. After the defendant establishes that he was "acting within the scope of discretionary authority," the burden shifts to the plaintiff to show that the defendant's "action violated the plaintiff's rights in light of clearly established law."

Finding the first prong satisfied, the 4th DCA opined that decisions of the building official and deputy attorney, even if wrong, were made in the performance of their respective duties. In this regard, the court endorsed the actions of the building official in not processing the permit application even though the court insinuated that such inaction was wrong. Regarding the second prong, a "clearly established right" is one that must have been so defined as to "make it obvious to all reasonable government actors that what [they were] doing violate[d] federal law." Opining that routine land use disputes between landowners and local planning authorities do "not implicate the constitution," the court found that reasonable town officials in the instant matter would

not have known that their refusal to process the permit application violated federal law. In this regard, the 4th DCA found that the property owner's right to have his permit application processed was not a "clearly established right," the violation of which would give rise to a federal constitutional claim.

Homeowners have standing to challenge approval of Developer's construction permits because they have interests protected under the Orange County Comprehensive Plan. *Dunlap v. Orange County*, 971 So.2d 171 (5th DCA Dec. 28, 2007).

Lakefront homeowners filed a declaratory judgment action against Orange County relating to two construction permits issued for the construction of a boat ramp in their subdivision. The homeowners contended that construction of the boat ramp was inconsistent with Orange County's Comprehensive Plan. Orange County filed a motion to dismiss the action alleging that homeowners waived their claims by not raising them at the public permit hearing. Developer M/I Homes intervened and alleged that the homeowners did not have standing to challenge the permit approvals.

Section 163.3215(2), F.S., provides that an "aggrieved or adversely affected party" may institute an action to "determine whether development orders (in this case, M/I Homes' construction permits) are consistent with a County's comprehensive plan." The section also provides that, while the "adverse interest may be shared in common with other members of the community at large" it must "exceed in degree the general interest in community good shared by all persons." Citing *Education Development Center, Inc. v. Palm Beach County*, 751 So. 2d 621, 623, the 5th DCA acknowledged that a liberal construction of §163.3215, F.S., would ensure the protection of parties with adverse interests protected under the comprehensive plan. The court determined that the lakefront homeowners had standing to challenge the permit approvals because (1) they had interests protected by the Orange County Comprehensive Plan and (2) their interests would be affected by the boat ramp to an extent greater than general members of the community-at-large who do not own lakefront property in proximity to the proposed boat ramp.

Homeowners also argued that the

circuit court erred when it concluded that § 163.3215, F.S., only authorized a de novo appeal as opposed to a de novo trial. Section 163.3215, F.S., provides the exclusive remedy for affected parties to “challenge the consistency of a development order with a comprehensive plan.” Section 163.3215(3), F.S., provides that “[a]ny aggrieved or adversely affected party may maintain a de novo action for declaratory . . . relief . . .” The 5th DCA found that, when challenging the

granting or denial of a development order, the express statutory language of § 163.3215, F.S., provides parties with an explicit right to a de novo trial as opposed to a mere appeal. As such, the 5th DCA found that the homeowners did not waive their claims when they failed to raise them at the public hearing and were entitled to raise them for the first time in the circuit court.

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On Appeal

by Stacy Watson May and Lawrence E. Sellers, Jr.

Note: Status of cases is as of June 15, 2008. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Florida Department of Environmental Protection, et al. v. Stop The Beach Renourishment, Inc., et al, Case No. SC06-1447 and 1449. Petition to review decision of First DCA relating to DEP's final order allowing the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County. 31 Fla. L. Weekly D1173. The First DCA certified as a question of great public importance whether the Beach and Shore Preservation Act (Part I of Chapter 161) has been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc., of their riparian rights without just compensation for the property taken, so that the exception provided in Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply. Status: Oral argument held April 19, 2007.

Advisory Opinion to the Attorney General re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, Case No. SC06-521. The Attorney General has asked the Court for an advisory opinion as to whether the financial impact statement prepared by the Financial Impact Estimating Conference on the constitutional amendment, proposed by initiative petition and entitled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans," is in accordance with Section 100.371, F.S. Status: On July 12, 2007, the Court remanded the financial impact statement for the petition to the Financial Impact Estimating Conference for redrafting because the statement did not meet statutory requirements in its current form. On July 27, 2007, the conference forwarded a redrafted financial

impact statement. Oral argument held May 6, 2008.

Department of Environmental Protection v. Contractpoint Florida Parks, LLC, Case No. SC07-1131. Petition for review of First DCA decision finding that, absent legislative intent to do so, Section 11.066, F.S., did not "overturn twenty-two years of case law subjecting the state to breach of contract actions." Section 11.066 provides that the state or its agencies shall not be required to pay monetary damages except pursuant to an appropriation made by law. The court certified the following question to be one of great public importance: "Does Section 11.066, Fla. Stat., apply where judgments have been entered against the state or one of its agencies in a contract action?" 32 Fla. L. Weekly D1416b. Status: Oral argument held December 5, 2007.

Phantom of Brevard, Inc. v. Brevard County, Florida, Case No. SC07-2200. Petition for review of Fifth DCA decision affirming in part, reversing in part and remanding a summary judgment upholding a county ordinance relating to fireworks. *Phantom of Brevard, Inc v Brevard County*, 32 Fla. L. Weekly D2084b (Fla. 5th DCA Aug. 31, 2007). Status: Review granted April 21, 2008

Lois Frankel, etc., et al v. Carolyn J. Wright, et al., Case Nos. SC08-41 and SC08-88. Petition for review of Fourth DCA decision reversing the trial court's order denying the plaintiffs' motion for summary judgment. *Carolyn J Wright v Lois Frankel*, 33 Fla. L. Weekly D171a, (Fla. 4th DCA Oct. 3, 2007) (on motion for rehearing en banc). The plaintiffs sought an order directing the City of West Palm Beach to place on the ballot initiative petitions for ordinances requiring voter approval for the relocation of the city hall and city library. The Fourth DCA certified the following question as one of great public importance: "Where a city charter provides for a citizen-initiated referendum process to enact an ordinance, and a city declines to place a citizen-initiated ordinance on the

ballot in accordance with the charter provisions, is laches a defense to a mandamus petition brought by the citizens to require the city commission to place the proposed ordinance on the ballot?" Status: Petition for review denied June 2, 2008.

Fla. Assn of Professional Lobbyists v Division of Legislative Information Services, Case No. SC08-791. Certified questions from the Eleventh Circuit: whether the Act establishing executive and legislative lobbyist compensation reporting requirements violates Florida's separation of powers doctrine, was properly enacted under Florida law, or infringes upon the Florida Supreme Court's jurisdiction. Status: initial brief filed June 2, 2008; answer brief due 20 days thereafter.

Advisory Opinion to the Attorney General re Florida Growth Management Initiative Giving Citizens the Right to Decide Local Growth Management Plan Changes, Case No. SC08-318. The Attorney General has asked the Court for an advisory opinion as to whether the so-called "Smarter Growth" amendment encompasses a single subject, and whether the ballot title and summary comply with the pertinent legal requirements. Status: Request filed February 26, 2008; oral argument set for September 11, 2008.

FIRST DCA

Florida Homebuilders Association, Inc., et al v. City of Tallahassee, Case No. 1D07-6413. Appeal from summary judgment for the City in connection with challenge to City's Inclusionary Housing Ordinance. Among other things, the plaintiffs allege that the ordinance constitutes a taking and an illegal tax. Status: All briefs have been filed.

International Paper Company v. Florida Department of Environmental etc., et al. Case No. 1D07-4198. Appeal from a DEP final order denying International Paper's application for a wastewater discharge permit at its Pensacola Mill. Status: All briefs have been filed.

Brenda D. Dickinson and Vicki A. Woolridge v. Division of Legislative Information of the Offices of Legislative Services, et al, Case No. 1D07-3827. Appeal from final judgment rejecting a constitutional challenge to executive and legislative lobbyist compensation reporting requirements. Status: Oral argument set for June 24, 2008. *Note*: See Fla. Assn of Professional Lobbyists v Division of Legislative Information Services, Case No. SC08-791, above, where some of same questions certified from 11th Circuit to Florida Supreme Court.

SECOND DCA

Peace River/Manasota Regional Water Supply v. State, Department of Environmental Protection, Case No. 2D06-3891 and 2D07-3116 (consolidated cases). Appeals from final order granting environmental resource permit to Mosaic for Ona Mine. Status: Oral argument set for June 30, 2008.

Marine Industries Association of Collier County v. Florida Fish & Wildlife Conservation Commission, Case No. 2D07-1777. Appeal from a final order approving the Fish and Wildlife Commission’s permit granted to the City for the placement of waterway markers. The final order rejected much of the Administrative Law Judge’s recommended order finding that 1) the parties had standing to challenge the permit and the necessity of the ordinance underlying the waterway marker permit application and 2) the Fish and Wildlife Commission was obligated to independently determine whether the local

ordinance was needed. Status: Oral argument held December 5, 2007.

THIRD DCA

Jimmy T. Bauknight, et al. v. Monroe County Board of County Commissioners, et al., Case No. 3D07-915. Appeal from trial court’s order granting County’s motion for summary final judgment declaring that appellant property owners failed to exhaust administrative remedies prior to seeking compensation for temporary taking of their properties. This is a result of the County’s application of transportation concurrency requirements. Status: Oral argument held October 30, 2007.

CNL Resort Hotel, L.P. v. City of Doral, Florida, et al., Case No. 3D07-1528. Petition for review of non-final administrative order dismissing or striking challenge to plan amendments based on allegation that the amendments are inconsistent to the extent they impair CNL’s property rights. Status: Oral argument held September 5, 2007.

FOURTH DCA

1000 Friends of Florida, et al. v. DCA, Case No. 4D05-2068. Appeal of final order determining that proposed amendments to Palm Beach County comprehensive plan to accommodate the proposed Scripps biomedical campus are in compliance. Status: Dismissed as moot March 10, 2008.

FIFTH DCA

Seminole Electric Cooperative, Inc.

v. Department of Environmental Protection Case No.: 5D07-3005. Appeal from DEP final order denying Seminole’s application to construct and operate a third generating station in Putnam County. Status: Reversed with directions to issue certification on June 13, 2008.

A. Duda and Sons v. SJRWMD, Case No. 5D08-1700. Appeal from final order denying Duda’s petition to determine invalidity of agency rule and statement generally relating to the so-called agricultural exemption. DOAH Case No. 07-3545 (final order entered April 24, 2008). Status: Notice of appeal filed May 22, 2008.

Aileen C. Alexander and James Pearsall, etc. v. City of New Smyrna Beach, Case No.: 5D08-1719. Appeal from a DCA final order adopting a recommended order granting a motion to dismiss as untimely a petition challenging a small scale amendment. The petition was filed by fax and was received shortly after 5pm on the 30th day. Status: Notice of appeal filed May 22, 2008.

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DCA Update

by Kelly Martinson, Assistant General Counsel

DCA, et al. v. Leon County, et al., (DOAH Case No. 07-3267GM)

DCA found amendments adopted by Leon County exempting closed basins from the protections of the Lake Jackson Special Development Zones not “in compliance.” The Department alleged that the amendments were not supported by appropriate data and analysis and the exemption would lead to a degradation of surface water and groundwater entering Lake Jackson. The ALJ found the amendments were not a mere clarification of the County’s existing plan and practice in issuing a Recommended Order finding the amendments not “in compliance.” In particular the ALJ found the amendments were not supported by adequate data and analysis because closed basins were analyzed using a storm definition not included in the plan, not all closed basins potentially impacted were analyzed, and it was assumed that wildlife and groundwater data and analyses from a particular site was a valid proxy for all other closed basins. This lack of adequate data analysis led to the further finding that the amendments may eliminate necessary protections for Lake Jackson. The matter is now before the Administration Commission for the entry of a Final Order.

APA Emerson @ Indrio, LLC v. St. Lucie County, et al., (DOAH Case No. 07-5061GM)

APA Emerson challenged remedial amendments adopted by St. Lucie County to address compliance issues raised by the Department regarding the new Towns, Villages and Countryside (TVC) category in the Future Land Use Element, applied to approximately 28 square miles of rural land in the County. APA Emerson owns 26 acres of land within the area newly designated as TVC. The TVC amendments aim to promote a compact form of urban development while leaving large areas of interconnected open space. The amendments also result in the development of a dense, interconnected roadway system. While the TVC amendments do not reduce existing densities and intensities on any specific properties in the TVC area, the amendments impose an overall

cap on the maximum allowable total development within the TVC area. APA Emerson, who did not challenge the County’s original amendments adopting the TVC policies, focused its challenge on whether the County had adequately planned for the transportation network needed to support the amendments beyond the cap for commercial development. As many of APA Emerson’s allegations related to provisions that were substantively unchanged between the original and remedial amendments, the portions of its petition attempting to “reach back” to the original plan amendment were struck. In recommending that the remedial amendments be found “in compliance,” the ALJ determined that the challenged portions of the County’s remedial amendments primarily addressed Senate Bill 360 financial feasibility requirements, which became law while the County was in the process of adopting the original TVC amendments. The transportation information supporting the amendments did not substantively change, therefore APA Emerson’s challenge proved largely untimely. This case is now before the Department for entry of a Final Order.

Leseman Family Land Partnership, et al. v. Clay County, et al., (DOAH Case No. 07-5755GM)

Petitioners challenged a 47.06 acre Future Land Use Map amendment changing the designation of two parcels from Rural Residential (max of 1 unit/acre) to Rural Fringe (max of 3 units/acre) found “in compliance” by the Department. The County also adopted a cap of 70 units (1.5 units/acre) for the property. The amendment site is part of the larger Kingsley Lake Community, which is completely surrounded by the Camp Blanding Military Installation. Petitioners, owners of neighboring property, argued that the amendment would: destroy the rural character of the area; place the property in an urban service area which conflicts with the rural land use and requires the property to have central water and sewer; and encourage urban sprawl inconsistent with the County’s Comprehensive Plan. The ALJ found that the neighboring

property was not necessarily rural in nature, that the County’s policies on the urban service area do not prohibit the creation of an urban service area where central water and sewer facilities are unavailable, and that the amendment does not fail to discourage urban sprawl. This case is now before the Department for entry of a Final Order.

Cochran v. City of Crestview, et al., (DOAH Case No. 07-5779GM)

The ALJ found a 9.98 small-scale amendment in the City of Crestview going from Rural Residential to Industrial (for a concrete plant) to be “not in compliance.” The amendment site is nestled within a roughly 76-acre parcel owned by the same applicant. The ALJ found, in part, that the City should have included the acreage needed for a 150-foot buffer (required by the Land Development Code) as part of the amendment, thereby bumping it over the 10-acre small-scale amendment threshold. The ALJ did not accept Petitioner’s argument that the dirt roads leading to the amendment site and the land needed for a water line extension should have been included in the acreage calculation since that infrastructure was already being used regardless of the amendment. The ALJ also found that: the amendment was not supported by adequate data and analysis for transportation impacts and compatibility with neighboring uses; the City did not specifically notify the County of the amendment in violation of the City’s own plan policy and Section 163.3177(4)(a), F.S.; and the amendment is internally inconsistent with a Future Land Use Element policy that requires the City to “ensure compatibility of adjacent land uses.” A subdivision is near the amendment site and the road used by the site terminates onto a road used by the subdivision and a nearby school. The matter is now before the Administration Commission for the entry of a final order.

Ashley v. Franklin County, et al., DOAH Case No. 05-2361GM, First DCA Case No. 1D07-0095

The Ashleys appealed a Final Order of the Administration Commission finding all but a few challenged provisions of Franklin County's evaluation and appraisal report based amendments "in compliance." The First DCA reversed the Administration Commission's finding that two future land use categories are not mixed-use categories, as both categories contemplate a variety of uses in addition to residential. The Rural Village category also permits a restaurant, hotel services, an outfitters store, and recreational uses. As for the Conservation Residential category, although it prohibits "[f]ree standing non-residential or commercial uses intended to serve non-residents," the First DCA found it may by negative implication allow free-standing, non-residential, commercial uses intended to serve residents. The case has been remanded to the Administration Commission to determine whether the two categories comply with the standards for mixed-use categories in Rule 9J-5.006(4)(c), F.A.C. Update: A Motion for Rehearing or in the Alternative Motion for Clarification has been denied. It is expected that the Administration

Commission will take up this matter in the near future.

Grassy Key Beach Subdivision, Inc. v. City of Marathon, et al., 2007-CA-240-M (Fla. 16th Cir.)

In this case, Plaintiff seeks to establish that it has a vested right under Section 380.05(18), F.S., to develop property without regard to the Florida Keys Area of Critical State Concern regulations and the Rate of Growth Ordinance that limits the number of building permits that can be issued annually. Plaintiff relies on the recordation of a plat by Plaintiff's predecessor in title in 1950 and subsequent expenditures for improvements to the property (roads, canals, potable water) by the three immediate past owners. In granting Defendants' Motion to Dismiss, the Court found that a subsequent purchaser must demonstrate how it relied upon an official act of government and changed its position because of such act and cannot tack on to the reliance and change of position of a prior owner. Plaintiff has filed an Amended Complaint which Defendants have moved to dismiss. Update: The Judge denied the motion and the case is proceeding through discovery.

Judkins v. Walton County, (DOAH Case No. 08-0302GM)

This case involves a Section 163.3213, F.S. challenge to a Walton County land development regulation (LDR) as being inconsistent with the Walton County Comprehensive Plan. Petitioners assert the LDR is inconsistent because it allows borrow pits as a special exception from the land development code without consideration for the land use category limitations in the comprehensive plan. Although the LDR does not expressly restrict the land use categories in which borrow pits may be allowed as a special exception, the Department determined it is consistent with and implements the comprehensive plan because the comprehensive plan allows borrow pits by special exception only in the General Agriculture and Large Scale Agriculture land use categories. The issue is now before the Division of Administrative Hearings and a hearing is set for April. The Judkins' petition was dismissed without prejudice for failure to comply with the pleading requirements. Update: The Judkins filed an amended petition and the case subsequently settled.

DEP Update

by Kelly Samek, Senior Assistant General Counsel and Amanda G. Bush, Senior Assistant General Counsel

ACF: In February, the United States Court of Appeals for the D.C. Circuit reversed the lower court's approval of the settlement agreement among Georgia, the Army Corps, the Georgia water supply providers, and the federal power customers which granted Georgia leases to water storage space in Lake Sidney Lanier, north of Atlanta. In its decision, the Court of Appeals concluded that the reallocation of water storage space in the agreement constituted a major operational change which had not been authorized by Congress, and therefore violated the federal Water Supply Act. Georgia and the water supply providers filed a joint petition for rehearing. The Court of Appeals denied the petition without opinion, and the mandate issued on May 27,

2008. This decision obviates the need for NEPA review of the invalidated settlement agreement.

On April 15, 2008, the Corps re-initiated Endangered Species Act consultation by submitting a Revised Interim Operating Plan ("RIOP") to the U.S. Fish and Wildlife Service. The RIOP has many of the flaws of the earlier IOP and has the potential of creating many more low flow days of a greater magnitude in the Apalachicola River. It allows for more upstream storage in Georgia and includes a drought contingency operation, which would permit flows to be reduced to 4,500 cfs (lower than any flows experienced in 2007) if composite storage falls below a newly defined "drought zone" (which is equal to the amount of conservation storage

in Lake Lanier's existing "Zone 4"). Florida sent a letter to the Service and the Corps opposing the Corps' proposed revisions. Further, Florida submitted additional comments to the Service emphasizing that the Service is required to take into account cumulative impacts of depletions of the water in the ACF Basin in preparing its biological opinion for the Corps' modified IOP. Members of Florida's Congressional delegation also sent a letter to the Corps, emphasizing the "potentially devastating" impacts to the river and basin from the RIOP, and asking that the Corps immediately halt its implementation of the RIOP, so that these urgent concerns could be addressed.

On June 1, the Service issued a Biological Opinion finding that the

continued...

DEP UPDATE

from page 15

RIOP will take protected endangered or threatened species – including (for the first time) Gulf Sturgeon – but concludes the species are likely to survive. The Biological Opinion is effective for 5 years while the Corps rewrites its Water Control Plan as the Corps announced earlier this year it intended to do. This likely will be a multi-year process.

The consolidated case before Judge Magnuson in Jacksonville now includes six complaints. He designed a schedule intended to move the cases to resolution by addressing, in two phases, the issues common to the multiple complaints. Phase 1 addresses the ESA claims. Phase 2 addresses claims related to the Corps' overall management of the ACF System, including its authority to enter into contracts, reallocate storage, or authorize withdrawals or releases. Most recently, Judge Magnuson entered an order suspending Phase 1 deadlines and suspending the scheduling order, pending a status conference.

Miccosukee Tribe of Indians, et al v. EPA, et al., Case No. 04-21448-CIV-Gold/Turnoff (S.D. Fla.):

Consolidated cases challenging EPA's

determinations regarding the Everglades Phosphorous Rule and the 2003 amendments to the Everglades Forever Act (EFA). The briefings on the 2003 EFA amendments and the Phosphorous Rule are now complete. Final arguments were held on April 21-22 and May 21. The parties are waiting for the court to issue a final judgment to conclude the case.

Tuten v. DEP, Case No. 4D06-4424:

In a 2005 opinion, the Fourth District Court of Appeal remanded a permit that had been deemed approved for failure to meet the statutory 90-day time period back to DEP in order to hold an evidentiary hearing regarding the appropriate conditions to place on the default permit. After an evidentiary hearing the ALJ entered his Recommended Order on August 11, 2006, recommending DEP enter a final order issuing Tuten a default ERP subject to certain general and specific conditions as proposed by DEP. The Department issued its Final Order on October 12, 2006 adopting with minor clerical modifications the Recommended Order and accepting all of the ALJ's recommendations.

Tuten then appealed the Department's Final Order to the Fourth District Court of Appeal. On May 28, 2008, the court per curiam affirmed the Department's Final Order. Tuten filed a motion for rehearing on June 12, 2008.

Peace River/Manasota Regional Water Supply Authority, et al v. IMC Phosphates & DEP, Case No. 2D07-3116: Mosaic applied for environmental and reclamation permits to mine phosphate on a 4,179-acre tract of land near the town of Ona in Hardee County. The mining activities are located in the Horse Creek Basin, a tributary of the Peace River. The permits were challenged by several petitioners in an 8-week administrative hearing held in 2004. The administrative law judge issued a 420-page Recommended Order and also a Recommended Order on Remand. On July 31, 2006, the Secretary entered a Final Order issuing the permits. The Petitioners appealed the Final Order to the Second District of Appeal. The main issues on appeal are (a) the Final Order's conclusion regarding interpretation of cumulative impacts analysis; (b) the propriety of the limited remand; (c) the policies applied to stream restoration; and (d) mitigation financial responsibility. The Court has set oral argument for June 30th.

California v. EPA, Case No. 08-70030 (9th Circuit Court of Appeal, San Francisco): California requested a waiver of federal automobile emissions standards so that it could enforce its more stringent standards that included restrictions to the emission of greenhouse gases. EPA has

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(0673C)

2008 ELULS Annual Update
(0690C)

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denied the waiver, stating that while greenhouse gases are a problem, they are a national/worldwide problem and that impacts on California are not unique. Florida DEP has moved to intervene in the case on the side of California, since Florida DEP cannot adopt California's proposed emission standard unless California obtains the waiver. EPA has moved to dismiss the appeal, arguing that the appeal was premature and filed in the wrong circuit. California and intervenors have opposed the motion.

Tsolkas et al. v. Gulfstream Natural Gas System, LLC and DEP (DOAH 07-3151): Petitioners—five individuals and the Palm Beach County Environmental Coalition—challenged DEP's notice of intent to issue an Environmental Resource Permit to Gulfstream for a natural gas pipeline in Martin and Palm Beach Counties, alleging that Gulfstream had failed to provide reasonable assurance that its project met all regulatory criteria. The Recommended Order, issued February 8, found that the proposed pipeline would not violate state water quality standards and that the project is not contrary to the public interest and therefore provided the requisite reasonable assurances; the Final Order was entered by DEP on March 18, 2008, ordering issuance of the permit. Tsolkas appealed to the Fourth District Court of Appeal. Initial briefs are due later this summer.

Seminole Electric v. DEP (Case No. 07-3005): Seminole filed an application for certification of a new coal fired unit at its existing site in Putnam County, Florida, pursuant to the Florida Electrical Power Plant Siting Act. Pursuant to recent changes in the Act, in February, 2007, all parties initially agreed that there were no disputed issues of fact or law to be considered at the certification hearing. The Administrative Law Judge relinquished jurisdiction to the Department for entry of a Final Order by the Secretary. However, the Secretary found the Stipulation deficient, and remanded the matter to the Administrative Law Judge for fur-

ther detailed Stipulation or hearing. Seminole successfully moved the Administrative Law Judge to relinquish jurisdiction back to the Department for entry of a final order. The Secretary thereafter entered a Final Order denying certification of the proposed new unit. Seminole appealed the Final Order. Oral argument occurred before the Fifth DCA on May 6th. On June 13, 2008, the Fifth DCA issued its opinion reversing the order and remanding the matter to the Secretary with directions to issue a final order granting certification.

Bobwhite Transmission Line (DOAH 07-000105TL): This is an action under the Florida Electric Transmission Line Siting Act to certify an approximately 25.5 mile long 230 kilovolt transmission line in Manatee and Sarasota counties. The four-week certification hearing concluded on May 15th, after a continuance during which a partial settlement was achieved, allowing several of the parties that had filed separate alternative corridors to align behind a single new corridor. The Transmission Line Siting Act Process was reopened to allow the new settlement corridor to be considered. When it was reopened, additional new corridors were filed, so that the final two weeks of the certification hearing included testimony on three new alternate corridors appropriate for consideration under the act. One party also presented testimony that none of the alternates considered should be certified. After receipt of a Recommended Order from DOAH, the matter will be presented to the Siting Board for entry of a Final Order.

Tampa Electric Company, Willow Oak-Wheeler-Davis Transmission Line (DOAH 07-004745TL): The DOAH Recommended Order, issued on May 13th, recommended that the Siting Board enter a Final Order approving Tampa Electric Company's Willow Oak-Wheeler-Davis 230 kV Transmission Line Application for certification subject to the conditions of certification agreed upon by the parties. It also included findings of fact and Conclusions of Law about EMF and its effects, and DEP's

standards for EMF. The Department anticipates being before the Siting Board for a Final Order in this case in late July.

Geotextile container rule: On April 25, the Bureau of Beaches and Coastal Systems published a Notice of Proposed Rules to add Chapter 62B-56, F.A.C., entitled "Rules and Procedures for Using Sand-Filled Geotextile Dune Cores (Permits for Construction and Maintenance)." The Bureau developed the proposed rule to address sand-filled geotextile containers used as dune core structures for coastal armoring. As required by statute, the rule sets forth criteria for siting and design of the dune cores, requires the continued maintenance of three feet of beach quality sand over the dunes and requires that permit holders maintain a financial assurance mechanism to assure removal of the structure if the permit holder fails to meet permit criteria. In addition, conforming changes were simultaneously published amending Chapter 62B-33, F.A.C., to clarify that all geotextile containers as the core of a reconstructed dune shall be governed by the new Chapter 62B-56, F.A.C. A petition challenging the validity of the proposed rule has been received by the Department.

Board of Trustees of the Internal Improvement Trust Fund's rules: Revisions to the Board's rules at Chapter 18-21, F.A.C., including rules .003, .004, .010, .011, and .013, regarding management of submerged lands, became effective April 14, 2008. In addition, revisions to all sections of Chapter 18-1, related to acquisition of state lands and conservation lands, and revisions to Chapter 18-24, related to Florida Forever project boundary amendments by the Acquisition and Restoration Council (ARC), became effective April 14th. Two sets of revisions were made to Chapter 18-2; the first set relating to Florida Forever and ARC (including Rules 18-2.017, .018, and .021) which became effective May 15th, and the second set regarding management of uplands (including Rules 18-2.017, .018, and .020) which became effective May 29th.

Water Management District Update

Southwest Florida Water Management District

by Carrie N. Felice, Staff Attorney

New Governing Board Members Take Office

On March 25, 2008, Henry "Paul" Senft, Jr. took his oath of office to begin his term on the District's Governing Board. Senft was appointed by Governor Crist to fill the newly-created seat for Polk County. Senft, a resident of Haines City, is a former Polk County Commissioner and is the owner of Townsend-Senft Consulting and Insurance, Inc. Senft also assumes responsibility as co-chair ex officio of the District's Peace River Basin Board. Senft's term ends March 1, 2011.

On April 29, 2008, Hugh M. Gramling and Bryan K. Beswick took the oath of office to begin their terms on the District's Governing Board. Gramling was appointed by Governor Crist to fill a seat for Hillsborough County. Gramling, a resident of Plant City, was a member of the Hillsborough River Basin Board and has served on numerous District committees. Gramling is chair ex officio of the District's Hillsborough River Basin Board. Gramling's term ends March 1, 2012. Beswick was appointed by Governor Crist to fill an at-large seat for Hardee, DeSoto, and Highlands Counties. Beswick, a resident of Arcadia, has more than 16 years experience in the citrus industry. Beswick also holds a Florida Real Estate license and is a sales associate for Blue Goose Realty. Beswick will also serve as co-chair ex officio of the District's Peace River Basin Board. Beswick's term ends March 1, 2012.

Governing Board Elects New Officers

C.A. "Neil" Combee, Jr., was unanimously elected on May 27, 2008 to

serve as Governing Board chair of the Southwest Florida Water Management District. Other Governing Board officers selected include Todd Pressman, vice chair; Jennifer E. Closshey, secretary; and Ronald E. Oakley, treasurer.

City of Lakeland v. SWFWMD, DOAH Case No. 07-0564

On December 29, 2006, the District gave notice of its intent to issue Water Use Permit (WUP) No. 2004912.006 to the City of Lakeland (City). The proposed permit allocated water withdrawals from the City's Northwest, Northeast, and Combee wellfields of up to 35.03 million gallons per day (mgd) through 2013. Among other conditions, the proposed permit imposed limits and a phasing schedule on withdrawals from the City's Northeast wellfield (NEWF), and required the City to obtain additional approvals from the District prior to increasing withdrawals at the NEWF beyond 1.5 mgd. On January 23, 2007, the City filed a timely petition with the District requesting an administrative hearing, arguing that the proposed permit was not the permit for which the City applied and alleging that reasonable assurances were provided in the City's permit application for all requested water allocations. On January 30, 2007, the matter was referred to the Division of Administrative Hearings to conduct a hearing on the matter. The issue presented was whether the District should issue the proposed permit to the City and, if so, how much water should be allocated under the permit and what conditions should be imposed on the allocation, particularly in regard to withdraw-

als from the City's NEWF. The final hearing was conducted over 10 days in August 2007 and proposed recommended orders were submitted in October 2007. On January 4, 2008, the Administrative Law Judge issued a Recommended Order (RO) recommending that the District issue WUP No. 2004912.006 to the City with a six-year duration, and authorizing a total withdrawal of 29.5 mgd with up to 4.0 mgd coming from the NEWF. The RO also required implementation of an environmental monitoring and management plan to ensure that the permitted groundwater withdrawals do not cause unacceptable adverse impacts, and a wetland improvement plan to mitigate impacts on the NEWF wetlands. Finally, the RO recommended that a special condition be included in the permit encouraging the City to pursue a WUP for the Combee site for the City's future water needs and/or for additional mitigation of the pumping impacts at the NEWF. The City filed one exception seeking a modification of the 29.5 mgd permit allocation recommended by the ALJ to include an additional 665,931 gallons per day constituting the City's export water sales, as well as 38,350 gallons per day consisting of 0.13 percent water treatment losses. The resulting allocation total of 30.2 mgd falls within the range of 28.7 to 30.9 mgd deemed reasonable by the ALJ for the year 2014 in Finding of Fact No. 120. On March 25, 2008, the District's Governing Board entered a final order that adopts the recommended order entered by the ALJ and issues WUP No. 20004912.006, but accepts the City's exception and modifies Conclusion of Law No. 188 in accordance with the exception.

***Ethics Questions? Call The Florida Bar's
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Law School Liaisons

Barry University School of Law

The summer update from the Center for Earth Jurisprudence (CEJ) discusses curriculum developments at the Schools of Law of both Barry and St. Thomas Universities, the upcoming climate change conference at Barry University's main campus on October 28 with Bill McKibben, and the student publications section of the CEJ website. More information is available at www.earthjuris.org.

Earth Jurisprudence Curriculum at St. Thomas and Barry Universities Schools of Law

The syllabus for the elective seminar, "Exploring Principles of Earth Jurisprudence," is now available on the CEJ website at www.earthjuris.org. This upper level seminar explores how the philosophy and values of law, as expressed in practice, embody a culture's understanding of the universe and the role of humans within it. Advances in scientific, anthropological, and ethical understandings are explored to determine how they support, undermine or are neutral in current legal decision-making for the health and well being of the Earth's community. This course surveys emerging legal theories and strategies toward that end. After first launch at Barry University School of Law in the spring semester of 2007, this seminar became part of the regular spring curriculum at the Schools of Law of both Barry and St. Thomas

Universities in 2008. It is believed to be the first law school course to take an Earth jurisprudence approach to current ecological challenges.

A new course, "Intersecting Business Law and Earth Jurisprudence," will be offered at St. Thomas University School of Law in the spring of 2009. This elective course examines the interdependencies between governmental and other public stakeholders, on the one hand, and private business interests on the other, and their intersection with ecological sustainability. Framed within an eco-centric perspective, this course examines new challenges in environmental, business, and legal accountability in the context of existing legal strategies as well as those that are emerging. This course will be available for audit for interested attorneys and will be offered on Tuesdays and Thursdays from 3:45 -5:00 pm at St. Thomas University School of Law.

Bill McKibben To Speak at Barry's Second Annual Undergraduate Mini-Conference

CEJ and the College of Arts and Sciences, Barry University, present *Global Warming: What Is To Be Done? South Florida and Beyond* at the Barry main campus in Miami Shores on October 28, 2008. Following the unique interdisciplinary pedagogy that made last year's Water Conference a success, this one-day program will again engage stu-

dents in small group workshops from a variety of perspectives ~ scientific, aesthetic, social, political, historical, economic, moral, spiritual, etc. Incoming first year students will have read keynote speaker Bill McKibben's *The End of Nature* as their common reader, and students at all levels prepare papers and other projects for contests and workshops associated with the mini-conference. The Center for Earth Jurisprudence will be presenting several of the workshops that address legal responses to climate change and the Presidential Climate Action Project. The evening keynote address by Bill McKibben is open to the public; details will be posted at www.earthjuris.org.

Student Publications Section of CEJ Website

An Earth Jurisprudence Student Series, ISSN 1941-7357, is published on the CEJ website and will include new additions from spring semester 2008. This series presents selected class papers from law school courses presented in collaboration with the Center for Earth Jurisprudence. They are not intended to be law review articles. They are some of the work of students who are creatively evoking a new jurisprudence on behalf of the Earth community. CEJ appreciates the dedication and hard work of all the students as they explore, share, and speak boldly on behalf of the whole Earth Community.

FSU Environmental and Land Use Law Program: Activities During the 2007-2008 Academic Year

by Professors Donna Christie, Robin Craig, Dave Markell, and J.B. Ruhl

The Florida State University College of Law's Program in Environmental and Land Use Law is very proud to report that, in the latest *U.S. News & World Report* Guide to Graduate Schools, its program is ranked among the top 10 environmental law programs in the nation.

We are also proud of the students

who have helped to contribute to the success of this Program. In the course of the 2007-2008 academic year, 20 students in the program graduated with the **Certificate in Environmental and Law Use Law** and one student graduated with the **Certificate in Land Use Law**. In addition, 27 students in the Program performed

696 hours of pro bono work, and the Program offered 15 different pro bono placements. Fourteen students were awarded **scholarships** related to their interests in environmental and land use law.

The Program also boasts many **student externships**. In Fall 2007, **Darrin Dest** participated in an ex-

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ternship at the Florida Department of Environmental Protection, while **Shaun Amarnani** and **Eric Reinerman** both completed externships at the Department of Community Affairs. In Spring 2008, **Ellen Wolfgang** pursued a full-time externship with the U.S. Department of Justice in Washington, D.C., while **Colin Adams** externed at Earthjustice and **Tina Joseph** externed at 1000 Friends of Florida.

The Florida State **Environmental Moot Court team** – students **Carolina Brady**, **Preston McLane**, and **Ramona Thomas**, coached by Segundo Fernandez, Tony Cleveland, and Tim Atkinson of Oertel Fernandez Cole & Bryant – won the Best Brief Award at the Pace National Environmental Law Moot Court Competition in February 2008, out of 82 teams. They also successfully competed through the quarter-final rounds, and Ramona Thomas was named Best Oralist in several rounds.

In the fall, the student-edited **Journal of Use and Environmental Law** issued its weighty Spring 2007 volume (Volume 22:2), containing proceedings from the Program's Spring 2006 **Symposium on the Law and Policy of Ecosystem Services**. The Fall 2007 volume (Volume 23:1) has also been published and contains Professor Daniel Farber's (Sho Sato Professor of Law, University of California, Berkley) article on climate change compensation, based on his Fall 2006 Distinguished Lecture. This volume also contains papers presented on the 13th Annual Public Interest Environmental Conference. The Spring 2008 volume (Volume 23:2) will appear soon and will feature articles by Professors Julian Juergensmeyer (based on his Distinguished Lecture) and Janet Neuman.

The College of Law's **Environmental Law Society**, under the leadership of President **Lauren Moody**, has been quite active within the law school, on the wider university campus, and within the community. Ms. Moody and **Asaf Naor** helped to run

the Second Annual Campus & Community Sustainability Conference, "Getting to GREEN," which took place October 14-16, 2007. In the Fall, the Environmental Law Society also hosted an Alternative Transportation Week at the law school during the week of November 5-11. The Society organized a field trip to the Florida Caverns State Park in February and arranged scholarships and other financial incentives so that students in the Program could attend the Public Interest Environmental Conference at the University of Florida from February 28 to March 1, 2008. The Society hosted its annual ISLA/ELS Dinner for students and practitioners in the areas of international and environmental law in early March and participated in the FSU Campus Earth Week from March 31 to April 5, encouraging recycling and proper disposal of hazardous wastes across campus. Finally, toward the end of the school year, the Environmental Law Society organized a law school Book Drive in connection with Better World Books, seeking to keep books out of landfills by using them to promote literacy programs instead.

In addition, the Environmental and Land Use Law Program has also sponsored a number of speakers and presentations throughout the year.

The Program and the College of Law's *Journal of Land Use and Environmental Law* have presented two **Distinguished Lectures in Environmental Law**. On November 7, 2007, Professor Julian Juergensmeyer, Ben F. Johnson, Jr. Chair in Law, Georgia State University College of Law, delivered the Fall Distinguished Lecture, "Infrastructure and the Law: Florida's Past, Present, and Future." On February 20, 2008, Professor Jutta Brunee, Metcalf Chair in Environmental Law, University of Toronto, delivered the Spring Distinguished Lecture, entitled "All Together Now? Europe, the United States and the Global Climate Change Regime." Articles based on these lectures will appear in future issues of the *Journal*.

The Program co-hosted a **Panel on Innovative Financing of Public Infrastructure** on November 6, 2007. Panelists included Professor Julian Juergensmeyer, Ben F.

Johnson, Jr. Chair in Law, Georgia State University College of Law; Jim Nicholas, Emeritus Professor of Urban & Regional Planning and Emeritus Professor of Law, University of Florida; Mark Mustian, Tallahassee City Commissioner and partner at Nabors, Giblin & Nickerson; and Tom Pelham, Secretary, Florida Department of Community Affairs.

On November 14, 2007, the Program hosted its **Fall Environmental Forum**, entitled "Cleaning It Up: TMDLs and Water Quality Trading in Florida." Speakers included William Green, co-founder of Hopping, Green & Sams; Daryll Joyner, Program Administrator of the Florida Department of Environmental Protection's Bureau of Watershed Management; FSU alum Rebecca O'Hara, Legislative Director of the Florida League of Cities; and J. Allison Defoor, State Coordinator for EarthBalance. Lauren Moody, third-year Environmental Certificate Program student and President of the College of Law's Environmental Law Society, introduced the Forum, and Professor Robin Craig moderated.

The **Spring Environmental Forum**, held March 27, 2008, was entitled "Climate Change and Greenhouse Gas Emissions in Florida: The Role of Transportation and Land Use" and was organized and moderated by Professor Dave Markell. Speakers included Dr. Jeff Chanton, John Widmer Winchester, Professor of Oceanography at the Florida State University; Kathy Neill, Director of the Florida Department of Transportation's Office of Policy Planning; and Charles Gauthier, Director of Florida DCA's Division of Community Planning.

Finally, several distinguished speakers have addressed the Program's **Environmental & Land Use Certificate Seminar**. Professor Randall Abate from the Florida Coastal School of Law spoke to the seminar students on public nuisance claims for climate change impacts. Professor Royal Gardner from the Stetson Law School spoke on wetlands mitigation, while Professor Mary Jane Angelo from the University of Florida School of Law spoke on the use of environmental resource valuation in law.

University of Florida ELULP Launches LL.M. in Environmental and Land Use Law

by Alyson C. Flournoy

The 2007-2008 academic year has been busy and successful for the Environmental and Land Use Law Program at the Levin College of Law. Here's a quick summary of some of the major activities, events, and accomplishments of the past year. We'll focus on faculty research and publications in an update this fall.

UF Law Launches LL.M. in Environmental and Land Use Law

We are pleased to announce that UF Law now offers a Master of Laws (LL.M.) in Environmental and Land Use Law. Although other law schools offer LL.M. degrees in environmental law and related areas, UF's program is the first to combine environmental and land use law in a one-year, post-juris doctor degree. The UF LL.M. program is unique in that six of the 26 required credit hours must be from relevant courses that have substantial nonlaw content — either offered outside the Levin College of Law or jointly by the law school and another department. This broadens student exposure to disciplines related to environmental and land use law practice, such as wildlife ecology, environmental engineering, urban and regional planning, and sustainable development. For application instructions and detailed program information, contact Lena Hinson at (352) 273-0777 or elulp@law.ufl.edu, or visit our website at www.law.ufl.edu/elulp.

Conferences & Lectures

14th Annual Public Interest Environmental Conference

The 14th Annual PIEC, co-sponsored by the ELUL Section, highlighted the theme of "Reducing Florida's Footprint, Stepping up to the Global Challenge." The conference was organized by UF Law students with the support of the Public Interest Committee of the Environmental and Land Use Law Section. It focused on Florida's role in global issues on energy, land use, biodiversity and water. The keynote speaker at Thursday's reception, Shannon Estenoz, Governing Board Member

of the South Florida Water Management District, gave a fascinating overview of the challenges and opportunities facing Florida in relation to water resources. David Hunter, Assistant Professor and Director of the Program on International and Comparative Law at American University's Washington College of Law, was the keynote speaker for the conference banquet. Friday featured a host of panels on a wide array of topics. Saturday's agenda included a workshop on effective public participation in the land use process, and the Saturday final plenary featured a lively discussion of Florida's challenges, featuring noted author Cynthia Barnett, ecologist Stephen Mulkey, and Tommy Burroughs from the Governor's Action Team on Energy and Climate Change. For a complete agenda visit the conference website at <http://www.law.ufl.edu/piec>. Save the date for next year's PIEC: February 26-28, 2009.

2007-2008 Environmental Speaker Series

Students and faculty hosted a series of distinguished speakers this year and heard about topics ranging from sign regulation and clean-water land use to the emerging land use law in Puerto Rico. Speakers in this year's series were:

- Dawn E. Jourdan, Assistant Professor of Law and Professor of Urban and Regional Planning, University of Florida: "*Evidence-based Ordinance Drafting: The Regulation of Signage Based on Scholarship*"

- Alexandra Klass, Associate Professor of Law, University of Minnesota Law School: "*Modern Public Trust Principles: Recognizing Rights and Integrating Standards*"

- Luis E. ("Ricky") Rodriguez-Rivera, Associate Professor of Law, University of Puerto Rico School of Law: "*The Development of Land Use Law in Puerto Rico*"

- C. Anthony Arnold, Boehl Chair in Property and Land Use & Professor of Law, University of Louisville, Louis D. Brandeis School of Law:

"Models of Clean-Water Land Use"

- Ronald L. Weaver, Shareholder, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.: "*Concurrency, Proportionate Fair Share, and Other Land Use Hot Topics*"

The Speaker Series is made possible through the support of Hopping Green & Sams, P.A.; Lewis Longman & Walker, P.A.; and the Environmental and Land Use Law Section.

Nelson Symposium

Over a hundred people attended the annual Richard E. Nelson Symposium on Jan. 22, in Gainesville, organized by Michael Allan Wolf, the Richard E. Nelson Chair in Local Government Law and co-sponsored by both the ELUL Section and the City, County and Local Government Law Section of the Florida Bar. This year's conference was titled "Green Building: Prospects and Pitfalls for Local Governments." The event drew experts from law and related fields who discussed topics including Leadership in Energy and Environmental Design (LEED) and other certification programs, state and local climate change initiatives, private environmental lawmaking, building industry and local government programs and national trends. Featured speakers included both leading academics from around the country and professionals from the private sector and the public sector.

Student Accomplishments

Students Graduate with Certificates

Fourteen UF Law students graduated with Certificates in Environmental and Land Use Law during the 2007-2008 academic year, one of whom received a joint J.D. /M.S. in Interdisciplinary Ecology

UF Law Student Selected for Knauss Sea Grant Marine Policy Fellowship

For the second year in a row, a UF Law student has been selected for a John Knauss Sea Grant Marine Policy Fellowship. Melanie King (J.D. 08) will follow in the footsteps

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of Heather Halter (J.D. 07) who is just completing her one-year fellowship with NOAA- Fisheries. As part of this prestigious fellowship, Mel-

anie will be placed with an agency or legislative office working on federal marine policy issues. Melanie's interest in marine policy stems not just from her water-based hobbies (sailing, scuba diving, and fishing) but from working on a boating law project in the Conservation Clinic and doing a summer externship with

The Ocean Conservancy during law school.

We'll look forward to seeing many of you at the Section's Annual Update in August. For more information and stories about ELULP activities, faculty and students, you can download our Spring 2008 newsletter at www.law.ufl.edu/elulp/events.htm.

Florida Coastal School of Law

Animal Law Moot Court Team Advances to Semifinals at Harvard

Congratulations to Vanessa Hodgerson and Joanna Wymyslo for their outstanding performance in reaching the semifinals of the Animal Law Moot Court Competition on February 16-17. It was Coastal's first trip to this prestigious competition, which is hosted by Harvard Law School and co-sponsored by Lewis and Clark Law School. For the second consecutive year, a team from Lewis and Clark Law School won the competition.

The competition results are available at: <http://www.lclark.edu/org/ncal/results08.html>. The competition featured 17 teams from throughout the nation. Also competing this year were teams from the following law schools: University of Pennsylvania, George Washington University, Vermont, University of Washington, Southwestern, University of Detroit, Temple University, Pace University, University of Arkansas, University of Louisville, Inter American University of Puerto Rico, West Virginia University, and William and Mary.

The team was coached by Professor Abate and student coach, Kelly Karstaedt.

Coastal Law Students Publish Environmental Law Articles, Enroll In Two of Nation's Top Environmental Law LL.M. Programs

• **Jeff Close ('07)**. Jeff's article, *Redeveloping Florida: United States Supreme Court Says No Time is Better than Now*, has been accepted for publication in the June 2008 issue of the *Florida Bar Journal*.

• **Kevin Moore ('07)**. Kevin's pa-

per, *Seized by Nature: Suggestions on How to Better Protect Animals and Property Rights under the ESA*, has been accepted for publication in the Spring 2008 issue of the *Great Plains Natural Resources Law Journal (University of South Dakota Law School)*.

• **Joanna Wymyslo ('08)**. Joanna has been accepted into the LL.M. in Environmental Law and Natural Resources Law program at Lewis & Clark Law School in Portland, Oregon. She will begin her LL.M. studies in the Fall of 2008.

• **Ryan Matthews ('08)**. Ryan has been accepted into the LL.M. in Environmental and Natural Resources Law and Policy program at the University of Denver, Sturm College of Law. He will begin his LL.M. studies in the Fall of 2008.

WHAT'S NEW

Two New Environmental Law Professors to Join Coastal Faculty in 2008-09

Professor E. Andrew Long will join the Coastal faculty in August 2008 as a tenure-track professor.

In the 2007-08 academic year, Professor Long was a Visiting Professor at the University of Louisville, Brandeis School of Law, where he taught Property and Environmental Law, and coached the environmental law moot court team. Prior to teaching law, Long served as a clerk with the New York Court of Appeals, completed LL.M. study at New York University School of Law, and practiced with a private firm. He is admitted to practice in New York and Oregon. Professor Long's research focuses on

U.S. and international environmental law, particularly issues related to biodiversity preservation and climate change. Most recently, his work has appeared in the *Columbia Journal of Environmental Law* and the *New York University Environmental Law Journal*. He will teach Environmental Law, Natural Resources Law, and Property I and II at Coastal in the 2008-09 academic year.

Professor Itzchak Kornfeld will join the Coastal faculty in August 2008 as a visiting professor.

After earning his B.Sc., Prof. Kornfeld worked for the Texas Bureau of Geology mapping heavy metals in the Brazos and Colorado River deltas, taught physical and historical geology to ESL college students, earned an M.A. in geochemistry, and worked at the United States Environmental Protection Agency ("EPA"). At the EPA, he drafted hazardous waste regulations and was a member of the first Superfund identification team. In the latter position, he investigated such sites as Love Canal. Upon relocating to New Orleans, he continued his vocation as a geologist and worked with Texaco U.S.A. for six years. Kornfeld worked full time while attending Tulane Law School and was awarded a Public Interest Law Fellowship. During law school, he served as Senior Articles Editor of the *Tulane Environmental Law Journal*.

Prof. Kornfeld has practiced law for the past seventeen years, and is a member of the Louisiana, New Jersey and Pennsylvania Bars. His practice has concentrated on environmental litigation, and several of his cases have been published. He has

litigated class action environmental law suits involving CERCLA, RCRA, and the Clean Water Act; toxic tort property damage suits; and insurance coverage claims. In addition, he submitted comments on behalf of clients regarding Public Notification of Unsafe Water; Pennsylvania's Storm Water Rules; Pennsylvania's Pesticide Notification Bill; NJ and TX Clean Air Act rulemaking; Land Use rulemaking; and hazardous waste regulation. Kornfeld also advised the U.S. Agency for Industrial Development's Food for Africa program on sustainable development issues. He is currently advising the Government of Israel Ministry of Environmental Protection's Rivers and Streams Authority on drafting regulations to address this year's drought, which is the most severe in the past fifty years. In December 2006, Congresswoman Shelley Berkeley (1st Dist. Nev.) requested that he undertake a study of water re-use in the Las Vegas-Clark County, Nevada region. He submitted a report to her on August 1, 2007. Other advisory positions have included a December 2002 appointment to then Pennsylvania Governor-Elect Edward G. Rendell's Transition Team for Homeland Defense, where he headed up a team that addressed terrorism of infrastructure.

Prof. Kornfeld has authored more than thirty publications, thirteen of which are law reviews articles. He has authored two books and has one, *Environmental Crimes*, under consideration by Lexis and West. As an adjunct professor at Drexel University, he taught courses in *Environmental Crimes and Bioterrorism* and the Law.

In 2006, Prof. Kornfeld enrolled in an LL.M. program at Georgetown University Law Center, in Washington D.C., where he graduated with Distinction. He was invited to study for his LL.D. (Dr. in Law) at the Hebrew University, where he served as a Lecturer – equivalent to an Assistant Professor – and an editor of the University's *English Language Law Review*. Prof. Kornfeld will teach Torts I and II, Ocean and Coastal Law, and Water Law at Coastal in 2008-09.

Two New Environmental Law Externship Placements for Summer and Fall 2008

The Coastal Environmental Externship program has added two of the most prominent environmental employers in Northeast Florida to its growing list of environmental externship opportunities. Starting in the summer of 2008, two Coastal externs per semester will be selected to work at the Florida Department of Environmental Protection (DEP). Students will have office space at DEP's office in Jacksonville, and will consult regularly with a team of environmental attorneys from Tallahassee in phone conferences and meetings in the Jacksonville office. The team of supervising attorneys will include Jeff Close ('07), one of the first environmental law certificate graduates of Coastal's program. Externs will draft notices of violation and consent orders, attend hazardous waste enforcement meetings, and research potentially responsible parties in cleanup actions.

Effective in the fall of 2008, the Jacksonville office of the prestigious international law firm, McGuire Woods LLP, will supervise one extern from Coastal.

Veteran environmental lawyer Don Anderson, Esq., a partner at the firm, and his team of environmental law associates will supervise the Coastal extern in a variety of environmental compliance matters.

Professor Abate Accepts Visiting Position at Florida State

Professor Abate has accepted a position as a Visiting Associate Professor at Florida State University College of Law for the 2008-09 academic year. At Florida State, Professor Abate will teach Torts and Constitutional Law II in the fall. In the spring, he will teach International Environmental Law and Constitutional Law I.

FACULTY HIGHLIGHTS

Professor Randy Abate

Professor Abate delivered a presentation, "Marine Protected Areas as a Mechanism to Promote Marine Mammal Protection: International and Comparative Law Dimensions," at the Tenth Annual International Wild-life Law Conference in Granada, Spain. The conference, which was held on March 6-7, featured international wildlife law experts from Australia, Canada, the Netherlands,

Wales, Spain, South Africa, England, and the United States.

The conference agenda is available here: <http://www.law.stetson.edu/conferences/IWLC/PDFs/IWLC-Agenda.pdf>

Professor Abate taught a course in International Ocean Law from January 2-12 in the Cayman Islands Winter Intersession Program, a new program co-sponsored by the American and Caribbean Law Initiative and Stetson University College of Law. The program website is available here: <http://www.law.stetson.edu/international/cayman/>

Professor Abate delivered a presentation, "*Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*," at the William and Mary Environmental Law and Policy Review's Annual Symposium on February 2. The website for this year's symposium, "Emission Not Accomplished: The Future of Carbon Emissions in a Changing World," is available here: <http://www.wm.edu/law/news/sNewsMU/home/february-2-conference-future-of-carbon-emissions/>

Professor Abate's article, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California* was published in February as the lead article in Volume 40, Issue 3 of the Connecticut Law Review.

Professor Abate served as a moderator on a panel addressing adaptation measures for sea level rise impacts to beaches and coastal property owners at the *Ninth Annual Northeast Florida Environmental Summit* at Florida Coastal School of Law on November 2.

Professor Abate served as a judge for the international finals of the *International Environmental Moot Court Competition* at Stetson University College of Law on November 9 and 10. Professor Abate judged teams from law schools in India, Australia, Brazil, the Dominican Republic, and the United States.

Professor Abate delivered a presentation, "Public Nuisance Claims for Climate Change Impacts: Preemption, Political Question, and Foreign Policy Concerns," on October 19 at the University of Oregon School of Law's symposium, *Combating Climate Change on the Regional Level*:

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LAW SCHOOL LIAISONS

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West Coast Policy and Litigation. The symposium website is available here: <http://www.law.oregon.edu/org/jell/climate.php>

Professor Elizabeth DeCoux

Professor DeCoux's article, *Pre-tenders to the Throne: A First Amendment Analysis of the Property Status of Animals*, was published in the Spring 2007 issue of the Fordham Environmental Law Review.

Professor Stephen Durden

Professor Durden's article, *Animal Farm Jurisprudence: Hiding Personal Predilections Behind the "Plain Language" of the Takings Clause*, has been accepted for publication in the Pace Environmental Law Review.

Professor Durden served as a moderator on a panel addressing adaptation measures for sea level rise impacts to industry, development, and tourism at the *Ninth Annual Northeast Florida Environmental Summit* held at Florida Coastal School of Law.

ALUMNI SPOTLIGHT

Jeff Close, Esq. ('07)

Jeff is an Assistant General Counsel in the Enforcement Section of the Florida Department of Environmental Protection (DEP) in Tallahassee. He litigates RCRA enforcement cases and hazardous waste cleanup cases on behalf of the DEP. He also reviews consent orders and notices of violations before they are served.

Louise Ambrose, Esq. ('07)

Lu is an in-house environmental and land use attorney for Genesis Group in its Jacksonville office. Genesis is a private Architecture, Engineer, Planning, and Land Development firm. Lu will be presenting at a Zoning and Land Development Law CLE in Jacksonville in April where she will discuss recent developments in Florida land use law.

Environmental Law Community Action Team (Elcat) Update

During the fall 2007 semester, EL-

CAT joined the local Surfrider chapter on Jacksonville Beach and participated in the Ocean Conservancy's International Coastal Clean-Up. This coming fall, ELCAT will be participating in this international event again, which will be held on September 20.

Also during the fall 2007 semester, a few ELCAT members gathered on a Wednesday afternoon to clean up the lake behind the FCSL campus. Other ELCAT activities during the fall 2007 semester included:

Two on-campus movies: *An Inconvenient Truth* and *Who Killed the Electric Car?* Participating in the Annual Northeast Florida Environmental Summit – planning the event and assisting with logistics on the day of the event. Working with Coastal's Animal Law Society (ALS), and the UNF VEGANS to bring animal rights activist, Peter Young, to speak at the University of North Florida.

During the spring 2008 semester, ELCAT organized a beach clean-up on Talbot Island. About fifteen ELCAT members spent about four hours collecting trash early on a Saturday morning. The group collected more than ten industrial-sized bags full of garbage, not to mention an old tire. Due to the success of this event we will likely make this an annual event.

ELCAT's big community service project for this semester was a sea oats replenishment project on Jacksonville Beach. Many ELCAT members worked hard planning the project and raising money. Special thanks to Daniel Kappler for doing the majority of the planning for this event.

The sea oats project was a huge success! We had between 30 and 40 members and friends involved, and we were able to cover three areas of the beach – 1st Avenue South, 3rd Avenue South, and 6th Avenue North.

One month after the sea oat planting, the president of the Northeast Florida Chapter of Surfrider Foundation called Professor Abate to offer praise for the work that the ELCAT members has undertaken in the sea oats project and to suggest that ELCAT partner with Surfrider on coastal restoration projects in the 2008-09 academic year.

ELCAT's remaining plans for this semester include an Earth Day event at the Jacksonville Landing on Saturday,

April 19. ELCAT will work with the North Florida Land Trust to interact with the public and distribute environmental literature at this local event. Also, on April 28, ELCAT members will assist with the North Florida Connectivity Summit being held at UNF.

Environmental Law Certificate Recipients

2007

Louise Ambrose
H. French Brown, IV
Jeffery Close
James Fitzsimmons
William Peters
J.R. Woodward

2008

Damien D'Ascenzio
Madeline Doria
Charles Ferenchick
Shannon Kennedy
Krystle Macadangdang
Robert Mara
Sidra Nelson
Angela Oertel
John O'Neal
Mark Silberstein
Dana Singer
Lee White
Joanna Wymyslo

Environmental Law Externships

Summer 2008 Placements

Gray Robinson (Jacksonville)
Jacksonville Environmental Quality Division
General Counsel, St. Johns Riverkeeper
Public Trust Environmental Law Institute
Florida Department of Environmental Protection (Jacksonville/Tallahassee)

Fall 2008 Placements

McGuire Woods (Jacksonville)
Gray Robinson (Jacksonville)
Jacksonville Environmental Quality Division
General Counsel, St. Johns Riverkeeper
Public Trust Environmental Law Institute
Florida Department of Environmental Protection (Jacksonville/Tallahassee)

New Federal Rule Raises the Bar on Wetland Mitigation Requirements; with Positive Implications for Florida Mitigation Bankers

by Pamela Fetterman, Senior Scientist for E Sciences, Inc. – Sarasota, Florida

New federal wetland mitigation rules were published on Thursday, April 10, 2008 in the Federal Register jointly by the U.S. Army Corps of Engineers (“COE”) (33 CFR Parts 325 and 332) and the Environmental Protection Agency (40 CFR Part 230). The rule represents a long overdue codification of federal wetland mitigation policy previously encompassed by the COE’s Regulatory Guidance Letter RGL 2-02 issued in 1992, the joint November 1995 federal mitigation banking guidance, and the 2000 in-lieu fee guidance. The rule also replaces portions of the 1990 Department of the Army (DA)/EPA Mitigation Memorandum of Agreement as well as the numerous District-specific guidance documents spawning from these over-arching documents. By all accounts, the rule will greatly improve planning, implementation and management of compensatory mitigation projects, as well as establish consistent and specific standards and criteria for the use of all types of compensatory mechanisms (on-site and off-site project specific mitigation, mitigation banks, and in-lieu fee programs) currently in use for offsetting unavoidable impacts to wetlands and waters of the United States authorized through the issuance of DA permits.

The most important element affecting the federal permitting process, particularly for the Florida mitigation banking industry, is the requirement of timelines for review and issuance of banking instruments, complete with a formal Interagency Review Team (IRT) dispute resolution process. If implemented assertively, this timeline structure will create a much more disciplined process for IRT review and public notice and comment, thus greatly enhancing the efficiency and accountability of a notoriously inefficient and arbitrary process.

This timeline is broken-up into three phases, with a total agency review timeframe of 220 days within which the COE must act through ei-

ther issuance or denial of the banking instrument. Should the dispute resolution process be implemented during the review, the rule requires the COE District Engineer to notify the bank Sponsor of the final decision within 150 days of receipt of the final instrument or amendment. While the rule does allow the COE District Engineer to extend timeframes under specific circumstances, it is incumbent upon the COE District Engineer to “promptly notify the sponsor in writing of the extension and the reason for it.”

There are other significant changes with the new rule, as compared to how federal mitigation policy was implemented in the past: (i) significantly, for Florida bankers, there is a new preference for use of mitigation banks over on-site mitigation, and (ii) the application of equivalency standards for all types of mitigation. Equivalency standards require that each form of mitigation must provide for the same level of information and for appropriate financial assurance/accountability in the permitting process as well as demonstrate equivalency in proposed performance criteria.

The reversal of the compensation preference from on-site, project specific (termed “permittee-responsible” in the new rule) to the use of credits from a mitigation bank at the top of the hierarchy is an indication of a monumental change in the philosophical underpinning of the new rule from old federal mitigation policy. This sea change was largely precipitated by the results of the National Research Council’s evaluation of the effectiveness of wetland compensation required under Section 404 of the Clean Water Act, and the documented dismal failure rate of permittee-responsible mitigation. The preference for banking also grew out of the recognition that banks initiate activities in advance of permitted impacts, thus substantially reducing temporal losses and greatly increasing the likelihood of success. Additionally, the fact that most banks are larger,

ecologically valuable parcels providing landscape corridor connectivity functions between publicly protected, high natural resource value areas, as well as the overall greater up-front planning, investment and financial accountability required for banks, also helped to precipitate this change in mitigation philosophy.

While the Florida Environmental Resource Permit (ERP) rules have long recognized the greater ecological value of “regionally significant” mitigation and mitigation banking, the federal rules alignment with the ERP rules on this issue can serve to greatly improve the quality and long term viability of mitigation as well as the efficiency of the federal permitting process in Florida. While careful planning and siting considerations in exceptional circumstances for on-site mitigation can create ecologically viable, long term mitigation success, this new alignment between Florida and federal rules can open the door to significantly reducing (or even eliminating) the current and future net losses that isolated, fragmented, failing mitigation sites embedded within commercial or residential developments often experience.

Lastly, one change may cause states to actually improve the implementation of ERPs by taking a cue from the federal rules— i.e., the requirement of equivalency standards for all forms of mitigation. The new federal rule requires that twelve fundamental elements be provided for all mitigation plans, including items not always traditionally required or provided for by on-site mitigation, such as a site protection instrument, financial assurances, performance standards, monitoring requirements, and a long-term management plan. The Florida mitigation banking rule has always required these elements, so implementation of the rule for Florida bankers will create minor compliance changes. Still, the federal government took a rare step, ahead of

continued...

NEW FEDERAL RULE

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Florida, by providing that all mitigation plans contain these twelve fundamental elements.

While ERP permits generally define success criteria for on-site and off-site mitigation plans, and require monitoring, financial assurance is only required in cases where (i) mitigation construction and monitoring costs exceed \$25,000, and (ii) site protection and long-term management by the Florida Department of Environmental Protection (FDEP) and the

individual Water Management Districts is turned over to either a single family homeowner, or a homeowner's or condominium owner's association. These private residential association entities are often ill-equipped and financially unprepared to provide for the long-term management of these areas due to the minimum permit success criteria. So, while ERP rules contain financial assurance obligations, only private entities are charged to provide such assurances in the case of project specific mitigation.

Overall, the new federal mitigation rule provides several benefits to not only Florida mitigation bankers,

but to the regulated public, by providing for greater predictability and transparency in the federal permitting process. The equivalency requirements discussed above will also improve mitigation planning, site selection, and performance, thus reducing the public burden from net losses of natural resource functions and values resulting from failed mitigation. At the same time, the equivalency requirements will simultaneously provide the regulated public with greater flexibility in mitigation options as well as opportunities for reduction in permitting timeframes and liabilities resulting from failed project-specific mitigation.

LEGISLATIVE SESSION

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speed limit is 35 mph or less, restricting such usage to state employees and state park volunteers for state purposes.

Effective Date: July 1, 2008.

SB 432 - Artificial Reefs/Placement of Vessels

The bill authorizes the planning and development of a statewide matching grant program, to be known as the "Ships-to-Reefs" program, to facilitate the securing and placement of United States Maritime Administration and United States Navy decommissioned vessels in state and federal waters seaward of Florida as artificial reefs. The bill provides the Fish and Wildlife Conservation Commission with authority to adopt rules to establish procedures necessary to administer the matching grants program.

Effective Date: Upon becoming law.

CS/HB 527 - Brownsfield Site Redevelopment

CS/HB 527 provides an additional tax credit in the amount of 25 percent of the total site rehabilitation costs, not to exceed \$500,000, to promote

the placement of affordable housing, new health care facilities and new health care providers on brownfield sites affected by solid waste, where the applicant documents that the construction has received a certificate of occupancy or a license or certificate has been issued for operation of a health care facility. The legislation also provides a tax credit towards the cost of removal of solid waste from a brownfield site for up to 50 percent of that cost, not to exceed \$500,000. Such tax credits may be issued for site rehabilitation or solid waste removal conducted prior to the execution of a brownfield site redevelopment application or the designation of a brownfield area.

This legislation clarifies the timing for filing applications for site rehabilitation tax credits, and for filing solid waste removal tax credits. All tax credit applications must contain specific supporting documentation to be considered complete, and complete applications are subsequently reviewed to verify that the costs claimed are eligible. Tax credit applicants are allowed one opportunity to supplement their application to meet the "completeness" requirements. Time frames are established for when supplemental information must be received and when tax credit certificates must be issued.

The legislation also amends

brownsfield area designation public hearing requirements to permit at least one public hearing to be held in a location as close to the brownfield area as practicable. The bill eliminates the need for a brownsfield contractor to certify to the DEP that it complies with OSHA regulations and that it maintains certain types of insurance. The bill also provides legislative findings and declarations regarding brownfields and community health, and authorizes the DEP and the Department of Health to adopt rules on how to evaluate and monitor the community health benefits associated with the rehabilitation and redevelopment of brownfield sites.

Effective Date: Upon Becoming a Law

CS/CS/SB 542 - Florida Forever Successor Program

CS/CS/SB 542 reauthorizes and increases the bonding capacity for land acquisition from \$3 billion to \$5.3 billion, while maintaining a \$300 million per year limit. The legislation expands the purposes for which these funds can be spent to include working waterfront and agricultural land acquisition. In addition, the bill specifically authorizes the expenditure of funds for capital projects that would enhance public access, including water access. The legislation provides that beginning July 1, 2010, the Legislature shall analyze

the state's debt ratio in relation to projected revenues prior to authorizing any bonds for land acquisition and, by February 1, 2010, the Legislature shall complete an analysis of potential revenue sources for the Florida Forever acquisition program. The bill also directs DEP to develop computerized information establishing all of the lands acquired by the previous acquisition programs and all agencies, and recipients who receive Florida Forever funds are required to submit land acquisition information to DEP.

The bill revises the definition of "public access" to state lands and water. The bill directs that imperiled species should be a specific focus of the state lands acquisition effort, and each land management plan should describe both a long-term and short-term management goal and include measurable objectives to achieve these goals. The Florida Fish and Wildlife Conservation Commission must submit a report to the President of the Florida Senate and the Speaker of the Florida House of Representatives by February 1, 2010, evaluating the efficacy of using state-owned lands to protect, manage, and restore habitat for native or imperiled species. The bill also directs DEP's Division of State Lands to inventory all state lands to determine the value of carbon capture and carbon sequestration opportunities, and submit the inventory to the Board of Trustees by July 1, 2009. The bill expands the definition of "multiple use of state lands" to include a listing of carbon sequestration, carbon mitigation, or carbon offset purposes as allowable under that provision.

The legislation also changes the requirements for surplussing state lands. The bill reduces some of the funding allocations to the water management districts. The bill expands the Acquisition and Restoration Council membership from 9 to 11 members, and specific expertise is identified amongst the scientific representatives on the Council as having a land management and recreational management background. The legislation directs the Land Management Uniform Accountability Council to evaluate management costs and provide reports which will assist in the efficiencies achieved in overall state land management.

Effective Date: July 1, 2008

CS/HB 547 - Water Quality Credit Trading

CS/HB 547 creates a pilot project authorizing water quality credit trading programs in the Lower St. Johns River. DEP must adopt rules to create the program. This rulemaking must be initiated by September 1, 2008, and the trading program will be implemented as part of the total maximum daily loads basin management action plan (TMDL BMAP). DEP must submit a report to the Legislature and the Governor no later than 24 months after the adoption of the TMDL BMAP. This report must outline the results of the trading program and recommend whether the trading program should be expanded.

Effective Date: July 1, 2008. (Chapter 2008-189, L.O.F.)

CS/CS/SB 682 - Department of Transportation

CS/HB 682 is a large scale bill covering a variety of transportation financing, planning, and administrative issues. In the growth management area, this bill revises requirements for comprehensive plans to provide for airports, land adjacent to airports, and certain interlocal agreements relating to certain elements of local government comprehensive plans to better integrate airport planning and adjacent land uses through the local planning process. The bill sets forth legislative findings relative to transportation concurrency backlogs, and authorizes transportation concurrency backlog authorities to issue bonds. The bill states that facilities determined by the Department of Community Affairs and the applicable general purpose local government to be port-related industrial or commercial projects are not considered to be a development of regional impact provided they are located within three miles of a port and rely upon the utilization of port and intermodal transportation facilities or are in a port master plan area. The legislation also mandates that the Department of Transportation "DOT" develop a methodology (known as "internal capture") that recognizes some developments, due to their size, location, and mix of uses, can result in at least 30 percent of the traffic generated in the development re-

maining in the development.

Effective Date: Upon becoming law.

CS/HB 697 - Building Standards

This legislation, while primarily focusing on building construction issues, contains a few provisions affecting environmental and land use law. The bill mandates that the Florida Building Code facilitate and promote the use of cost-effective energy conserving, energy demand-management, and renewable energy technologies in buildings. The bill integrates energy efficiency issues into several components of local government comprehensive plans, which will be due at the next evaluation and appraisal update of each local government's comprehensive plan. Particularly, the bill requires that a local government's future land use element address reduction in urban sprawl and energy efficient land use patterns in relation to existing and future electric power generation and transmission systems, as well as greenhouse gas reduction strategies. The bill requires that the traffic circulation element must address strategies to reduce greenhouse gases, and that the conservation element address factors that affect energy conservation. The bill also specifies that the housing element of a comprehensive plan contain standards and principals for energy efficiency in new houses. The bill sets forth a schedule of required increases over time in the energy efficiency performance of buildings subject to the Florida Energy Efficiency Code.

This legislation also provides that deed restrictions, covenants, or other binding agreements may not prohibit the installation of energy devices based on renewable resources. The bill specifies that condominium units are residential dwellings for purposes of installation of solar collectors or other energy devices, and removes the three-story height restriction for installation of solar collectors or other energy devices on such residential dwellings. Finally, the bill prohibits any county, municipality, or special district from owning or operating an asphalt plant or a portable or stationary concrete batch plant having an independent mixer; but provides an exception for counties with plants prior to April 15, 2008.

Effective Date: July 1, 2008.

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CS/SB 758 - Inland Navigation Districts

The bill provides as legislative intent that it is in the public interest for inland navigation districts to operate and maintain the Intracoastal Waterway "ICW" and any other public navigation channels authorized by the Board of Trustees of the Internal Improvement Trust Fund for the purposes of construction, maintenance, and operation of Florida's inland waterways pursuant to Section 107 of the federal River and Harbor Act of 1960. The bill provides authority to the inland navigation districts to aid and cooperate with nonmember counties that contain any part of the ICW within their boundaries, public seaports, and with navigation districts in planning and carrying out public navigation, local and regional anchorage management, beach renourishment, public recreation, inlet management, environmental education, and boating safety projects directly related to the waterways. Districts are also granted authority to assist in projects concerning waterway access.

The legislation also authorizes the DEP to develop and maintain a list of flocculants that may be used at a disposal site of dredged material. The bill provides that such list does not prevent an entity from proposing, or the DEP from approving, the use of a flocculant that is not on the DEP's list subject to the entity providing the necessary documentation required by the DEP to ensure that its use will not cause harm to the water resources of the state.

Effective Date: July 1, 2008. (Chapter 2008-40, L.O.F.)

HB 961 - Petroleum Cleanup Sites

HB 961 calls for an increase in public funding for the restoration of certain sites contaminated by petroleum from \$300,000 to \$400,000 from the Inland Protection Trust Fund subject to annual appropriation. The bill provides certain criteria for sites eligible for additional funds, as well as providing requirements concerning pre-approved site rehabilitation agreements that govern submittal of invoices to the DEP and payment of

subcontractors. The legislation also revises eligibility in the Florida Petroleum Liability and Restoration Insurance Program. The bill provides methods of release detection at petroleum facilities and their eligibility for restoration insurance coverage for new discharges.

Effective Date: July 1, 2008. (Chapter 2008-127, L.O.F.)

CS/CS/SB 1094 - Gambling Vessels/Clean Ocean Act

CS/CS/SB 1094 creates the "Clean Ocean Act" and defines different types of "waste" (biomedical waste, hazardous waste, oily bilge water, sewage, blackwater and graywater), "berth," and "coastal waters." The bill requires owner/operators of gambling vessels to register with DEP on an annual basis, and describe the waste treatment system of each registered vessel. DEP must estimate the volume of waste that is reasonably expected to be released from registered gambling vessels based upon the information provided by the registrant. The bill requires an owner or operator of a gambling vessel berth location to create procedures for the release of waste from gambling vessels and to make available a waste-management service to handle and dispose of the vessel's waste, based upon DEP's calculations. The bill also mandates that an owner/operator of a gambling vessel that releases any waste into coastal waters must report that release to the DEP within 24 hours. A gambling vessel that discharges for the purpose of securing the safety of the vessel or saving life at sea is not required to notify the DEP of the release. Traditional cruise ships are excluded from the definition of "gambling vessel."

The legislation also directs DEP to request, by August 1, 2008, that the U.S. Secretary of Commerce amend the Florida Coastal Zone Management Program to include this act. If the Secretary of Commerce approves such amendment, DEP must request the appropriate federal authorities to prohibit the release of waste from gambling vessels in any waters that could affect the coastal waters of the State. The bill also directs DEP to request the appropriate federal authorities to prohibit the release of waste within federal territorial waters off the coast of the State.

Effective Date: July 1, 2008.

CS/CS/SB 1286 - Fish & Wildlife Conservation Commission

This legislation re-enacts Section 20.331, F.S., relating to the establishment of the Florida Fish and Wildlife Conservation Commission ("Commission"). The bill also requires that all vessels used on the waters of the state must be registered, either as commercial or recreational. The bill increases fees for all vessels requiring registration, while providing for future adjustment of the vessel registration fees based on the percentage change in the Consumer Price Index. The Commission must report to the Legislature on how the increase in fees will be used. The bill also raises fees for obtaining hunting and fishing licenses in the State of Florida based on the Consumer Price Index.

Effective Date: July 1, 2008 (Chapter 2008-106, L.O.F.)

CS/CS/SB 1294- DEP Reauthorization Act

This bill reauthorizes the powers and duties granted to DEP. The bill transfers many of the duties of the Invasive Plant Bureau from DEP to the Florida Fish and Wildlife Conservation Commission, with specific direction dealing with invasive plants, including the ability of the Board of Trustees of the Internal Improvement Trust Fund to delegate to the Commission the ability to take final action on applications which would authorize invasive plant activities on sovereign submerged lands. The bill creates an Office of Intergovernmental Programs within DEP, and renames DEP's Division of Resource Assessment and Management to Environmental Assessment and Restoration. In addition, the Environmental Regulation Commission is authorized for the first time to employ separate and independent legal counsel and contract for outside technical consultants in the course of their rule development duties.

The bill provides that phosphate mining companies in Florida will incur a \$1.38 per ton severance tax surcharge beginning on July 1, 2008, until such time as \$60 million is generated. The legislation also provides additional guidance in funding the use of phosphate-related expenses by local governments where phosphate rock is produced, and the lawful use of those dollars is now stated to include the provision of infrastructure or

services in support of the phosphate industry, reclamation or restoration of phosphate lands, community infrastructure on such reclaimed lands, and similar expenses directly related to support of the industry. Additionally, the bill provides that all chapter 378 and chapter 373, part IV, F.S., permits issued for phosphate mining activities are eligible for consideration under the final summary hearing provisions contained in section 120.574, F.S.

The bill also deals with a number of miscellaneous environmental provisions. The bill provides that water management district-developed standards and guidelines applicable to landscape irrigation design activities must occur by January 1, 2011, instead of the rotating five year schedule which previously existed. Drycleaning facilities are required as of March 1, 2009, to display a certificate of registration issued by DEP. The definition of "regulated air pollutant" found in section 403.031(19), F.S., is revised to become synonymous with any pollutant regulated under the federal Clean Air Act. DEP is granted specific rulemaking authority to establish data quality objectives in laboratory training and sampling protocols.

The bill authorizes Environmental Resource Permit fee increases pursuant to rules to be initiated no later than December 1, 2008, and specific minimum fees or ranges of fees are established for formal determinations, verification of exemptions, and noticed general permits or individual permits. The legislation also provides a Consumer Price Index increase of these fees every 5 years. The bill also allows other permit fees to be adjusted by this same Consumer Price Index.

The legislation also repeals provisions dealing with motor vehicle refrigerants and emissions related to motor vehicle refrigerants and citrus juice processing facilities. The legislation provides a legislative prohibition against the conversion of a Class III landfill to a Class I landfill in a specific area located within the Southern Water Use Caution Area within the City of Bartow.

Effective Date: June 11, 2008. (Chapter 2008-150, L.O.F.)

CS/CS/SB 1302 - Wastewater Disposal/Ocean Outfalls

This legislation directs the South Florida Water Management District (SFWMD) to include water resource and water supply development projects that promote the elimination of wastewater ocean outfalls within its regional water supply plan. It also provides that such projects should be given first consideration for state or water management district (WMD) funding assistance. Subject to specified conditions, the SFWMD must require the use of reclaimed water made available by the elimination of the wastewater ocean outfalls as part of its consumptive use permitting process.

The legislation prohibits the new construction or expansion of wastewater ocean outfalls and limits the discharge of wastewater through ocean outfalls to the permitted capacity in effect on July 1, 2008. It requires that discharge of domestic wastewater through ocean outfalls meet advanced wastewater treatment and management requirements no later than December 31, 2018. It provides an exemption to treatment standards for those facilities that meet 100 percent reuse for domestic wastewater discharge by the same date.

The bill requires all facilities that discharge wastewater through ocean outfalls to achieve, at a minimum, 60 percent reuse of the facilities actual annual flow by December 31, 2025, and prohibits discharge through ocean outfalls beyond that date, unless as a backup to the functioning reuse system. The bill creates a reporting schedule for permit holders who discharge domestic wastewater through ocean outfalls. Permit holders are required to detail the plan to meet the requirements of the legislation and provide a summary of actions accomplished to date. The bill provides a reporting schedule for the DEP to summarize the progress to date which must be submitted to the Legislature every five years beginning July 1, 2010.

Effective Date: July 1, 2008

CS/SB 1318 - Onsite Sewage Treatment and Disposal Systems

The bill also adds a representative from local government who is knowledgeable about domestic wastewater treatment and who is recommended by the Florida Association of Counties and the Florida League of Cities

to the technical review and advisory panel that assists the Department of Health in rulemaking and decision making regarding onsite sewage treatment and disposal systems. The panel may also review and comment on any legislation or any existing or proposed state policy or issue related to onsite sewage treatment and disposal systems. The membership of the panel is increased to a total of eleven members. The bill also exempts from certification as an environmental health professional a person who has successfully completed a department-approved soils morphology course and who is working under the direct responsible charge of an engineer licensed under Chapter 471, F.S.

Effective Date: July 1, 2008. (Chapter 2008-215, L.O.F.)

CS/HB 1427 - Beach Management

CS/HB 1427 directs DEP to attempt to provide an annual average quantity of beach-quality sand sufficient to accomplish the replication of natural drift sand resulting from inlet and port construction. Inlet management projects must ensure that beach-quality sand placed on beaches is suitable for marine turtle nesting. The bill directs ports to establish that reasonable efforts have been undertaken to ensure beach-quality sand is placed on adjacent eroding beaches as part of the port master plan approved by the Department of Community Affairs and any construction permits authorized by DEP. Additionally, federal projects which involve dredging for navigation purposes are directed to sustain beach-quality sand on adjacent eroding beaches.

Effective Date: July 1, 2008

CS/SB 1552 - Everglades Restoration

CS/SB 1552 extends the \$100 million bonding for Everglades restoration, which includes the Lake Okeechobee, Caloosahatchee River, and St. Lucie River Watersheds, for 10 years through 2019-2020. The legislation also requires an analysis of the ratio of the state's debt to projected revenue beginning July 1, 2010.

Effective Date: July 1, 2008. (Chapter 2008-49, L.O.F.)

CS/SB 1706 - Developments of Regional Impact

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The bill mandates that all developments of regional impact (DRI) development orders, phase, buildout and commencement dates for DRIs under active construction on July 1, 2007, or DRIs which received a development order between January 1, 2006 and July 1, 2007, are extended for three years. This DRI extension specifically includes all “associated local government approvals, including, but not limited to, agreements, certifications, and permits related to the [DRI].” The legislation also exempts from DRI applicability a development that is within a county with a population of at least 1.25 million; is a multiuse project with one use dedicated to office or laboratory for medical technology, biotechnology or life sciences; is located in an urban infill area or within five miles of a state support biotechnical research facility; is located within 2/4th mile of a bus or rail line; and is registered as a “LEED” development or locally recognized alternative “green” building program.

CS/SB 1706 was vetoed by Governor Crist on June 25, 2008.

CS/HB 7059 - Protection of Wild and Aquatic Life

CS/HB 7059 authorizes the Board of Trustees of the Internal Improvement Trust Fund “BOT” to provide for the establishment of seagrass mitigation banks to offset unavoidable impacts to seagrasses by projects that are determined to be in the public interest. The bill also sets forth penalties for any person who operates a vessel in a careless manner outside lawfully marked channels and causes seagrass scarring within an aquatic preserve. The bill provides uniform boating citation and escalating misdemeanor penalties for violations of boating laws pertaining to seagrasses.

The bill requires the state’s land managing agencies, beginning July 1, 2010, to prepare an operational report for each managed area assessing the land manager’s progress toward achieving short term and long-term land management goals of the approved management plan,

identify any deficiencies in management and provide corrective actions to address identified deficiencies. The operational report is to be submitted to the Division of State Lands within DEP for inclusion in the Acquisition and Restoration Council’s annual management review team report. The bill transfers the Bureau of Invasive Plant Management currently within DEP to the Fish and Wildlife Conservation Commission with the exception of the permitting program component related to business activities involving the importation, transportation, non-nursery cultivation, collection, sale, or possession of aquatic plant species, which is transferred to the Department of Agriculture and Consumer Services. This legislation also provides for the confiscation, forfeiture and disposition of illegally taken wildlife, freshwater fish and saltwater fish.

CS/HB 7059 was vetoed by Governor Crist on June 30, 2008.

HB 7091 - Fish and Wildlife Conservation

The bill consolidates chapters 370 and 372, F.S., relating to the regulation of wild animal life, freshwater aquatic life, and marine life into one combined chapter 379, F.S., as a follow up to the 1999 merger of the Game and Freshwater Fish Commission and the Marine Fisheries Commission.

Effective Date: July 1, 2008.

HB 7135 - Relating to Energy

HB 7135 is a lengthy bill governing generally the topic of energy and greenhouse gas emissions. The bill creates the Florida Energy and Climate Commission, to be made up of nine members, appointed by the Governor, Commissioner of Agriculture, and Chief Financial Officer. The Commission will administer several programs and acts including the Florida Renewable Energy and Energy Efficient Technologies Grant Program, the Florida Green Government Grants Act, and the Florida Energy and Climate Protection Act. The Commission is to advocate for energy and climate change issues and be a party to Public Service Commission “PSC” proceedings.

The bill transfers the State Energy Program from the Department of Environmental Protection (DEP) to the Energy and Climate Commission.

The Commission is required to submit an annual report to the Governor and Legislature. The bill also revises the State Comprehensive Plan, to encourage development of low carbon emitting electric power plants, such as nuclear plants.

The bill amends Florida Statutes regarding utility plans, programs, annual reports, and energy audits, to focus on demand-side and supply-side conservation and efficiency. A definition of “demand-side renewable energy” is added, meaning thermal or electric energy produced and consumed at a customer’s premises (up to 2 MW) and intended to offset the customer’s electricity requirements. This legislation encourages further development of demand-side renewable energy systems. The Energy and Climate Commission is to be a party to PSC proceedings that adopt goals on energy efficiency and demand-side renewable energy systems.

The bill provides that electric utilities can recover costs for quantifying and reporting greenhouse gas emissions, as well as for scientific research and geological assessments of carbon capture and storage if incurred through joint projects with a state agency or university. Utilities can also recover costs for transmission lines or associated facilities necessary to serve a nuclear or integrated gasification combined cycle power plant, even if the plant is not ultimately constructed.

The bill creates the “Florida Energy Systems Consortium” to promote collaboration among experts from the state universities to develop a long-term sustainable, efficient energy plan, focusing on development of innovative energy systems leading to alternative energy strategies, improved energy efficiencies, and expanded economic development. A report from the Consortium is due by November 1st of each year.

The bill provides that deed restrictions, covenants, and agreements may not prohibit solar devices on condominiums. The bill makes revisions to tax credits for renewable energy source devices. The bill also requires the PSC to propose rules to establishing a renewable portfolio standard, with draft rules provided to the Legislature by February 1, 2009. The PSC is to consider current and forecasted costs and installed capacity for each renewable energy generation method

through 2020. The rules can provide added weight to energy provided by wind and solar over other forms of renewable energy. Each municipal and cooperative utility is to develop standards for the use of renewable energy and energy conservation and efficiency measures, and report annually beginning April 1, 2009.

The bill requires the Department of Agriculture and Consumer Services, in conjunction with DEP, to conduct an economic impact analysis on the effects of financial incentives for energy producers who use woody biomass as fuel, including an analysis of effects on wood supply and prices, impacts on current markets, and on forest sustainability. The report is due by March 1, 2010. The bill also encourages counties to capture and use methane from landfills and wastewater treatment facilities.

The bill allows the Board of Trustees of the Internal Improvement Trust Fund to delegate to the Secretary of DEP the authority to grant easements for transmission and distribution lines. When an easement is granted via this delegation to the Secretary, the utility is to provide fee simple title to available uplands that are 1.5 times the size of the easement. If suitable uplands cannot be identified, the utility must pay DEP an amount equal to two times the current market value of the state-owned land.

The bill provides that transmission lines may be placed adjacent to and within state road rights-of-way. Both the Power Plant Siting Act "PPSA" and the Transmission Line Siting Act "TLSA" are amended, primarily to address alternate corridor provisions and associated offsite facilities. The bill provides that utilities may obtain separate permits for associated facilities (e.g., roads, rail lines, transmission lines, water access) necessary to construct a nuclear power plant without certification under the PPSA.

The legislation includes some changes and clarifications regarding the land use consistency determinations under the PPSA. The bill provides that linear facilities are not subject to local government consistency determinations. New notice provisions are added for proposed power plants and transmission line corridors, as well as informational meetings conducted by a local govern-

ment or regional planning council. The bill revises power plant certification hearings to provide that, at the request of a local government, a hearing can be held where local residents can testify regardless of party status.

The bill creates the Florida Climate Protection Act to establish a market-based program to reduce greenhouse gas emissions from electric utilities. This program applies to all greenhouse gases including carbon dioxide, methane, nitrous oxide, and fluorinated gases. The bill sets forth a cap-and-trade approach that includes a limit on the total allowable emissions (i.e., a cap), allowances for authorization to emit, and the trading of allowances among sources as a means of compliance with emission limits. DEP may adopt rules after January 1, 2010, to implement the program in consultation with the Energy and Climate Commission, PSC, and Climate Action Team. The rules must be ratified by the Legislature before becoming effective.

The bill requires DEP to consider several economic, administrative and environmental factors in developing the cap-and-trade program. The cap-and-trade rules are to be implemented for a trial period before full implementation. DEP is to identify sectors and activities outside of the capped sectors for possible offset credits, including other state, federal, and international activities. Electric utilities must use The Climate Registry for emission registration and reporting.

The bill provides that buildings constructed, financed, or leased by the state must meet certain "green" standards. State agencies must report energy consumption and cost data annually. The bill declares there to be an important state interest in promoting the construction of energy-efficient and sustainable buildings, and requiring all county, municipal, school district, water management district, state university, community college, and state court buildings to meet green building standards. In addition, the St. Petersburg College may work with the community college system and consult with the University of Florida to provide training and educational opportunities to help ensure that green building rating system certifying agents are available in the state.

The bill requires the development

of a "Florida Climate Friendly Preferred Products List" to identify products and vendors that have clear energy efficiency or other environmental benefit over competing products. The bill provides that the State will use hotels and conference centers with the "Green Lodging" designation. State agencies must reduce vehicle fuel consumption and purchase more fuel efficient vehicles in the future. All state agencies are to use ethanol and biodiesel fuels when available.

The bill creates the Florida Green Government Grants Act to award grants to assist local governments in the development of programs to achieve green standards. The bill amends the Florida Building Code to require the Florida Building Commission to select the most current version of the International Energy Conservation Code as its foundation code, provided it is to be modified to maintain the overall efficiencies of the Florida Energy Code for Building Construction. The bill establishes scheduled increases in thermal efficiency standards under the Florida Energy Efficiency Code for Building Construction. Energy-efficiency performance options and elements are to include solar water heating, appliances, windows, doors, skylights, solar-absorption roofs, ceiling and wall insulation, reduced leak duct systems, programmable thermostats, and energy-efficient lighting systems. The Florida Building Commission is to adopt rules to implement a cost-effectiveness test for proposed increases in energy efficiency.

The bill creates the "Florida Renewable Fuel Standard Act" addressing ethanol and blended gasoline. After December 31, 2010, all gasoline sold in the State must be blended with at least nine to ten percent fuel ethanol (produced by the conversion of carbohydrates), with exemptions for aircraft, boats, small engines, locomotives, and off-road vehicles. The Department of Agriculture and Consumer Services is to set certain specifications for eligible ethanol and is authorized to adopt rules to implement the new act. The bill requires the Energy and Climate Commission to conduct a study to evaluate lifecycle greenhouse gas emissions associated with all renewable fuels, including biodiesel and renewable diesel, biobutanol, ethanol, and consider a banking/trading program for

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credits among refiners, blenders, and importers, by December 31, 2010. If DEP proposes to adopt the California motor vehicle emission standards, the bill prohibits implementation of those standards until after ratification by the Legislature.

The legislation states that through recycling efforts, solid waste is to be reduced by 75 percent by the year 2020 compared to the amount of waste disposed of in 2007, based on a statewide average. DEP is to develop a recycling program to meet the reduction goal by January 1, 2010. DEP to undertake an analysis of the need for new or different regulation of auxiliary containers,

wrappings, or disposable plastic bags used by consumers to carry products from retail establishments. DEP must report to the Legislature on this by February 1, 2010. Until then, no state or local agency may enact a rule, prohibition, or tax regarding their use. The bill provides that by July 1, 2010, each county must develop and implement a plan to achieve a goal to compost organic material—up to 10 percent and no less than 5 percent. Each county is encouraged to consider mulching organic material.

The bill encourages each Metropolitan Planning Organization to provide for sustainable development and reduced greenhouse gas emissions. The Department of Education and DEP, in coordination with the business, environmental, and energy communities, are to develop an award/recognition program for outstanding efforts or

achievements concerning conservation, reductions in energy and water use, green products, recycling efforts, and curriculum development that help enhance the quality of education while preserving the environment. *Effective Date: July 1, 2008.*

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