

THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Gary K. Hunter, Jr., Chair • Thomas R. Gould, Co-Editor • Jeffrey A. Collier, Co-Editor

Florida Caselaw Update

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

Supreme Court reverses previous decision on rehearing regarding authority for local governments to issue bonds without voter approval. *Strand v. Escambia County*, 33 Fla. L. Weekly S680 (Fla. Sept. 18, 2008).

In *Strand*, the Florida Supreme Court reconsidered, and reversed in its entirety, its earlier decision that would have mandated voter approval for bonds payable from ad valorem taxes, even where there was no pledge of ad valorem taxing power. The Court ultimately held that local governments, special districts, and school boards can issue bonds repayable from ad valorem monies without

going through a referendum approval if the bond covenants contain clear language that the taxing authority is not pledging its taxing power to pay the bonds and, by implication, the bondholders cannot then sue the government to raise taxes to repay the bonds.

The Court premised its reversal on the strong role of stare decisis and noted that the Court's holding in *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, (Fla. 1980) had: (1) not proven unworkable; (2) been widely relied upon for the past twenty-seven years by local governments; and (3) not experienced any factual changes that would leave the

central holding without legal justification. Furthermore, it noted that here, as compared to a number of past cases, the non-ad valorem revenues will only be used to supplement funding in the event that Trust Fund revenues prove insufficient for debt service, and that the County did not covenant to maintain services or programs for the purpose of generating income to repay the bonds.

The Beach and Shore Preservation Act does not on its face unconstitutionally deprive upland owners of littoral rights without just compensation. *Walton County v. Stop the Beach Renourishment*,

See "Caselaw Update," page 16

From the Chair

by Gary K. Hunter, Jr.



What an honor to author the "Chairs Column" to my colleagues in this Section. Officially, I've not yet assumed those duties thanks to the havoc of Tropical Storm Faye. Fortunately her fury was in the form of much needed liquid in many parts of the State impacted. I'm assuming a few of you shared responsibility in addressing legal complications of rising waters and damaged property.

Behind every cloud is a rainbow,

demonstrated perfectly to our Section by the prolonged tenure of Michelle Diffenderfer as our Chair. In a decade plus of Section involvement, I've witnessed tireless volunteers leading our CLE, public interest, treatise, affiliates and other programs. None compare to the commitment and guidance Michelle has graciously provided to the ELULS. Despite her stated elation in joining our illustrious list of past chairs as ELULS Council "fossil," we know it isn't in her soul to ever abandon the life-long friends established through our Section – and if she were so inclined, we would deprive her the opportunity.

See "Chair's Message," page 2

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CHAIR'S MESSAGE

from page 1

Michelle, you are an impossible act to follow and the Section thanks you for your literally hundreds of hours of work on its behalf, your inability to say no and your always jubilant spirit.

Speaking of accolades, that "small" three day annual meeting, Affiliate's workshop and CLE had to be planned twice, the second time in less than two months. CLE Chair Marti Collins (with new baby girl); Program Co-Chairs Tara Duhay and Bud Vielhauer; Affiliates Chair and Program Chair, Dave Bass and Erin Deady; and Section Administrator Jackie Werndli, deserve a huge debt of gratitude for their efforts in the nearly seamless transition to our November dates. Amelia Island Plantation deserves recognition as well in its cooperation moving our dates on the single day notice offered by Mother Nature. Hopefully many of you reading this Column made it up or over — for those who could not, make plans early for the August 2009 Annual Update.

I would be remiss in failing to mention my first boss and Section Mentor Ralph DeMeo. Before I figured out RCRA and CERCLA were too complex for my South Georgia education, Ralph insisted I attend the Annual Update, encouraged Section involvement, provided guidance on articles and introduced me to the environmental and land use lawyers who forged the early development of Florida's precedential environmental protection and growth management

laws/regulations. In that same spirit, I encourage each of you to identify a young lawyer, and introduce them to the network of expertise and collegiality of our Section. Take them to a CLE, introduce them to a Section Committee Chair, work with them to co-author an Article or Treatise Chapter, or bring them along to one of our many affiliates mixers scheduled throughout the State. We are blessed with the energy and unprecedented intelligence of hundreds of young

lawyers in our Section yet rely upon and welcome the faces yet to arrive (young, old or in between).

In closing, I thank our 2008/2009 Committee Chairs for their time and leadership. Should you wish to become involved or just have questions regarding any of the Committees, please call or e-mail me or the appropriate Committee Chair. Thank you for the privilege to serve as your Chair. I look forward to the challenge.

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

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On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of November 6, 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. 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: On September 29, 2008 the Court rephrased the certified question and concluded that, on its face, the Beach and Shore Preservation Act does not unconstitutionally deprive upland owners of littoral rights without just compensation. 33 Fla L. Weekly S761a. Motion for rehearing filed October 14, 2008.

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 (FIEC) 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 Septem-

ber 25, 2008 the Court included that the revised statement prepared by the FIEC is misleading and therefore does not comply with s.100.3701(5), F.S.; accordingly the Court remanded the statement to the FIEC to be redrafted. Redrafted statement filed October 14, 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: Affirmed July 10, 2008, 33 Fla L. Weekly S493a.

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: Oral argument set November 3, 2008.

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ON APPEAL

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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: All briefs have been filed.

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 held 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: Motion for Stay granted and oral argument set for September 17, 2008 was cancelled.

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 Eleventh Circuit to Florida Supreme Court.

SECOND DCA

Peace River/Manasota Regional Water Supply v. State, Department of Environmental Protection, Case Nos. 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 October 8, 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: Reversed and remanded September 12, 2008, 33 Fla. L. Weekly D2181b; motions for rehearing filed.

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. Status: Affirmed September 17, 2008, 33 Fla. L. Weekly D2212b.

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: Remanded September 24, 2008, 33 Fla. L. Weekly D2265a.

Collins v. Monroe County, Case No. 3D07-1603. Appeal from an amended order granting state's motion for summary judgment on ripeness grounds. Status: Oral argument held June 30, 2008.

Luis Stabinski and Bell Stabinski, et al v. Miami-Dade Co., Department of Planning and Zoning, et al., Case No. 3D08-1226. Appeal from order dismissing complaint because Plaintiffs' taking claims are not ripe. Status: Oral argument held October 29, 2008.

Shands, et al, v. City of Marathon, Case No. 3D07-3288. Appeal from order to dismiss property owners' complaint because the property owners' claims were time barred and unripe. Status: Oral argument held June 30, 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 third generating station in Putnam County. Status: Reversed on June 13, 2008; request for rehearing denied July 16, 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 27, 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: Dismissed for lack of jurisdiction June 25, 2008.

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Rev. 05/08

DCA Update

by Kelly Martinson, Assistant General Counsel and Andrea Bose, Certified Legal Intern

FINAL ORDERS:

Runyan, et al. v. City of St. Petersburg, et al., DOAH Case No. 07-2239GM:

Petitioners challenged the Department's "in compliance" finding for an 18 acre Future Land Use Map amendment in the City of St. Petersburg. Focusing on six acres of the amendment going from Institutional to a category allowing a mix of residential, office, and commercial, Petitioners alleged no need existed for additional commercial uses and that policies in the comprehensive plan restrict the addition of commercial uses. In the Recommended Order the ALJ agreed with Respondents that the restriction on the addition of commercial uses does not apply to mixed use categories. However, in the Final Order the Department instead concluded that the restriction on commercial uses applies to any land use category that allows commercial uses. Nevertheless, the Department maintained the "in compliance" finding because, as stated in the Recommended Order, Petitioners failed to prove beyond fair debate that the amendment did not fall into one of the two exceptions to the restriction: allowable infilling or clear need.

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

As summarized in the August, 2008 Reporter, an ALJ found amendments adopted by Leon County exempting closed basins from the protections of the Lake Jackson Special Development Zones not "in compliance." On October 14, 2008, the Leon County Board of County Commissioners enacted an ordinance repealing the amendments, rendering the matter moot.

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

As summarized in the August, 2008 Reporter, an ALJ found a 47.06 acre Future Land Use Map amendment that changed the designation of two parcels from Rural Residential (max of 1 unit/acre) to Rural Fringe (max of 3 units/acre) "in compliance."

In particular, the ALJ determined 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 the amendment does not fail to discourage urban sprawl. The Department entered a Final Order adopting the Recommended Order except for one minor change to a Finding of Fact.

RECOMMENDED ORDERS:

Save Boca Raton Greenspace LLC, et al. v. City of Boca Raton, et al., DOAH Case No. 08-1212GM:

Local citizens challenged the Department's "in compliance" finding for an amendment that changed the designation of a 30 acre parcel from Recreation and Open Space to Residential Medium and amended the Transportation Element to establish an interim level of service for an adjacent roadway. The amendment would allow the conversion of an existing golf course into a townhome community. Petitioner alleged that the elimination of open space was contradictory to the City's policy of preserving a system of open areas. The ALJ agreed with the City that the proposed project included sufficient landscaping and recreational areas to fulfill the stated purpose of open area, which is to provide the surrounding community with relief from urban landscape. The ALJ also held that the new level of service standard for the adjacent roadway was consistent with the City's Comprehensive Plan and the Growth Management Act. Furthermore, the City provided sufficient data and analysis to support its finding that the new level of service standard would be met. The matter is now before the Department for entry of a Final Order.

The Jensen Beach Group, Inc., et al. v. Martin County, et al., DOAH Case No. 07-5422GM:

Land owners and a not-for-profit organization that monitors development issues in Martin County chal-

lenged the Department's "in compliance" finding for an amendment to Martin County's Future Land Use Map. The amendment changed the land use designation for a parcel from Mobile Home to Low Density Residential, which allows Class A manufactured single-family mobile homes. The comprehensive plan defines Class A homes as those constructed after 1976 and meeting certain federal standards. Petitioners alleged that the amendment was not supported by data and analysis and that it was inconsistent with the County's Comprehensive Plan in that it failed to provide for adequate mobile home sites and affordable housing. Petitioners also alleged that the amendment was inconsistent with requirements of the Growth Management Act and State Comprehensive Plan related to affordable housing, concurrency and adequate water resources. The ALJ acknowledged that the County had previously adopted two ordinances to stem the conversion of land designated for mobile home sites to more profitable residential designations, but found that Petitioners had failed to prove that the change for this parcel violated either of those ordinances or was not "in compliance." The matter is now before the Department for entry of a Final Order.

Gutierrez Jr., et al. v. Monroe County, et al., DOAH Case No. 07-5735GM:

Petitioners, land owners in Monroe County, challenged the Department's finding that a Monroe County ordinance which updated procedures for obtaining a beneficial use determination was consistent with the Principles for Guiding Development in the Florida Keys. Petitioners alleged that the changes to the process increased both the time and cost of obtaining a beneficial use determination and thus violated several of the Principles for Guiding Development. The ALJ found that the changes actually facilitated the process for both the County and the applicant by making it more "coherent and predictable." Therefore, the ordinance was consistent with the Principles for Guiding Development

as a whole. The matter is now before the Department for entry of a Final Order.

Sarasota Shoppingtown, LLC v. Sarasota County, et al., DOAH Case No. 07-4598GM:

Petitioner, owner of a local shopping mall, challenged the Department's "in compliance" finding for a comprehensive plan amendment in Sarasota County that created a special land use designation for Phase II of a 275 acre development of regional impact along I-75. Petitioners alleged the County failed to adequately address traffic impacts. The ALJ determined the amendment was "in compliance" because the traffic impacts had been adequately addressed by planned traffic improvements. Specifically, the ALJ held that a local government can choose among multiple methods of traffic data analysis so long as the chosen method is professionally acceptable. Furthermore, the required transportation improvements were financially feasible as evidenced by the fact that most of the improvements had already been completed, and the County had obtained capital contribution agreements from the developer to complete the remaining improvements. Finally, since the project build out was to be complete in three years, it was acceptable that the traffic analysis covered only three years, even though the capital improvement schedule covers five years. The matter is now before the Department for entry of a Final Order.

The Lodging Association of the Keys and Key West, Inc. v. Islamorada, Village of Islands, et al., DOAH Case No. 07-4364GM:

Petitioner challenged the Department's final order finding Islamorada, Village of Islands Ordinance No. 07-11, which changed land development regulations for transient lodging, inconsistent with the Principles of Guiding Development in the Florida Keys. Islamorada, Village of Islands previously instituted a cap on the number of transient lodging rooms and defined a room as one bedroom with one and one half bathrooms. Ordinance No. 07-11 allows multiple bedroom units created by the redevelopment of existing facilities to be considered a single unit so long as there is a single key for all entrances. Using

the fairly debatable standard, the ALJ held the Ordinance was inconsistent with the City's Comprehensive Plan and therefore inconsistent with Principle (a) of the Principles of Guiding Development. Specifically, Ordinance 07-11 would vitiate the comprehensive plan's cap on the number of hotel and motel rooms by effectively allowing an increase in the number of rooms. The matter is now before the Department for entry of a Final Order.

SMALL-SCALE AMENDMENT ORDERS:

Burson v. City of Titusville, DOAH Case No. 08-0208GM:

Petitioner challenged a small-scale amendment adopted by the City of Titusville which changed the designations on a portion of a 18.17 acre parcel from Residential High Density to Conservation, Residential High Density and Conservation to Commercial Low Intensity, and Conservation to Residential Low Density. Petitioner, who lives near the amendment site, primarily alleged that the Conservation designation should not have been removed from upland areas surrounding a wetland. The ALJ disagreed, holding that the City's Comprehensive Plan specifically allows the Conservation designation to be placed only on wetlands. Furthermore, the functional value of the wetland was not affected as the entire wetland is in the Conservation designation. As for gopher tortoise burrows on-site, the ALJ held that the amendment was consistent with the City's requirement that negative impacts to threatened species habitat be minimized because the relocation of gopher tortoises is practicable and often acceptable to regulatory agencies. Upon receiving the Recommended Order, the Department remanded as the ALJ applied the fairly debatable standard rather than the preponderance of evidence standard when determining whether the amendment was internally consistent with the comprehensive plan. The Recommended Order Following Remand corrected the standard of proof and retained the determination that the amendment is internally consistent with the City's Comprehensive Plan. A Final Order from the Department is pending.

The Vizcayans, Inc., et al. v. City of Miami, et al., DOAH Case Nos. 07-2498GM and 07-2499GM:

Petitioners challenged a small-scale amendment that changed the designation of a 6.72-acre parcel from Major Institutional, Public Facilities, Transportation and Utilities to High Density Multifamily Residential. Petitioners alleged the amendment did not qualify as a small-scale amendment, was internally inconsistent with provisions of the City's Comprehensive Plan, was not supported by adequate data and analysis, and was not in compliance with the Growth Management Act. The ALJ held that although the "gross lot area" of 11.44 acres is used to calculate the project's maximum square footage, the designation change applies only to the "net lot area" of 6.72 acres. Additionally, high-density multi-family residential is not allowed as of right in the Major Institutional category, rather it is permitted only under specified circumstances which the site does not meet. The data and analysis was therefore insufficient as the City had treated the amendment as a down-planning. Upon receiving the Recommended Order, the Administration Commission remanded based on the application of the fairly debatable standard rather than the preponderance of the evidence standard to the internal inconsistency claims. The Supplement to Recommended Order After Remand corrected the standard but did not modify the ultimate conclusions. A Final Order from the Administration Commission is pending.

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

As reported in the August 2008 Reporter, an 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." On July 30, 2008, the Administration Commission entered a Final Order adopting the ALJ's recommended order in toto.

APPELLATE OPINION:

CNL Resort Hotel, L.P. v. City of Doral, et al., Case No. 3D07-1528 (September 24, 2008):

CNL Resort Hotel sought review of a non-final order from the Division of Administrative Hearings dismissing

continued...

DCA UPDATE

from page 7

certain claims from its petition challenging a City of Doral comprehensive plan amendment. CNL's claim that its private property rights were abrogated had been dismissed as the ALJ equated it with a constitutional takings claim which DOAH does not have jurisdiction over. Additionally, the ALJ dismissed claims related to "reverse spot" and "specific use" planning as being irrelevant. In quashing the order, the Third DCA determined that a taking claim had not been alleged. The Court also found that private property rights are appropriately considered in a challenge to a comprehensive plan amendment, noting the State Comprehensive Plan

contains a provision stating, "Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action."

MISCELLANEOUS:

McCole v. City of Marathon and State of Florida, 2005-CA-314-M (Fla. 16th Cir.):

Plaintiff, having never sought a building permit from either Monroe County or the City of Marathon after incorporation, sued in inverse condemnation. Defendants filed a Motion to Dismiss arguing Plaintiff failed to file a takings claim within the 4-year statute of limitations. Plaintiff argued the case was not ripe and the 4-year statute of limitations did not start to run until Plaintiff applied for a Beneficial Use Determination

(BUD). In granting the Motion, the Judge found that because no permit application had been filed, the taking claim was "facial" rather than "as-applied." In facial takings claims there is no ripeness requirement as the ordinance, upon adoption, "takes" the property and the statute of limitations begins to run. The ordinance at issue was either the 1986 Monroe County Comprehensive Plan or the 1992 rate-of-growth ordinance. Due to the devaluation of Plaintiff's property by the property appraiser in the tax assessment, Plaintiff was on notice that environmentally sensitive land was likely not developable due to recently adopted regulations. Furthermore, the land development code does not require a BUD, which is a voluntary process designed to help a landowner understand the land use regulations and what can be developed.

Law School Liaison Committee Report

The Law School Liaison Committee provides outreach to Florida's law schools to ensure faculty and students are aware of the work of the Section and to encourage students to pursue careers in environmental and land use law. This article provides a brief update on some of the recent work of the Committee.

With the approval of the Executive Council, the Committee recently awarded over \$15,000 in block grants and special funding requests to support environmental and land use programs at the schools. Eight schools applied for and received \$1,000 block grants to be used for moot court travel, speaker honorarium, conference expenses, and activities sponsored by the schools' various student environmental organizations. In addition, the Council approved a request from St. Thomas and Barry for \$2,500 to

defray a portion of the cost of their Distinguished Lecture Program, and awarded \$1,000 to Coastal for its Environmental Summit, \$1,000 to FSU for the Journal of Land Use and Environmental Law, and \$3,000 to UF for its Public Interest Conference.

The Committee is also working with others on the Executive Council to promote the Section's two fellowship programs. The Section agreed again this year to jointly sponsor two fellowship positions with the ABA. The purpose of those fellowships is to encourage students from underprivileged and disadvantaged backgrounds to study and pursue careers in environmental and/or land use law. More information on this fellowship program can be found at www.abanet.org/environ/committee/lawstudents/2009fellowship/florida.shtml or by contacting Fran-

cine Ffolkes at Francine.Ffolkes@DEP.state.fl.us. The Section's other fellowship program is designed to create public interest opportunities for Florida law students and to encourage them to pursue careers in public interest law. Information on this fellowship opportunity can be found on the Section's website. Applications for the fellowships will be accepted through January 30, 2009.

Finally, the Section is again sponsoring the Dean Maloney Memorial Writing Contest. The contest, which is open to all Florida law students, awards cash, free admittance to the Annual Update and other recognition to the top three papers submitted on topics relating to environmental, land use or zoning law. The deadline for submission of papers is June 8, 2009, and more information is available on the Section's website.

Law School Liaisons

Barry University School of Law/St. Thomas School of Law

The Center for Earth Jurisprudence (CEJ) winter update offers practicing lawyers opportunities to attend a symposium about the precautionary principle for CLE credit and to audit courses about Earth jurisprudence and incorporating the principles of Earth jurisprudence into business law. A joint initiative of Barry and St. Thomas universities, the CEJ seeks to establish new approaches to law and governance that acknowledge the rights and interdependence of nature and the inhabitants of Earth. The CEJ has recently expanded to Central Florida, opening an office at the Dwayne O. Andreas School of Law at Barry University in Orlando. For more information or to sign up for the newsletter, visit www.earthjuris.org.

Precautionary Principle Academy

The CEJ presents the Precautionary Principle Academy, a participative event designed to explore the Precautionary Principle and its practical implications as the basis for local and state laws with members of the legal and environmental communities. Three national experts from the Science and Environmental Health Network (SEHN) lead the academy: Carolyn Raffensperger, Ted Schettler, and Joseph Guth; they discuss scientific and legal uncertainty, present case studies, and investigate local applications. A panel of local lawyers and decision-makers address the intersection between the Precautionary

Principle and local environmental concerns. Participants are invited to suggest practical issues and investigate how the precautionary principle applies to their area of expertise. Two Florida locations are scheduled: Miami, February 6; and Orlando, February 9. In Miami the panel of local issues is led by Murray Greenburg, former Dade County attorney; in Orlando, it is led by Robert Guthrie, senior assistant county attorney, Orange County. Receptions are hosted the night before, and CLE credit is available. Registration for CLE credit is \$80; e-mail cej@stu.edu for more.

Audit Opportunities for Practicing Lawyers

Beginning in January, the CEJ is offering an opportunity to practicing lawyers to audit "Exploring Principles of Earth Jurisprudence Seminar." Taught by CEJ executive director Sister Pat Siemen, O.P., J.D., the course examines, *inter alia*, the principles of an ecological worldview, legal concepts of indigenous people, standing issues for non-humans, and emerging legal and equitable remedies. Offered Thursdays, 11:00 a.m. - 12:40 p.m. "Business Law and Earth Jurisprudence" is also available for audit. Participants will investigate expanding the realm of corporate accountability – Corporate Social Responsibility (CSR) – to mesh principles of Earth jurisprudence and of social and environmental responsi-

bility with profit maximization and accountability toward shareholders. CEJ legal director Mary Munson, a former deputy general counsel of the National Parks Conservation Association, joins forces with St. Thomas Law Faculty Professor Lydie Pierre-Louis to teach the course. Classes begin January 6 at St. Thomas University in Miami Gardens; Tuesday and Thursdays, 3:45 - 5:00 p.m. Call 305-628-2329 to register.

Published Works

This summer the PACE Environmental Law Review published an article by Judith E. Koons, associate professor of law at Barry University School of Law and chair of the CEJ governance committee, titled "Earth Jurisprudence: The Moral Value of Nature," 25 Pace Envtl. L. Rev. (2008). In it, Koons explores the moral status of nature by examining issues such as global warming, genetic modification and the practical consequences of monocultures against the backdrop of four moral questions: what is good?; what is fitting?; what is true?; and what is right? In addition, the Barry University Law Review's winter edition is dedicated to Earth jurisprudence. Readers can acquaint themselves with issues central to Earth jurisprudence from the perspectives of a South African environmental lawyer, a founder of a nonprofit international environmental law institute, a law professor, a law student and others.

The Florida State University College of Law Program in Land Use and Environmental Law — Fall 2008 Update

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

The FSU College of Law's Program in Land Use and Environmental Law continues to try to improve upon its top-10 national ranking, according to *U.S. News & World Report*, in terms both of student preparation and success and in terms of programs.

The College of Law and its *Jour-*

nal of Land Use and Environmental Law are again sponsoring two *Distinguished Environmental Law Lectures* over the course of the academic year. On October 22, 2008, John Nagle, the John N. Matthews Professor of Law at the University of Notre Dame School of Law, delivered the Fall 2008

Distinguished Environmental Lecture, entitled "The Effectiveness of Biodiversity Law in the United States and Southeast Asia." That lecture may be viewed through the following link: <http://mediasite.oddl.fsu.edu/mediasite/Viewer/?peid=c9ea1e8971b249a5a9cd9f467362804d>. An

continued...

article based on Professor Nagle's presentation will be appearing in the *Journal of Land Use and Environmental Law*.

Professor Hope Babcock of the Georgetown University Law Center will deliver the Spring 2009 Distinguished Environmental Lecture. That event will occur on February 25, 2009.

In addition, the College of Law's environmental law program and the Florida State Bar's Land Use and Environmental Law Section will sponsor two *Environmental Forums* over the course of the school year. The Fall Environmental Forum was entitled *Balancing Needs? A Look At Big Bend Coastal Development*, and occurred on October 29, 2008. Jennifer Davis, a second-year student and President of the school's Environmental Law Society, introduced the Forum, which featured four experts on Big Bend ecology and development issues. These speakers were: Dr. Markus Huettel, a professor in the Florida State University's Department of Oceanography, whose research inter-

ests include coastal ocean sedimentary processes, transport processes at the sediment-water interface, and the biology and ecology of sedimentary organisms; Howard W. Kessler, M.D., a Wakulla County Commissioner representing District 4 who has served on the commission since 2002; Patrick F. Maroney, the Kathryn Magee Kip Professor at the Florida State University College of Business and Director of the Florida Catastrophic Storm Risk Management Center; and James "Jim" O'Brien, the Robert O. Lawton Distinguished Professor in Meteorology and Oceanography at the Florida State University, who founded the University's Center for Ocean-Atmospheric Prediction Studies. Linda Jamison of the Florida State University's Department of Oceanography collaborated with Professor Robin Craig of the law school in planning the Forum. A video of the Forum may be viewed at: <http://mediasite.oddl.fsu.edu/mediasite/Viewer/?peid=20fff6ef7c744e24a910a1d770b82808>.

The College of Law's students continue to train in land use and environmental law in increasing numbers. In May 2008, eighteen J.D. recipients graduated with *Certificate in Land Use and Environmental Law*: Colin H. Adams, Jeffrey S. Ainsworth, Christopher R. Bruce, Morgan G. Bourdat,

Colin W. Bennett, Ginette A. Beard, Thomas L. Dickens, III, Matthew I. Flicker, Susan J. Kutkiewicz, Michael G. Green, II, Gregory S. Oropeza, Mary K. McEwen, Malinda Kressel, Lauren R. Moody, Sarah R. Rissman, Ellen L. Wolfgang, Allison R. Starr, Nathaniel A. Romanic.

Moreover, over 100 students are currently enrolled in the environmental law program. Three students will be completing the Certificate Seminar in Fall 2008, while another 12 began their seminar work this semester. Approximately seven students will complete the Certificate Seminar in Spring 2009, while another 18 will be beginning their seminar work.

In addition, our students continue to participate in a variety of externships. Third-year student Howard Fox is completing a full-time externship this semester with the U.S. Department of Justice in Washington, D.C. More locally, Andrea Bose is externing at the Department of Community Affairs; Erica Greer Lybrand is externing at the Florida Fish & Wildlife Conservation Commission; Jeffrey Patenaude is externing at the Florida Department of Environmental Protection; and Sean Seely is externing at the Leon County Attorney's Office.

Stetson University College of Law: Environmental Law Activities and Accomplishments

Stetson University College of Law continues to make great strides in influencing environmental policy and in teaching students about environmental issues.

One way in which Stetson achieves these goals is through the **Stetson Institute for Biodiversity Law and Policy**. Created in 2005, the Biodiversity Institute serves as an interdisciplinary focal point for education, research, and service activities related to global, regional, and local biodiversity issues.

The **International Environmental Moot Court Competition** is one of several programs the Biodiversity Institute facilitates. This event is the largest moot court competition devoted solely to international environmental issues. Regional rounds

are held throughout the world, and the top teams are then invited to the International Finals in Gulfport. In 2007 more than eighty teams competed worldwide, and the International Finals included students from Armenia, Australia, Brazil, the Dominican Republic, India, Ireland, the Philippines, Thailand, and the United States. The 2008-2009 competition will culminate with the International Finals at Stetson in March 2009, and teams from China, Nepal, and Ukraine will make their initial appearances.

Stetson hosted the **Ninth International Wildlife Conference** in Gulfport in January 2007, with keynote speaker Janet Reno reminiscing about growing up in the Everglades. In March 2008, Stetson held the con-

ference at the University of Granada, Spain, where sessions focused on climate change, marine protected areas, the precautionary principle, and cetacean conservation regimes. The conference will return to Gulfport in March 2009, in conjunction with the International Environmental Moot Court Competition.

Each semester, the Biodiversity Institute sponsors several **Biodiversity Lectures**, which are free and open to the public. The Fall 2008 lectures covered a range of issues, such as CITES compliance in Nepal (Dr. Joel Heinen of Florida International University), the impact of energy development on Florida's biodiversity (Alex Glenn, General Counsel of Progress Energy Florida), and seagrass mitigation banking (Jim

Anderson of Seagrass Recovery). In the spring, the Biodiversity Institute will be arranging for a videoconference with a representative from the Ministry of Environment of Georgia who will discuss the environmental impacts of Russia's recent incursion.

Stetson's publications also illustrate its commitment to environmental education. Since August 2006, Stetson has served as the host school for the **Journal of International Wildlife Law and Policy**, a peer-reviewed journal which is published quarterly. Students with a demonstrated interest in wildlife issues edit articles submitted by scientists, attorneys, policy analysts, and regulators. In addition, in March 2009, the **Stetson Law Review** will be publishing a special issue devoted to biodiversity issues. The lead article, which examines the federal government's new aquatic resources mitigation rule, is authored by several former members of the National Research Council's Committee on Mitigating Wetland Losses.

In accordance with Stetson's mission to train students in and outside the classroom to become outstanding lawyers and leaders, the Biodiversity Institute has promoted several **innovative courses**. For example, a Wetland Law and Policy Seminar is an interdisciplinary course team-taught by Dr. Melanie Riedinger-Whitmore of the University of South Florida. Students study environmental law and science, which includes trips to the field.

Furthermore, Stetson students have had the opportunity to contribute to the **development of international environmental law**. Dr. Heather MacKay of South Africa, the Chair of the Scientific and Technical Review Panel (STRP) for the Ramsar Convention on Wetlands, invited Stetson students enrolled in International Environmental Law to prepare case studies involving environmental flows (EFs), minimum in-stream flows required for environmental purposes. The students' case studies were then distributed via the STRP website, and the students and STRP held a videoconference during an STRP workshop in Gland, Switzerland. The STRP found the students' efforts very helpful, and Dr. MacKay and Deputy Secretary General Nick Davidson complimented

them on their work product, calling it "excellent." The case studies have been incorporated into a Ramsar Technical Report.

The Biodiversity Institute has also encouraged Stetson professors to focus on real world issues, producing **scholarship that makes a difference**. Associate Dean Theresa Pulley Radwan and Professor Royal Gardner co-authored several articles examining the intersection of wetland mitigation banking and bankruptcy law ("What Happens When a Wetland Mitigation Bank Goes Bankrupt?"). Their analysis of the implications of bankruptcy actions and the long-term stewardship of mitigation sites influenced federal agencies as they revised the rules governing wetland mitigation. When the U.S. Environmental Protection Agency created a Mitigation Bank Review Team Academy to train agency personnel about wetland mitigation banking, Associate Dean Radwan and Professor Gardner were invited to lecture about long-term stewardship issues.

Stetson University College of Law was the first school to become a member of the **U.S. National Ramsar Committee (USNRC)**, which supports the Ramsar Convention on Wetlands in the United States. Stetson hosts the USNRC website (www.ramsarcommittee.us), and Professor Gardner served as Chair from 2005-2008. On the international level, he is serving as the North American representative to the Ramsar Scientific and Technical Review Panel for 2006-08.

Stetson students have worked with existing U.S. Ramsar sites to assist the sites in updating their Ramsar Information Sheets (RIS). Students also worked with Audubon's Corkscrew Swamp Sanctuary in drafting an RIS, which is the first step toward seeking designation as a Wetland of International Importance. Corkscrew Swamp Sanctuary's application is currently under review at the U.S. Fish and Wildlife Service.

Another opportunity for students at Stetson University College of Law is **Environmental Law Internships**. Through internships with government agencies and non-profit organizations, students have the opportunity to work on environmental and land use issues under the direct supervision of attorneys active

in the field. Placements include the National Oceanic and Atmospheric Administration (NOAA), the Hillsborough County Environmental Protection Commission, and The Ocean Conservancy. Also, since 2005 the Biodiversity Institute has arranged for Stetson law students to intern at the Sacramento field office of the U.S. Fish and Wildlife Service where they have worked on conservation banking agreements.

Stetson University College of Law's **Environmental Law Society (ELS)** is active in bringing students and nature together. Through its guest speakers, students are introduced to many different aspects of environmental and wildlife law. The ELS also coordinates non-legal pro bono hours for students. One such opportunity is kayak cleanups, coordinated with Kayak/Nature Adventures, in which students kayak through Clam Bayou (Gulfport's storm water repository), cleaning up trash and recyclables from within the mangrove habitats. Similarly, the ELS co-sponsors beach clean-ups with Stetson's Maritime Law Society, which are coordinated through The Ocean Conservancy.

Finally, Stetson University President Doug Lee has signed the **American College and University Presidents Climate Commitment**. This initiative calls upon the College of Law to make the campus more environmentally friendly in a variety of ways. The Student Bar Association's **Go Green Committee** is helping to implement this goal, and has worked to expand recycling on campus and to increase awareness of how to conserve natural resources.

Moving? Need to update your address?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information. The online form can be found on the web site under "Member Profile."

University of Florida Upcoming Events and Faculty Update

by Alyson C. Flournoy

Upcoming Events

Richard E. Nelson Symposium in Local Government Law

The Eighth Annual Nelson Symposium is scheduled to be held on Friday, February 13, 2009, at the UF Hilton in Gainesville. The topic is "The Squeeze on Local Governments." Presenters will include Professor James Ely, Milton R. Underwood Chair in Free Enterprise at Vanderbilt University Law School; John Echeverria, currently Executive Director of the Georgetown Environmental Law and Policy Institute and, beginning in 2009, Professor of Law at Vermont Law School; and Frank Alexander, Professor of Law at Emory University. Presentations will cover, among other topics, restrictions on eminent domain and public financing, state takings laws, and the impact of the housing and financial crises on local governments.

15th Annual Public Interest Environmental Conference – Save the Date!

UFLaw students and faculty are working closely with the Public Interest Committee of the Section to finalize the agenda for the 15th Annual Public Interest Environmental Conference, to be held at UF Law School February 26-28, 2009. The theme for the conference is "Beyond Doom and Gloom: Illuminating a Sustainable Future for Florida." The conference will focus on farsighted and innovative approaches to our environmental problems, emphasizing sustainability solutions from science and technology, progressive regulation and economics, and behavioral change through communication and social marketing. More information about the schedule will be posted on the conference website www.law.ufl.edu/piec as it becomes available.

Spring 2009 Environmental and Land Use Speaker Series

The theme for this spring's upcoming

speaker series is Climate Change. Speakers already confirmed are:

– January 15: Michelle Mack, Assistant Professor of Botany, University of Florida on *The Science of Climate Change*

– January 29: Linda Malone, Marshall-Wythe Foundation Professor of Law and Director, Human Rights and National Security Law Program, William & Mary Law School on *Climate Change and Human Rights / National Security*

– February 12: Michael Dworkin, Director of the Institute for Energy and the Environment and Professor of Law, Vermont Law School on *Climate Change & Energy Policy*

– February 19: Robert R.M. Verchick, Gauthier-St. Martin Eminent Scholar Chair in Environmental Law, Loyola University New Orleans on *Climate Change, Disaster Law, and Sea Level Rise*

All talks will be held in the Faculty Dining Room in Bruton-Geer Hall. Section members are welcome to attend. If you'd like to receive an email with updates on additional speakers, or to reserve a seat for any of these programs, please email Lena Hinson at elulp@law.ufl.edu. We are grateful to the law firms of Hopping Green & Sams, P.A., and Lewis Longman & Walker, P.A., for their support that makes this series possible.

The Wolf Family Lecture in the American Law of Real Property

The Second Annual Wolf Family Lecture is scheduled for Tuesday, March 17, 2009, at the law school. The lecture will be delivered by Gregory S. Alexander, A. Robert Noll Professor of Law, Cornell University Law School. For more details, contact Barbara DeVoe at devoe@law.ufl.edu.

Faculty Update

Periodically, we report on the publications and research undertaken by our environmental and land use law

faculty. This update summarizes faculty publications and presentations during 2007-08.

MARY JANE ANGELO Associate Professor

"Reforming the Florida Water Resources Act of 1972: Beyond the First 35 Years" (monograph), published in connection with the Century Commission for a Sustainable Florida, *2008 Water Congress*, Orlando, Sept. 25-26 • "Where Did Our Water Go? Give the Law a Chance" (op-ed), *Orlando Sentinel*, Sept. 23, 2008 and *Ocala Star-Banner*, Sept. 28, 2008 • "Stumbling Toward Success: A Story of Adaptive Law and Ecological Resilience" (presentation) University of Nebraska College of Law (Sept. 2008) • "Harnessing the Power of Science in Environmental Law: Why We Should, Why We Don't, and How We Can," *86 Texas L. Rev.* 1527 (2008)(presented at University of Texas School of Law Feb. 2008) • "The Killing Fields: Reducing the Casualties in the Battle Between U.S. Endangered Species and Pesticide Law," *32 Harvard Env'tl. L. Rev.* 95 (2008) • "Incorporating Emergy Synthesis into Environmental Law: an Integration of Ecology, Economics, and Law" (with Mark T. Brown), *37 Env'tl. L.* 963 (2007) (presented at Lewis & Clark School of Law) • "Reforming the Federal Insecticide, Fungicide, and Rodenticide Act," *CPR for the Environment: Breathing New Life into the Nation's Major Environmental Statutes, A Legislative Sourcebook of Progressive Ideas for Members of Congress and Staff* (Alyson Flournoy and Matthew Shudtz, eds.) (2007) • "Regulating Evolution for Sale: an Evolutionary Biology Model for Regulating the Unnatural Selection of Genetically Modified Organisms," *42 Wake Forest L. Rev.* 93 (2007)

THOMAS T. ANKERSEN Legal Skills Professor; Director, Conservation Clinic and Costa Rica Law Program – UF Provost's Faculty Fellow for Sustainability

"Designing and Developing Service Learning Pedagogy in Support of Sustainability," (presentation) Annual Meeting of the Association for the Advancement of Sustainability in Higher Education, Raleigh, North Carolina (November 2008) • Served on Florida Building Commission's Green Building Task Force (Nov. 2007 – Feb. 2008) • "Lawyers (and law students) without Borders: Transnational Collaboration in Climate-induced Endangerment Petitions Under the World Heritage Convention" (presentation) Michigan State Journal of International Law symposium (February 2008) • "A Long Slow Flood: Comprehensive Coastal Adaptation Planning for Sea Level

Rise" (presentation) Widener Law Review annual symposium (April 2008) • White paper with conclusions and recommendations for a comprehensive reform of Florida's boating laws (presentation to the Florida Boating Advisory Council under contract with the Florida Fish and Wildlife Conservation Commission) (Spring 2008) • UF Water Institute Symposium "Sustainable Water Resources: Florida's Challenges; Global Solutions" (moderator for closing policy synthesis) (Feb. 2008) • 14th Annual UF Law PIEC "Reducing Florida's Footprint: Stepping Up to the Global Challenge" (moderated closing plenary) (March 2008) • "Florida's Preservation of Recreational and Commercial Working Waterfronts Legislation: Too Little, Too Late?" (presentation) Working Waterways and Waterfronts 2007: A National Symposium, Norfolk, Virginia (May 2007) • "Pedagogy of Clinical Education." (Roundtable Chair) 2007 Ward Kershaw Environmental Law Conference University of Maryland School of Law (April 2007)

MARK A. FENSTER
Professor; UF Research Foundation Professor

"After Lingle," (presentation) 11th Annual Georgetown Environmental Law & Policy Institute Litigating Takings Conference, Stanford Law School, November 2008 • *Conspiracy Theories: Secrecy and Power in American Culture* (University of Minnesota, revised 2nd ed., 2008) • "Democratic Property Ownership and the Commodification of Community" (presentation), University of Colorado Law School, *Conference on Property* (June 2008) • "The Dilemmas of Local Transparency" (presentation), Law & Society, *Annual Meeting*, Montreal (May 2008) • "Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions," 58 *Hastings L. J.* 729 (2007) • "The Folklore of Legal Biography," 105 *Michigan L. Rev.* 1265 (2007) • "Takings, Version 2005: The Legal Process of Constitutional Property Rights," 9 *University of Pennsylvania J. of Constitutional L.* 667 (2007) • "Coolhunting the Law," 12 *Harv. Negotiation L. Rev.* 157-173 (2007) • "On Idiocratic Theory: A Reply," 19 *Critical Review* 147 (2007)

JOAN D. FLOCKS
Director, Social Policy Division, Center for Governmental Responsibility

"Pesticide Policy and Farmworkers" Testimony before the President's Cancer Panel, meeting series on Environmental Factors in Cancer, Indianapolis, IN (Oct. 2008) • "Responses to International Environmental Justice" (presentation) Latin American Studies Association, Montreal, (Sept. 2007) and Society for Applied Anthropology Annual Meeting, Tampa, FL (March 2007) • "Florida Farmworkers' Perceptions and Lay Knowledge of Occupational Pesticides" (with P. Monaghan, S. Albrecht, and A. Bahena), *Journal Comm. Health* 32(3) (2007)

ALYSON CRAIG FLOURNOY
UF Research Foundation Professor & Alumni Research Scholar; Director, Environmental and Land Use Law Program

"Protecting a Natural Resource Legacy While Promoting Resilience: Can It Be Done?" (pre-

sentation) University of Nebraska College of Law (Sept. 2008) • "Harnessing the Power of Information to Protect Our Public Natural Resource Legacy," 86 *Texas L. Rev.* 1575-1599 (2008) (presented at University of Texas School of Law Feb. 2008) • "Supply, Demand, and Consequences: The Impact of Information Flow on Individual Permitting Decisions under Section 404 of the Clean Water Act," 83 *Indiana L. J.* 537 (2008) • *Squandering Public Resources: A Center for Progressive Reform Report* (with Margaret Clune Giblin and Matt Shudtz) (2007) • "CPR for the Environment: Breathing New Life into the Nation's Major Environmental Statutes, A Legislative Sourcebook of Progressive Ideas for Members of Congress and Staff" (co-edited and co-authored introduction with Matthew Shudtz) (2007) • Invited participant, Dialogue and Workshop on Preparing Green Lawyers for Practice in a Changing Environment organized by ABA Section on Environment, Energy, and Resources, Keystone, Colorado, March 9-10, 2007

RICHARD HAMANN
Associate in Law Research, Center for Governmental Responsibility

"Reforming the Florida Water Resources Act of 1972: Beyond the First 35 Years" (monograph), published in connection with the Century Commission for a Sustainable Florida, 2008 *Water Congress*, Orlando, Sept. 25-26 • "Where Did Our Water Go? Give the Law a Chance" (op-ed), *Orlando Sentinel*, Sept. 23, 2008 and *Ocala Star-Banner*, Sept. 28, 2008 • Invited Delegate, Century Commission for a Sustainable Florida, 2008 *Water Congress*, Orlando, Sept. 25-26, 2008

DAWN JOURDAN
Assistant Professor; Joint appointment with the UF College of Design, Construction & Planning

"Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes" (with Elizabeth Garvin), *J. of Land Use & Environmental L.* (2008) • "Interdisciplinary Tourism Education in Interdisciplinary Teaching and Learning in Higher Education: Theory and Practice" (with Tazim Jamal), in *Interdisciplinary Learning and Teaching in Higher Education: Theory and Practice* (B. Chandramohan & S. Fallows, eds., 2008) • "Grounding Theory: Developing New Theory on Intergenerational Participation in Qualitative Methods for Housing Research" in *Qualitative Housing Research Methods* (P. Maquin, ed., 2008) • "The Legal Challenges of Employing a Land Bank to Support Rural Affordable Housing Development," 2008 Joint Conference of the Association of Collegiate Schools of Planning (ACSP) and the Association of European Schools of Planning, Chicago, Illinois (Presentation July 2008)

CHRISTINE A. KLEIN
Chesterfield Smith Professor; Associate Dean, Faculty Development

"Reforming the Florida Water Resources Act of 1972: Beyond the First 35 Years" (monograph), published in connection with the Century Com-

mission for a Sustainable Florida, 2008 *Water Congress*, Orlando, Sept. 25-26 • "Where Did Our Water Go? Give the Law a Chance" (op-ed), *Orlando Sentinel*, Sept. 23, 2008 and *Ocala Star-Banner*, Sept. 28, 2008 • "Water Transfers: The Case Against Transbasin Diversions in the Eastern States," 25 *UCLA J. Envtl. Law & Policy* 101 (2008) • "Mississippi River Stories: Lessons from a Century of Unnatural Disasters" (with Sandra B. Zellmer), 60 *SMU L. Rev.* 1471 (2007) • "Survey of Florida Water Law," *Waters and Water Rights* (Robert E. Beck, ed., Matthew Bender & Co., Inc.) (rev. vol. 6 [2005] and 2007 Supp) • "The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming," 48 *B. C. L. Rev.* 1155 (2007) • "Climate Change Litigation" (panelist), AEI-Brookings Joint Center for Regulatory Studies, *Judicial Symposium on Scientific Evidence In the Courts*, Washington, D.C. (June 22, 2007)

TIMOTHY McLENDON
Assistant in Law, Center for Governmental Responsibility

"Law Schools as Agents of Change and Justice Reform in the Americas (with Jon Mills), 20 *Fla. J. of Int'l L.* 5 (special edition, 2008)

JON L. MILLS
Professor; Dean Emeritus; Director, Center for Governmental Responsibility

Privacy: The Lost Right (Oxford University Press, 2008) • "Two Contemporary Privacy Issues in Poland: Liability for Internet Publication and the Registration of Communist Party Affiliation," *Univ. of Warsaw L. Rev.* (2008) • "Law Schools as Agents of Change and Justice Reform in the Americas (with Timothy McLendon), 20 *Fla. J. of Int'l L.* 5 (special edition, 2008) • "Legal Education in the Americas: The Anchor for Hemispheric Justices," 17 *U. Fla. J. of Int'l L.* 1 (2005)

STEPHEN J. POWELL
Lecturer in Law; Director, International Trade Law Program, Center for Governmental Responsibility

Just Trade: A New Covenant Linking Trade and Human Rights (with Berta Hernández-Truyol) (NYU Press 2009) • "Land Use Regulation, Foreign Real Estate Investment, and Trade Agreements" (presentation), University of Florida / University of Costa Rica Conference, San Jose, Costa Rica (June 2008) • "Andean Community, MERCOSUR, and UNASUL: A New Opportunity for Linkage of Trade with Labor and Other Human Rights" (presentation), Federal University of Bahia Law Faculty Workshop, *MERCOSUL and Civil Society*, Salvador, Brazil (May 30, 2008) • "Humanizing Trade's Economic Benefits: An Analysis of MERCOSUL's Effects on the Environment, Labor Standards, Indigenous Populations, and Health" (presentation), 9th Annual University of Florida Law / PUC-Rio Conference on Legal & Policy Issues in the Americas, Rio de Janeiro, Brazil (May 2008) • "Should or Must: Nature of the Obligation of States to Use Trade Instruments for the Advancement of Environmental, Labor, and Other Human Rights," 45 *Alberta L. Rev.* 443 (2007) • "Peru-United States Trade Promotion Agreement: The New

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LAW SCHOOL LIAISONS

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Economic Model for Civil Society?" in *Acuerdo de Promoción Comercial Perú—Estados Unidos* (Universidad Peruana de Ciencias Aplicadas, 2007) • *Small Steps: Ending Trade's Splendid Isolation from Human Rights* (PUC-Río Núcleo de Direitos Humanos 2007) • "Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations" (with Paola Chavarro), 19 *Fla. J. Int'l L.* 93 (2007)

THOMAS RUPPERT

Assistant in Environmental Law, Center for Governmental Responsibility

"Eroding Long-Term Prospects for Florida's Beaches: Florida's Coastal Construction Control Line," 1 *Sea Grant L. & Pol'y J.* 65 (2008) • "Homeowners' Associations and the Environment: From Antagonists to Partners?" (presentation) Orange County "A Florida Friendly Neighborhoods Workshop" (Sept. 2008)

JEFFREY S. WADE

Associate in Law; Director, Environmental Division, Center for Governmental Responsibility

"Privatization and the Future of Water Services," 20 *Fla. J. Int'l L.* 179 (2008) • Panelist and presenter, "Forest Management in Brazil and the U.S.: Comparison of Issues," Ninth Annual Conference on Legal and Policy Issues in the Americas, Rio de Janeiro, Brazil (May 2008) • Invited respondent, "Green Building as Private Environmental Lawmaking," Seventh Annual Richard E. Nelson Symposium: "Green Building: Prospects and Pitfalls for Local Governments," Gainesville, Florida (Feb. 2008) • Seminar coordinator and presenter, "Selected Aspects of U.S. Environmental Law," State Magistrates' Association of Minas Gerais (AM-AGIS), Belo Horizonte, Brazil (June 2007)

MICHAEL ALLAN WOLF

Richard E. Nelson Chair in Local Government Law; Professor

The Zoning of America: Euclid v. Ambler (University Press of Kansas, 2008) • *Powell on Real Property* (Matthew Bender-LexisNexis, General Editor) • "William Faulkner, Legal Commentator: Humanity and Endurance in Hollywood's Yoknapatawpha," 77 *Mississippi Law Journal* 957 (2008) • "Hysteria v. History: Public Use in the Public Eye," in *Private*

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DANAYA C. WRIGHT

UF Research Foundation Professor & Clarence TeSelle Endowed Professor

"The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: *Hash v. United States* and the Threat to Rail-Trail Conversions," 38 *Environmental L.* 711 (2008) • "Charitable Deductions for Rail-Trail Conversions: Reconciling the Partial Interest Rule and the National Trails System Act" (with Scott Bowman), 32 *Wm. & Mary Env't'l L. & Pol'y Rev.* 1 (2008) • "Rails-to-Trails: Conversion of Railroad Corridors to Recreational Trails," in 78A *Powell on Real Property* (Michael Allan Wolf, ed.) (2007)

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Inc., 33 Fla. L. Weekly S761 (Fla. Sept. 29, 2008).

Following numerous hurricanes that eroded beaches in the City of Destin and Walton County, the City and County applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (JCP) to renourish the beaches under the Beach and Shore Preservation Act, Chapter 161, Florida Statutes.

Stop the Beach Renourishment (STBR), a group of oceanfront property owners, filed petitions challenging the issuance of the JCP and the establishment of the Erosion Control Line (ECL). According to the Act, an ECL is established that becomes the permanent property boundary between the upland owned property and the sovereign submerged land. This ECL replaces the Mean High Water Line as the natural property boundary.

In the administrative hearing, STBR argued that the governments were not entitled to the JCP because they did not meet the requirements of Rule 18-21.004(3), F.A.C., which requires the applicant to show it has ownership interest in the upland property that is riparian to the sovereign submerged lands where the work is proposed. In this case, the project was about seven miles long traversing more than 400 parcels of property. The governments argued that it was entitled to the exception in Rule 18-21.004(3), F.A.C., that provides a governmental entity does not have to provide evidence of upland ownership interest for beach nourishment projects “provided that such activities do not unreasonably infringe on riparian rights.”

The ALJ found that at least two littoral rights of STBR’s members (specifically the right to accretion and the right to have one’s property remain in contact with the water) had been expressly eliminated by the Act. ‘ 161.191, Fla. Stat. The ALJ, however, did not consider the elimination of these two rights to be an “infringement” under Rule 18-21.004(3), F.A.C., because it was the Act that eliminated the rights and not DEP’s activity in issuing the JCP. DEP ad-

opted the ALJ’s order.

On appeal, the First District reversed finding that the Act, as applied to STBR’s members, eliminated at least two littoral rights which not only “unreasonably infringed” on their littoral rights in violation of Rule 18-21.004(3), F.A.C., but also resulted in a taking of constitutionally protected littoral rights without compensation. Thus the Court remanded the case for the applicants to demonstrate sufficient upland interest as required by Rule 18-21.004(3), F.A.C. If the applicants could not provide evidence of upland ownership then it would have to comply with section 161.141, Florida Statutes, of the Act which provides “[i]f an authorized . . . beach nourishment . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.” Finally, the Court invalidated the ECL survey in the public records to the extent it showed a boundary different than that in the deeds of the STBR members.

The First District then certified the following question as one of great public importance:

Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, 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 Florida Administrative Code 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?

After accepting jurisdiction on this question, the Supreme Court changed the certified question. In so doing, the Court suggested that the First DCA essentially considered a “facial” challenge and not an as-applied challenge. The Court then modified the certified question as follows:

On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?

The Court’s opinion, after discussing the intent of the Act, provides a

history of the relationship between upland owners of beach property and the public. The Court then concludes that the Act is facially constitutional because it “reasonably balances” public and private interest like the common law was intended. After reaching this policy conclusion, the Court addresses the merits finding no facial taking by the Act.

The Court then found the doctrine of avulsion was pivotal, yet ignored by the First District and the parties below. The Court reaffirmed the doctrine of avulsion which holds that the property boundary between sovereign submerged lands and upland properties does not change as a result of an avulsive event (e.g., hurricane). In such an avulsive event, the MHWL as it existed prior to the avulsive event remains the boundary and the party losing land has the right to reclaim that land. The Court then concluded that the Act, on its face, like the common law, allows the State to reclaim the land and is thus facially constitutional. The Court noted however, that the facts of the case do not indicate whether the ECL set in this case was the pre-hurricane MHWL. If the ECL does not represent the pre-hurricane MHWL (which it typically would not as the beaches being renourished were eroded by the hurricane), the state could be claiming property that belongs to the upland owner under common law. The Court however, declined to decide that as-applied issue.

The Court next found that STBR’s members’ littoral right to accretion is “not implicated” by the Act. The Court states “the common law rule of accretion, which is intended to balance private and public interests, is not implicated in the context of this Act.” While acknowledging that the Act eliminates the right to accretion, the Court appears to conclude that the Act’s provisions relating to nourishment procedures are sufficient to replace the common law need and purpose for the right to accretion.

The Court next concluded that an upland property owner no longer has the right to have its property remain in contact with the MHWL. Rather, so long as the owner has some “right of access” to the water or MHWL (which the ACT facially provides after the nourishment), then right to have the property remain in contact with the MHWL is ancillary. As such, the Act

does not facially result in a taking of the littoral right to have the property remain in contact with the water or MHWL.

Finally, the Court distinguished its holding in *Belvedere Dev. Corp., v. Department of Transp.*, 476 So.2d 649 (Fla. 1985), which held that littoral rights cannot be severed from the uplands, as applying only in the context of condemnation proceedings. Interestingly, the Court did not rule on the validity of the JCP issued by the DEP, as it only held the Act was facially constitutional. The Court only quashed the First DCA order. It did not remand the case leaving the validity of the JCP in question.

Agency is required to perform its own analysis in determining whether a city's application for waterway marker permit meets one of six relevant rule criteria and cannot delegate its final order authority to its executive director. *Collier County Bd. of County Comm'rs v. Fish & Wildlife Conservation Comm'n*, 33 Fla. L. Weekly D2181 (Fla. 2d DCA Sept. 12, 2008).

After adopting an ordinance establishing new slow speed zones in Naples Bay, the City of Naples applied for a waterway marker permit to mark these zones with signs pursuant to the requirements of Florida Administrative Code Rule 68D-23.105(1)(b). The Florida Fish and Wildlife Conservation Commission (FWC) issued a notice of intent to issue the permit and several entities/individuals filed timely petitions for administrative hearing. Following an administrative hearing, the ALJ entered a recommended order to deny the permit. Despite repeated requests for the seven member FWC commission to consider and issue the Final Order, the FWC commission expressly declined to consider the issue and reaffirmed its "delegation of authority" to its executive director. Thereafter, the executive director entered a Final Order rejecting the ALJ's findings and conclusions of law.

On appeal, the Second DCA only discussed two issues in reversing the FWC Final Order: (1) whether the FWC's interpretation of the F.A.C. rule, referenced above, was erroneous and (2) whether FWC's delegation of authority to its executive director was

improper.

The court found that FWC's interpretation of Rule 68D-23.105(1)(b) (i.e. that FWC was not required to make an independent factual determination on whether the application and supporting documentation met one of six enumerated criteria in the Rule) was clearly erroneous. The court rejected FWC's position "that it cannot question the validity of the City's statements in its permit application that it meets the fact-based criteria of rule 68D-23.105(1)(b)." Accordingly, the Court found that the rule requires the FWC to make an independent determination of whether the City's application meets the Rule criteria. The Court further rejected the FWC's argument that it had no jurisdiction to consider the wisdom, validity or purpose of a city ordinance noting that the FWC was confusing the administrative challenge to the permit with a challenge to the ordinance.

The Court also found that the Administrative Procedures Act requires the "agency head" to enter final orders. Thus, it found the FWC's practice of delegating final order authority to its executive director "improper and not supported by the applicable law." The final order was set aside and remanded to FWC commission for proceeding consistent with the opinion.

Consideration of private property rights is part of comprehensive development goals and should be taken into consideration. *CNL Resort Hotel, L.P. v. City of Doral*, 33 Fla. L. Weekly D2265 (Fla. 3d DCA Sept. 24, 2008).

After CNL purchased several hundred acres of land within later-incorporated Miami-Dade County for use as the Doral Golf Resort and Spa, the City adopted a comprehensive development plan ("Plan"). The Department of Community Affairs (DCA) filed a petition challenging the Plan to which CNL intervened. After the City and DCA settled, CNL filed a petition challenging the settlement and revised Plan. CNL stated three claims: (1) the Plan was inconsistent because it abrogates CNL's private property rights while benefiting surrounding private landowners and the Plan impermissibly utilizes "reverse spot" and "specific use" planning; (2) the Plan exacerbates urban sprawl;

and (3) the Plan is internally inconsistent.

The City moved to dismiss the first and a portion of the third claim contending the claims were constitutional takings claims outside the jurisdiction of the Administrative Law Judge. Following dismissal of the claim, CNL sought certiorari review. The Third DCA reversed the ALJ's order. First, the Court held that CNL demonstrated irreparable injury because it would be unable during the pendency proceeding to obtain a permit to develop its property, while its surrounding neighbors will develop their properties and consume the available, but limited, roadway capacity.

Turning to the merits, the Court found the ALJ's dismissal of the claims improper. The Court first concluded that Florida "protects these sacrosanct private property rights when evaluating a comprehensive development plan" through the State's Comprehensive Plan. See section 187.201(14)(a), Fla. Stat. Because the State comprehensive Plan requires consideration of private property, the ALJ erred in dismissing CNL's claims. The court further explained that CNL was not asserting a claim against the City for taking its property without just compensation; rather, it wanted City consideration of private property rights before enacting the Plan.

A claim for inverse condemnation based on an illegal exaction more than 13 years ago is time barred. *New Testament Baptist Church, Inc. of Miami v. Dept of Transp.*, 33 Fla. L. Weekly D2462 (Fla. 4th DCA Oct. 22, 2008)

In 1992, Broward County required the New Testament Baptist Church ("Church") to dedicate 7.5 of its 19 acres for city streets in order to obtain plat approval. When the DOT went to condemn more of the church's property in 2005, the church cross complained that the earlier dedication was an illegal exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and void.

The trial court granted summary judgment against the Church finding its claim was barred by the statute of limitations. On appeal, the Church argued that the dedication was "void" in 1992 because it was an illegal exaction. In affirming, the Fourth DCA rejected this argument holding that

continued...

the dedication (to the extent it was an illegal exaction) was only voidable, and not void ab initio because it only affected the Church and did not harm the general public.

In addition, the Court noted that the church had ratified the conveyance by not objecting to it or taking any action to challenge it since 1992, despite the availability of administrative and judicial remedies to challenge the alleged illegal exaction. Therefore, the statute of limitations would apply to bar the claim.

Fact finder is bound by party stipulations to facts. *Seminole Elec. Co-op., Inc. v. Fla. Dep't of Env'tl Protection*, 985 So. 2d 615, 33 Fla. L. Weekly D1560 (Fla. 5th DCA 2008).

Pursuant to particular Florida Electrical Power Plant Siting Act ("Siting Act") provisions, Seminole Electric Cooperative, DEP, and all other parties to a power plant certification proceeding entered into a joint stipulation that there were no disputed issues of fact or law and that the Conditions of Certification provided reasonable assurances that the construction and operation of the proposed electricity generating unit would comply with all applicable agency standards. The parties stipulated that the Application for Site Certification, DEP's Staff Analysis Report, and other documents

would comprise the record for which the DEP Secretary would enter his final order. With all issues of law and fact fully stipulated, the parties then canceled the planned certification hearing in accordance with the Siting Act.

Despite the joint stipulation and agreed-upon evidentiary record, the Secretary of DEP attempted to remand the case to DOAH, citing a need to obtain "more facts." When the administrative law judge declined to accept this attempted remand, DEP entered a final order denying certification. Seminole appealed.

Upon appeal, the Fifth District Court of Appeal found the stipulations complete and binding. The court noted DEP's order failed to mention or acknowledge the DEP Staff Analysis or other agency reports, nor did it mention the PSC's Determination of Need, the stipulated record, or the detailed findings of fact set forth in the statutorily authorized stipulated proposed final order. The court ruled that the Secretary cannot reject stipulated facts as insufficient when the agency and relevant parties deem them complete and, based on the stipulations, no remaining issues were left as a basis to deny the permit.

Standing to challenge a County Comp Plan only requires a particularized interest and not a particularized harm. *Save the Homosassa River Alliance, Inc. v. Citrus County*, 33 Fla. L. Weekly D2490 (Fla. 5th DCA Oct. 24, 2008).

Save the Homosassa River Alliance and other area property owners ap-

pealed the trial court dismissal, with prejudice, of their second amended complaint against Citrus County. The Plaintiff's filed suit challenging County's approval of the Resort's application: the Resort owned property adjacent to the Homosassa River and desired to develop and redevelop 87 condominium dwelling units, retail space, amenities and parking. Plaintiff's challenged on the ground that the application was inconsistent with County's Comprehensive Land Use Plan.

The trial court dismissed the suit with prejudice, citing Plaintiff's failure to allege concrete and specific adverse interests that exceeded in degree the general interest in the community good shared by the public at large. The fifth DCA, however, reversed and remanded, citing Plaintiff's Second Amended Complaint as containing sufficient allegations of specialized interests. The court said that the Plaintiff's demonstrated their interests were greater than a general interest shared by all persons in the community because each had a direct and demonstrated concern for the protection of the interests furthered by the comprehensive plan that would be adversely affected by allowing a development that violates the plan. The court clarified the statutory requirement, holding that the statute requires *interests*, and not *harm*, different in degree from other citizens. To hold otherwise, said the court, would eviscerate the reason for the statute and put the public back in the common law standing realm. Thus, according to this court, the applicable statute, section 163.3215, Florida Statutes, simply requires a citizen to have a particularized interest of the kind contemplated by the statute, not a legally protectable right.

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Mr. Hunter and Mr. Safriet practice primarily in the areas of environmental, land use and property rights litigation.

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	2007-2008 Budget	2007-2008 Actual	2008-2009 Budget
REVENUE			
Administrative Fee Adjustment	(9,937)	0	0
Section Dues	66,500	69,225	68,950
Affiliate Dues	4,000	4,280	3,500
Admin Fee to TFB	(34,850)	(36,486)	(35,875)
Online CLE	500	0	0
CLE Courses	20,000	18,455	24,000
Section Differential	0	9,971	8,000
Sponsorships	12,000	16,000	12,000
Allowances	0	(6)	0
Investment Allocation	14,841	7,475	17,392
Miscellaneous	100	5,308	1,000
TOTAL REVENUE	73,154	94,222	98,967
EXPENSE			
Credit Card Fees	0	55	0
Staff Travel	3,206	2,559	3,999
Postage	1,350	1,661	1,350
Printing	2,700	540	400
Newsletter	6,000	8,472	14,800
Membership	2,000	0	2,000
Supplies	50	0	50
Photocopying	520	107	225
Officer Travel	3,000	750	3,000
Meeting Travel	11,000	2,575	11,000
CLE Speaker Expense	1,000	95	1,000
Committees	1,000	399	1,000
Council Meetings	3,000	1,164	3,000
Bar Annual Meeting	2,200	1,378	2,500
Section Annual Meeting	19,000	31,305	32,000
Retreat	3,000	5,964	3,000
Land Use Law Manual	10,000	9,600	13,000
Pubic Interest Committee	500	259	500
Awards	2,500	550	2,500
Scholarships	4,000	0	4,000
Law School Liaison	21,000	26,300	29,000
Dean Maloney Contest	1,000	1,000	1,000
Access to Justice	2,000	0	0
Website	4,000	5,075	4,500
Council of Sections	300	300	300
Misc.	1,000	503	1,000
Operating Reserve	10,835	0	13,845
TFB Support Services	3,022	3,763	3,327
TOTAL EXPENSE	119,183	104,374	152,296
BEGINNING FUND BALANCE	212,019	289,534	248,454
PLUS REVENUE	73,154	94,222	98,967
LESS EXPENSE	(119,183)	(104,374)	(152,296)
OTHER COST CENTER	(5,041)	(2,276)	(4,000)
ENDING FUND BALANCE	160,949	277,106	191,125

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