



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Paul H. Chipok, Chair • Thomas R. Gould, Co-Editor • Jeffrey A. Collier, Co-Editor

Message from the Chair

by Paul H. Chipok

“Life is what happens while you are busy making other plans.” Thank you John Lennon for that observation. As I am writing my first column as chair there is lots of life happening all around us with an economy that is impacting our clients, our regulatory agencies and ourselves. For those professional issues life provides us outside of our plans, each of the substantive committees have established their own listserv which can be used to disseminate information and provide a forum for discourse on subjects particular to that subject area. Contact your committee

chairs to get signed up.

Land Use - Kelly Martinson, kmartinson@sarasotalawfirm.com; Pollution Assessment, Remediation, Management & Prevention - Robert Malinoski, rmalinoski@gunster.com; Water, Wetlands, Wildlife and Beaches - Keith Rizzardi, krizzar@sfwmd.gov.

As we are all endeavoring to do more with less, the Section is striving to provide an alternative method of obtaining CLE on current topics through audio webinar seminars. Check the ELULS website for information on dates and topics. If you

miss the comradery of attendance at the actual seminar, invite some fellow practitioners over for a shared audio webinar experience.

The upcoming year should prove to be interesting with the continuing saga of SB 360, the Amendment 4 vote looming on the November horizon, and the impending EPA Numeric Criteria for Florida Inland Waterways, to name a few. There is plenty for us to plan and even more life to happen around us. Hopefully, the Section and the resources it offers can be of assistance to you.

Florida Case Law Update

by Gary K. Hunter, Jr. & D. Kent Safriet, Hopping Green & Sams, P.A.

Note: Status of cases is as of November 1, 2009

Construction of a term in a deed restriction is not controlled by the definition accorded the term in the local government code. The sole function of the definition of “building” in the Tallahassee Land Development Code is only to demarcate the types of buildings controlled by that code. *Killearn Homes Ass’n, Inc. v. Visconti Family Ltd. P’ship*, not yet published (Fla. 1st DCA September 17, 2009).

Summary judgment granted to Visconti and Lamar by the trial court regarding the interpretation of “building” in a deed restriction was improper. The appellees were subject to a deed restriction that read “no

building shall be erected, placed or altered on said tract until the construction plans and specifications . . . have been approved by the President of Killearn Properties, Inc.” Notwithstanding the deed restriction, appellees erected a billboard without such prior approval.

The appellants challenged the summary judgment ruling, arguing that the term “building” in the deed restriction was ambiguous and susceptible to more than one interpretation. The 1st DCA agreed with the appellants that the term “building” could be interpreted in more than one manner and cited a 1998 Second Circuit opinion that construed the term “building” from the same deed

restrictions more broadly. Therefore, summary judgment was improper.

Moreover, the 1st DCA ruled that

See “Case Law Update,” page 19

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On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of November 3, 2009. Readers are encouraged to advise the author of pending appeals that should be included.

U.S. SUPREME COURT

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, Case No. 09-154. Petition for review of decision by the U.S. Court of Appeals for the 11th Circuit, rejecting challenges to an act establishing lobbyist compensation reporting requirements. 566 F. 3rd 1281 (11th Cir. 2009). Status: Petition denied October 5, 2009.

Stop the Beach Renourishment, Inc. v. DEP, Case No. 08-1151. Petition for review of decision by the Florida Supreme Court concluding 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 (Fla. 2008). Status: Petition granted on June 15, 2009; oral argument held on December 2, 2009.

FLORIDA SUPREME COURT

Florida Homebuilders Association, Inc., et al. v. City of Tallahassee, Case No. SC09-1394. Petition for review of 1st DCA decision dismissing an appeal for lack of standing. 34 Fla. L. Weekly D1096b (Fla. 1st DCA 2009). The appeal was from a summary judgment for the City in connection with a challenge to the City's inclusionary housing ordinance. Among

other things, the plaintiffs allege that the ordinance constitutes a taking and an illegal tax. Status: Petition filed August 3, 2009.

SJRWMD v Koontz, Case SC09-713. Petition for review of 5th DCA decision in *SJRWMD v. Koontz*, affirming trial court order that the District had effected a taking of Koontz's property and awarding damages. 34 Fla. L. Weekly 123a (Fla. 5th DCA 2009). Status: Petition granted September 16, 2009.

Polk County Builders Association, Inc. v. Polk County, Case No. SC09-633. Petition for review of 2nd DCA's decision, affirming a summary judgment finding that County ordinances imposing substantial educational impact fee increases on behalf of the local school board in order to fund costs associated with meeting the class size reduction requirements of Article IX, Section 1(a) did not violate any funding provisions of Article IX, Section 1(a). 34 Fla. L. Weekly D455b (Fla. 2nd DCA 2009). Status: Petition denied September 10, 2009.

Citrus County, Florida, etc. v. Save the Homosassa River Alliance, Inc., et al, Case No. SC09-552. Petition for review of 5th DCA decision concluding that second amended complaint adequately alleges plaintiffs' standing to challenge the County's failure to comply with its comprehensive plan. 33 Fla. L. Weekly D2490c (Fla. 5th DCA 2008). Status: Petition denied July 29, 2009.

Curd v. Mosaic Fertilizer, LLC, Case No.: SC08-1920. Petition for review of 2nd DCA decision affirming the trial court's dismissal of class-action lawsuit for alleged economic damages after contaminated water was released into Tampa Bay, killing fish and crabs. 33 Fla. L. Weekly D2193a (Fla. 2nd DCA 2008). Status: Oral argument held May 6, 2009.

Kurt S. Browning v. Florida Hometown Democracy, Case No. SC08-884. Petition for review of DCA opinion finding that a 2007 state law that allows voters to revoke their signatures on petitions collected in the citizens initiative process violates the Florida Constitution by imposing an unnecessary regulation on citizen initiative process. 33 Fla. L. Weekly D1099b (Fla. 1st DCA 2008). Status: Affirmed June 17, 2009; full opinion to follow at a later date.

Miccosukee Tribe v. SFWMD, Case No. SC09-1817. This case involves a challenge to a bond issue to restore part of the Everglades. Status: Petition filed September 30, 2009.

FIRST DCA

Southern Alliance for Clean Energy v. DEP, and Seminole Electric Cooperative, Inc., Case No. 1D08-4900. Petition for review of DEP final order issuing permits for construction and operation of electrical generating unit. Status: Appeal dismissed for lack of standing on June 25, 2009.

Sierra Club, Inc. v. DEP, and Southern Electric Cooperative, Inc., Case

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

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Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.

No. 1D08-4881. Petition for review of DEP final order issuing permits for construction and operation of electrical generating unit. Status: Appeal dismissed on September 9, 2009.

International Paper Company v. DEP 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 July 31, 2009.

Lowe's Home Centers, Inc. v. DCA, Case No. 1D09-4383. Petition for review of final order of Administration Commission finding that amendments to Miami-Dade Comprehensive Plan are not in compliance. Status: Notice of appeal filed August 31, 2009.

SECOND DCA

Lee County v. DEP and Mosaic, Case No. 2D09-913. Petition for review of DEP final order granting

permits and approvals for Mosaic's South Fort Meade Hardee County Mine. Status: Notice of appeal filed February 27, 2009.

John Falkner v. State of Florida Governor & Cabinet, Case No. 2D08-5998. Petition for review of final order of the Siting Board regarding the transmission line corridors for the Bobwhite-Manatee County 230- kV transmission line. Status: Oral argument set for December 1, 2009.

FIFTH DCA

St. John's Riverkeeper, Inc. v. SJRWMD, Case No. 5D09-1644; *City of Jacksonville v. SJRWMD*, Case No. 5D09-1646. Petition for review of SJRWMD final order granting consumptive use permit to Seminole County for withdrawal of surface water from the St. John's River for public supply and reclaimed water augmentation. Status: Petition filed

May 13, 2009.

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. Status: Remanded, 34 Fla. L. Weekly D1454a (July 17, 2009).

A. Duda and Sons v. SJRWMD, Case No. 5D08-2269. Appeal from SJRWMD final order directing Duda to obtain after-the-fact permit or restore the impacted wetlands. Status: Affirmed in part, reversed in part remanded for additional proceedings, 34 Fla. L. Weekly D2013a (October 2, 2009).

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Department of Community Affairs November 2009 Summary

COMPREHENSIVE PLANNING

DCA and Air Force vs. City of Tampa and Florida Rock, DOAH Case No. 08-4820GM

The Department and Air Force objected to the conversion of a 25 acre parcel adjacent to MacDill Air Force Base's northern boundary from light industrial to commercial mixed use. The Department alleged that the existing land use was compatible with the operations at MacDill, whereas commercial mixed use (allowing both commercial and residential uses) is incompatible due to concerns regarding urban encroachment upon the base.

Urban encroachment upon military bases is a nationwide problem and the Air Force was granted intervention in the proceeding. The Air Force was especially concerned about residential development located only a half mile from the runway at MacDill and would be subject to frequent low flying planes. The parcel subject to the amendment is basically at the

end of one of the runways at MacDill; it is wholly within the "accident potential zone" and the 65db noise contour and is currently being used as a distribution center. The amendment would allow the development of thirty five residential units per acre.

The Department and the Air Force raised concerns that the impact of the high level of expected noise at the site may be unsuitable for residential development and that the potential for aircraft accidents at this site may be unreasonably high and therefore unsuitable for residential development.

The Administrative Law Judge found in favor of the City and landowner on the basis that the surrounding area is largely existing residential that has co-existed with the base for a number of years. The only tangible evidence of negative impacts upon either the base or the surrounding neighborhood is noise complaints which are logged at the base. Despite the noise and safety

concerns raised, MacDill has never suffered a crash and thus the mere potential for an accident was not enough to deem the site unfit for residential development.

The Department and the Air Force have filed exceptions to the Administrative Law Judge's Recommended Order and are currently awaiting a Final Order.

Leseman Family Land Partnership, et al. v. Clay County, et al., DOAH Case No. 07-5755GM, Final Order No. DCA08-GM-320 (Dept. Comm. Affairs 2008)

Clay County adopted an amendment to the future land use map of the local comprehensive plan to redesignate 47.06 acres from rural residential to rural fringe. The Department reviewed the amendment and issued a notice of intent to find it in compliance. Nearby residents (Petitioners) filed a petition for administrative hearing, raising several issues.

continued...

The main argument raised by these Petitioners was with respect to central services. The rural fringe future land use category may only be used within a designated urban service area. As part of this amendment, the County had designated the property as an urban service area. Petitioners argued that designated urban service areas must be served or planned to be served with central services and that the amendment was not in compliance because the site was going to be served by onsite systems. The County's local comprehensive plan, however, provides that "[o]n-site sewerage treatment and disposal systems will be allowed within the Urban Service Area if central sewer is not available." The Final Order rejected this argument and the others raised by Petitioners.

No party appealed the Final Order and the time for so doing has expired.

Carol Runyan, et al. v. City of St. Petersburg, et al., DOAH Case No. 07-2239GM, Final Order No. DCA08-GM-220 (Dept. Comm. Affairs 2008)

The City of St. Petersburg adopted an amendment to the future land use map of the local comprehensive plan to redesignate 17.98 acres from institutional to a combination of residential office retail, residential office general and residential urban. The Department reviewed the amendment and issued a notice of intent to find it in compliance. Nearby residents (Petitioners) filed a petition for administrative hearing, raising several issues.

Petitioners' main contention was that there was no demonstrated land use need for the portion of the amendment that allowed commercial development. This argument is based on the adopted provisions of the City's local comprehensive plan, which provide that "[t]he City has an adequate supply of commercial land use to meet existing and future needs" and "additional commercial acreage is not required to serve the future needs of St. Petersburg." Even with these policies, the City's local comprehensive

plan does contemplate plan amendments to increase the supply of commercial acreage; "Future expansion of commercial uses shall be restricted to infilling into existing commercial areas and activity centers, except where a need can be clearly identified." The local comprehensive plan also encourages mixed-use developments, which will increase the supply of commercial acreage.

The Administrative Law Judge found that the future land use categories employed by this amendment were mixed use and, therefore, the policies providing that there is no need for additional commercial acreage did not apply. The Department rejected these findings. While the future land use categories employed by the amendment allow for several uses, they do not require that there be a mix of uses. In fact, the evidence at hearing demonstrated that the City employs these categories for single-use development. Thus, they were not true mixed use categories.

The Administrative Law Judge found, in the alternative, that if the categories were not mixed use, the amendment site constituted commercial infill. On this ground, the Department's Final Order affirmed the recommendation that the amendment be found in compliance.

No party appealed the Final Order and the time for so doing has expired.

Department of Community Affairs, et al. v. Miami-Dade County, et al., DOAH Case No. 08-3614GM

Miami-Dade County adopted several amendments to the local comprehensive plan for two parcels, referred to as the "Lowe's Parcel" and the "Brown Parcel." The amendments for the Lowe's Parcel would redesignate approximately 21 acres from open space to business and office and approximately 30 acres from open space to institution, utilities, and communications. The Brown amendment would redesignate approximately 42 acres from agriculture to business and office and would require a road extension through the parcel. The amendments for both parcels also include expansions to the urban development boundary.

The Department reviewed the amendments and issued a notice of intent to find them not in compliance. The basic issue raised by the Depart-

ment relates to the expansion of the urban development boundary. The County's local comprehensive plan contains strong policies that govern expansions of the urban development boundary. These policies first require a demonstration of need. If need is demonstrated, the policies prohibit urban development boundary expansions into certain geographic areas, discourage expansions into other areas, and express a preference for expansions into other areas.

County planning staff concluded that there was no demonstrated need to expand the urban development boundary for either parcel in accordance with the local comprehensive plan. The County Commission disagreed and, over the veto of the Mayor, approved the amendments.

The matter proceeded to a final hearing, following which the Administrative Law Judge entered his recommended order. The Administrative Law Judge recommended that the amendments for the Lowe's Parcel be found not in compliance on the basis that no need has been demonstrated and the site is one which the local comprehensive plan discourages expansion of the urban development boundary due to the presence of wetlands. The Administrative Law Judge recommended that the amendments for the Brown Parcel be found in compliance.

On July 28, 2009, the Administration Commission adopted the Administrative Law Judge's findings of fact and conclusions of law in the Second Corrected Recommended Order as modified therein and determined that the Brown Amendment is in compliance and that the Lowe's Amendment is not in compliance. The Commission directed Miami Dade County to rescind the Lowe's Amendment and provide a status report within 60 days of the Final Order on the status of the Lowe's Amendment.

Susan Woods, et al. v. Marion County, et al., DOAH Case No. 08-1576GM

Marion County adopted an amendment to the future land use map of the local comprehensive plan by Ordinance 07-31 to redesignate approximately 395.83 acres from urban reserve and rural land to medium density residential. The Department reviewed the amendment and issued a notice of intent to find it in compli-

ance. Nearby residents (Petitioners) filed a petition for administrative hearing, raising several issues.

One of the issues raised by Petitioners is whether the amendment is supported by a demonstration of land use need. During discovery and preparation for the final hearing, the Department was made aware that it had erred in finding that the amendment was supported by a demonstration of land use need. The Department admitted this error at the final hearing.

The Administrative Law Judge entered a recommended order concluding that the amendment was not supported by a professionally acceptable analysis of land use need. Specifically, the recommended order finds that the analysis submitted in support of the amendment erred in that it used a county-wide analysis, whereas the local comprehensive plan requires a planning district analysis; it used a planning timeframe of 2015, whereas the County's adopted planning timeframe is 2010; and it applies an allocation factor to the total projected need for the jurisdiction (including past need already satisfied by built dwelling units), not just the increment of need from the present to the planning timeframe.

On September 15, 2009, the Administration Commission denied all exceptions to the Administrative Law Judge's findings of fact and conclusions of law with the exception of the Department's exception to finding of fact number 26 which was granted. The Commission found that the FLUM amendment is not in compliance as defined by Section 163.3184(1)(b), Florida Statutes, and that no remedial actions would bring the plan amendment into compliance. The Commission directed the County to rescind Ordinance 07-31 and to provide a report on the status of Ordinance 07-31 to the Commission within 60 days.

RULEMAKING

Florida Land Council, Inc., et al. v. Department of Community Affairs, DOAH Case No. 09-3488RP

The Department has been engaged in rulemaking to implement the "rural land stewardship" statute (Section 163.3177(11)(d), Florida Statutes) for approximately two years. The Department conducted its first

workshop on the proposed rules in June 2007, culminating with a notice of proposed rulemaking in December 2008. This proposal was challenged by the Florida Chamber of Commerce, Florida Land Council, and Florida Farm Bureau. The Department withdrew the proposed rules in light of this challenge, substantially revised the rules, and then again noticed them for adoption. This second proposal was again challenged by the same parties who challenged the first one.

The petition raises numerous issues, including land use need, data and analysis requirements, and the extent to which certain matters may be addressed in land development regulations instead of the local comprehensive plan. The petition also challenges the portion of the existing definition of "new town" (Rule 9J-5.003(80), Florida Administrative Code) that requires new towns to be depicted on the future land use map of the local comprehensive plan.

The final hearing was held on July 14, 2009, and proposed final orders were filed August 14, 2009. The Administrative Law Judge issued a final order on September 14, 2009, dismissing the challenge and holding that the preponderance of the evidence supports a conclusion that the challenged portions of Rule 9J-11.023 do not exceed the Department's grant of rulemaking authority; and the preponderance of evidence supports a conclusion that challenged sections of proposed Rule 9J-5.026 and existing Rule 9J-5.003(80) do not enlarge, modify or contravene the statutes being implemented. Finally, the Administrative Law Judge found that proposed Rule 9J-5.026(3) does not fail to establish adequate standards for the Department.

Proposed Rules

The Department has been engaged in rule development to update Rule 9J-11, Governing the Procedure for the Submittal and Review of Local Government Comprehensive Plans and Amendments; Rule 9J-42, EAR Schedule - to update the schedule for local governments to submit their Comprehensive Plan Evaluation and Appraisal Reports; Rule 9J-5.006 Needs Analysis - to amend the rule to provide greater detail and explanation relating to the statutory requirements that the future land use ele-

ment be based on the amount of land required to accommodate anticipated growth and the projected population of the area.

The Department is also engaged in rule development for Rules 9J-5.006; 9J-5.003; 9J-5.010; 9J-5.013; and 9J-5.019 - to implement the new requirements in Ch. 2008-191, L.O.F., (CS/HB 697), Ch. 9J-5 is to be amended to establish minimum criteria to be used in reviewing comprehensive plans to determine whether they comply with the new requirements of Ch. 2008-191, L.O.F., regarding energy efficient land use patterns accounting for existing and future electric power generation and transmission systems, greenhouse gas reduction strategies, strategies to address reduction in greenhouse gas emissions from the transportation sector, factors that affect energy conservation, depicting energy conservation in the future land use map series, energy efficiency in the design and construction of new housing, and the use of renewable energy resources.

Ethics Questions?



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DEP Update

by West Gregory

Amendments to Solid Waste Management Facilities Rule 62-701: The Department amended Chapter 62-701, Florida Administrative Code (F.A.C.), entitled Solid Waste Management Facilities. The chapter contains regulations for a wide variety of solid waste facilities including landfills, construction and demolition (C&D) debris disposal facilities and waste processing facilities. A number of technical and substantive changes were made to address the management and operation of C&D disposal facilities, deployment of spotters at landfills, remediation of contamination at permitted facilities, and changes in landfill permit and construction processes. Below is a list of notable changes:

- The proper management of wood treated with chromated copper arsenate (CCA) was specifically addressed.
- The exemption for industrial byproducts was updated to be consistent with recent changes in the statutes.
- The exemption for beneficially using road construction debris in the construction of other roads was extended to include street sweepings, ditch scrapings, shoulder scrapings and catch basin sediments provided these materials are not contaminated.
- The prohibition of storage or disposal of solid waste within 1000 feet of a community water supply well was deleted to be consistent with the Department's well head protection rule.
- Fees were updated to be more consistent with the types of facilities currently regulated.
- Language on emergency preparedness and response was added to clarify the requirements for emergencies such as fires or natural disasters.
- Language was added to make it clear that professional geologists are allowed to conduct parts of the geotechnical site investigation they are qualified to perform.
- The rule was amended to state that Chapter 62-780, F.A.C. must be used to conduct corrective actions for water quality violations at solid waste

management facilities, and clarifies which parts of that Chapter are applicable at permitted facilities.

- The odor remediation plan language was strengthened to require immediate steps be taken when objectionable odors are confirmed off-site, such as increasing initial cover, reducing the size of the working face, or ceasing operations.
- Changes to the rule make it clear that long-term care also includes controlling erosion, filling subsidence areas, complying with the ground water monitoring plan and maintaining the stormwater system. Clarification was provided to explain what an "ineffective" closure means if the Department decides to extend the LTC period because it has determined the closure is ineffective.
- The applicability section of this rule was revised to make it clearer which facilities are considered waste processing facilities. Facilities used for temporary storage of road maintenance byproducts such as street sweepings, ditch and shoulder scrapings and catch basin sediments are exempted from the need to get a waste processing facility permit provided certain requirements are satisfied.
- Above ground disposal units will be required to control the flow of stormwater off the disposal unit at closure by using techniques such as reverse sloping benches and down slope drainage ways.
- The requirements for financial assurance of these facilities was clarified, including adding the provision that the permittee may delay submitting proof of financial assurance for a solid waste disposal unit that has not received any waste provided certain conditions are followed.

ACF

In an important decision rendered on July 17, 2009, Judge Magnuson ruled that the Corps' current operations of the ACF reservoir system in furtherance of water supply storage agreements with Georgia local governments effected a major operational change, requiring Congressional approval under the Water Supply Act, which had not been received.

Specifically, the Judge agreed with Florida and Alabama that the Corps lacked legal authority for converting the purposes of the dam, stating:

Having thoroughly reviewed the legislative history and the record, the Court comes to the inescapable conclusion that water supply, at least in the form of withdrawals from Lake Lanier, is not an authorized purpose of the Buford project. Therefore, if the Corps's actions to support water supply constitute "major structural or operational changes" or "seriously affect" the project's authorized purposes, the Corps was required to seek Congressional approval for those actions and its failure to do so renders the actions illegal.

Judge Magnuson stayed the case for three years, during which time the parties are permitted to operate at current water supply withdrawal levels, but cannot increase withdrawals beyond those levels without agreement of all the parties. Under this decision, if, after the three-year period, the Corps and the States cannot either reach agreement regarding, or secure Congressional authorization for, water supply storage in Lake Lanier, such storage will revert back to "baseline" operations of the mid-70s.

Following the Court's July 17 decision, Georgia and the Georgia water supply providers filed a motion for entry of a final judgment in the Georgia 1 case (Georgia's challenge to the Corps' denial of its 2001 request for reallocation of 34% of conservation storage to water supply), which the Court denied. Further, the Georgia Parties filed a notice of appeal to the Eleventh Circuit Court of Appeals from the entirety of the July 17, 2009 Order, arguing that the Order was an injunction.

Florida and Alabama filed a joint motion to dismiss with the Eleventh Circuit, arguing that there is no basis for appellate jurisdiction at this stage of the proceedings. In support of their motion, Florida and Alabama later filed a copy of Judge Magnuson's order denying the Georgia parties' motion for entry of final judgment,

in which the Court both stated that “[n]o injunctive relief was ordered or intended by the Court’s July 17, 2009, Order,” and indicated that the Court “fully anticipates that the parties will resolve their differences within the three-year stay.” Consistent with this view, at a Tri-State Delegation Water Meeting held on October 28, the legislative delegations from Alabama, Florida and Georgia agreed that the multi-state water dispute is a matter for the Governors of the three States to resolve.

Additionally, shortly after entering the July 2009 Order, Judge Magnuson issued an order addressing the

schedule for Phase 2 of the litigation, involving challenges to the Corps’ Revised Interim Operations Plan and the corresponding United States Fish and Wildlife Service Biological Opinions. Under the scheduling Order, summary judgment briefing will begin no later than December 2009.

Surfrider Foundation, et al. v. Town of Palm Beach and DEP (DOAH Case # 08-1511)

The Town of Palm Beach applied to the DEP for a permit and authorizations necessary to construct a beach restoration and dune restoration project along a portion of the shore-

line of Palm Beach Island, known as Reach 8. The DEP issued a Consolidated Notice of Intent to Issue a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (JCP) along with a water quality variance for an extended turbidity mixing zone. The Surfrider Foundation, Snook Foundation, and several individuals challenged the intent to issue. After the challenge was referred to DOAH, the City of Lake Worth and the Eastern Surfing Association intervened. An ALJ from DOAH conducted the final hearing in the Fall of 2008 and subsequently issued his RO in March of 2009. In

continued...



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DEP UPDATE

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the RO, the ALJ recommended that the DEP deny the Town's application for a JCP and variance. Based on the extensive factual finding, the ALJ ultimately concluded that the Town did not prove that it was entitled to the JCP. The ALJ further concluded that the Town "would have been entitled to a variance from the turbidity water quality standards," however, based on his recommendation to deny the permit, the request was now moot. The ALJ also recommended that "due to the vastly lower volumes of fill involved, the final order may authorize the nourishment of the Reach 8 dunes, apart from those within Lake Worth's municipal boundaries, in accordance with the dune template approved by the permit, without any mitigation." The Final Order, issued in July 2009, adopted the ALJ's RO, except for some legal conclusions, and rejected his finding and alternate recommendation for approval of a dune-only restoration along Reach 8.

Hancock Bridge Marina, LLC v. DEP and FWC (DOAH Case # 08-3984)

Hancock Bridge Marina petitioned for a formal administrative hearing to challenge the Department's denial of an environmental resource permit (ERP) and sovereign submerged lands lease to expand an existing marina by adding an additional 198 dry slips in one phase and another 154 dry slips in a second phase. The Florida Fish & Wildlife Conservation Commission (FWC) determined the proposed project would pose adverse impacts to manatees in that area of the Caloosahatchee River. Based on FWC's determination, the Department denied the ERP and sovereign submerged lands authorization requests for failing the applicable public interest tests. FWC was a party to the challenge because it issued a federal consistency objection pursuant to its authorities in the federally-approved Florida Coastal Management Program, which, per 373.428, Fla. Stat., requires the ERP to be denied. The final hearing occurred February 24 and 25, 2009, in Ft. Myers. A Recommended Order

supporting the denial was issued May 15, with the ALJ determining that "the more credible and persuasive evidence supports a conclusion that [Hancock Bridge Marina] has failed to provide reasonable assurances that the project will not violate the applicable statutes and rules." The Final Order was issued by the Department on August 13, adopting the Recommended Order in its entirety. Time for appeal has expired.

Bernard Montgomery Myers v. DEP and BOT (DOAH Case # 09-2928)

Petitioner filed a rule challenge in response to the Department's Notice of Violation assessing penalties and ordering corrective actions for numerous proprietary and regulatory violations associated with Petitioner's construction of a boathouse with a second-story apartment on the sovereign submerged lands of Lake Talquin. The Petitioner (Respondent in the enforcement case) also petitioned the Notice of Violation (enforcement action). On August 24, 2009, DOAH issued a Final Order denying Petitioner's Section 120.56 rule challenge alleging the Board's rules prohibiting non-water dependant uses in Rules 18-14.003 and 18-21.004 are invalid exercises of delegated legislative authority and challenging a specific permit condition prohibiting fish cleaning stations as an unadopted rule. The Final Order specifically concludes that the Petitioner failed to prove that: 1) there is no specific rulemaking authority for the challenged parts of Rules 18.14.003 and 18-21.004; 2) the challenged parts enlarge, modify, or contravene the cited provisions of law implemented; 3) the challenged parts are vague, lack adequate standards for Board decisions, or vest unbridled discretion in the Board; 4) the challenged parts are arbitrary or capricious; 5) the specific permit condition prohibiting fish cleaning stations is an unadopted rule as defined in Chapter 120. The Petitioner filed a notice of appeal on September 22, 2009. The enforcement action is set for final hearing on November 12, 2009.

DEP v. Empire Core Supply LLC, Tim Engels, and Christine Engels

This case involves soil and ground-

water contamination, as well as a number of operational violations, at the former site of an auto salvage yard. A trial was held in circuit court in Sanford on June 29th, at which the judge announced a ruling in favor of the Department. The ruling includes injunctive relief requiring defendants to conduct site assessment and remediation in accordance with Rule 62-780, as well as \$80,000 in civil penalties against each defendant.

Port Dolphin

In March 2007, Port Dolphin Energy, LLC, submitted a Deepwater Port Application to the Maritime Administration and the U.S. Coast Guard to construct an offshore liquid natural gas facility in federal waters 28 miles southwest of Tampa Bay. The Governor of an adjacent state has 45 days from the last public hearing (following issuance of final environmental impact statement) to approve/disapprove a proposed deepwater port before the license is issued (33 U.S.C. 1508). The public hearing for the Port Dolphin project was held on July 28th. The Governor approved the project on September 11th and placed 13 conditions on the project including a condition that the Department, FWC, and Port Dolphin sign the memorandum of agreement within five working days of September 11th. The Department, FWC and Port Dolphin signed the memorandum of agreement which set forth special terms and conditions for the project to move forward.

Of Note

The 28th Annual International Submerged Lands Management Conference was held via a webinar series in the fall of 2009. The Florida Coastal Management Program hosted the series which consisted of 6 sessions entitled Emerging Policies and Plans for Offshore Energy Development, The Evolving Public Trust Doctrine, Working Waterfronts, The Questionable Future of Water Dependency, Wetlands Restoration/Climate Change Adaptation, and Marine Spatial Planning. To view the lectures got to <http://www.submergedlandsconference.com/>. Free CLE credits are available for three of the webinars; see the website for more information.



THE
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The Florida Bar Continuing Legal Education Committee,
the Environmental and Land Use Law Section and the Real Property, Probate
and Trust Law Section present

Environmental and Land Use Considerations for Real Estate Transactions

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation and Webcast: Friday, January 29, 2010

Tampa Airport Marriott • 4200 George J. Bean Parkway
Tampa, FL 33607 • 813-879-5151



Course No. 0969R

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

8:30 a.m. – 8:35 a.m.

Opening Remarks

Nancy Stuparich, Arcadia

8:35 a.m. – 9:00 a.m.

Case Study Introduction

David W. Childs, Tallahassee

9:00 a.m. – 9:45 a.m.

**Real Estate Contract Issues: Due Diligence Timeline,
Checklist, & Required Disclosures**

Barry B. Ansbacher, Jacksonville

9:45 a.m. – 10:30 a.m.

Environmental Due Diligence

Carl Eldred, Tallahassee

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:25 a.m.

**Money Money Money! Taxes, Entity Selection, &
Insurance**

Jay D. Mussman, Boca Raton

Andrea J. C. Northrop, Jupiter

11:25 a.m. – 12:00 p.m.

Alcoholic Beverages and Adult Entertainment Regulations

Louis J. Terminello, Miami

12:00 p.m. – 1:15 p.m.

Lunch (on your own)

1:15 p.m. – 2:00 p.m.

NPDES Permitting: Stormwater, Wastewater, & Nutrients

Terry Cole, Tallahassee

2:00 p.m. – 2:45 p.m.

**Comprehensive Planning & Impact Fees Under the New
SB 360 Paradigm**

Vinette D. Godelia, Tallahassee

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 3:45 p.m.

Zoning, Citizen Challenges, and Appeal Rights, Oh My!

Kelly A. Martinson, Sarasota

3:45 p.m. – 4:30 p.m.

Developments of Regional Impact

Robert C. Apgar, Tallahassee

WEBCAST CONNECTION

All registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

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Register me for the "Environmental and Land Use Considerations for Real Estate Transactions" Seminar

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LOCATION (CHECK ONE):

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January 29, 2010
(317) Online

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LIVE REGISTRATION (CHECK ONE)

- Member of the Environmental & Land Use Law Section or the Real Property, Probate & Trust Law Section: \$180 \$210
- Non-section member: \$205 \$235
- Full-time law college faculty or full-time law student: \$105
- Persons attending under the policy of fee waivers: \$0
Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee waivers are only applicable for in-person attendees.

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Related Florida Bar Publications can be found at <http://www.lexisnexis.com/flabar/>

Law School Liaisons

Barry University School of Law

On October 23, 2009, Barry University School of Law hosted the first annual Environmental Justice Summit: *Serving the Underserved: Improved Representation for Environmental Justice Communities*. Thanks in part to an ELULS grant, the Environmental Justice Summit introduced an interested audience to the profound suffering of impacted communities. The Summit presented three panels illustrating the challenges faced by impacted communities. The keynote speaker was Lois Gibbs, Executive Director of the Center for Health, Environment, and Justice. During the late 1970s, Gibbs lived near Love Canal where she discovered that her children's school sat on top of a 20,000 ton toxic chemical dump in Niagara Falls, New York. She achieved relocation for her community in spite of officials insisting the toxic chemicals were not causing the high birth defect rates, miscarriages, cancers, and other severe health problems affecting the community. In 1980, President Jimmy Carter delivered an Emergency Declaration that moved families from this hazardous area. Lois Gibbs offered insight and ideas to the law students, impacted community members, attorneys, academics, and local residents in attendance.

The first panel considered the client's perspective from community members who live with environmental justice issues. Dr. Billy Ward, from Tallevast, and Wanda Washington, the vice-president of Tallevast's community group FOCUS (Family Oriented Community United Strong), were the first speakers. Dr. Ward spoke about the fact that government officials had knowledge of the contamination in the community's groundwater three years before the officials informed the residents. Dr. Ward also discussed how FOCUS worked to create the Tallevast Rule, section 376.30702, Florida Statutes (2009), which requires the responsible party to inform the residents regarding a contamination issue within a specified time.

Barry Gray also spoke during the first panel. Mr. Gray is the Director of the Greater Sylvania Heights Front Porch Community – he is also a resi-

dent of a contaminated community. Mr. Gray has led efforts to create the Neighborhood Action Plan that will produce long-term improvements in the Greater Sylvania community in the Lovejoy/Fort Walton Beach area. Linda Lee rounded out the first panel. She is a farm-worker from Apopka, Florida who worked in the Lake Apopka area for years. She discussed her exposure to pesticides during harvesting activities. She also suggested that farm-workers are suffering from severe illnesses but lack sufficient help to create a cleanup process or institute biomonitoring studies to determine the level of pesticides in their bodies.

The second panel dealt with the attorney's perspective and offered insight from a non-profit attorney, a Florida legal services attorney, and a tort attorney. This panel explored various environmental justice cases, with which the attorneys had involvement and succeeded in seeking recovery for the contaminated communities. Matt O'Malley, from WildLaw, has primarily worked on Environmental Justice issues alongside various communities throughout Florida as part of WildLaw's Assisting Communities with Environmental Solutions (ACES) program. Mr. O'Malley discussed his past cases, tools Environmental Justice attorneys can utilize, and various challenges facing EJ attorneys.

Deborah Schroth also presented during the second panel. She currently works for the Department of Children and Families in Florida, but previously worked as Senior Staff Attorney with Florida Legal Services, Inc. ("FLS"). While employed by FLS, Ms. Schroth assisted on an environmental justice case which affected a large portion of the Jacksonville community. Ms. Schroth offered insight on how it is possible to get involved in environmental law without being an environmental lawyer.

Van Kirk McCombs II was the second panel's third presenter. Mr. McCombs presented an overview of an Environmental Justice case he worked on, the issues he faced, and how he confronted the case-related obstacles and attained a desirable outcome. The

attorney panel was an important addition to the Summit because it offered the members of impacted communities an opportunity to understand that there is hope for their friends and families residing in contaminated neighborhoods.

The third panel presented the collaborator's perspective, offering an academic and technical viewpoint on Environmental Justice issues. Timothy C. Varney, PhD, CIH, CHMM, PG, Principal, ENVIRON of Tampa, Florida offered a technical and scientific perspective of environmental justice cases. His work has included exposure assessment and risk characterization for biological, chemical, and physical agents in both ambient and indoor settings.

Jeannie Economos, who also presented on the third panel, is the Pesticide Health & Safety Project Coordinator and member of the Farm-worker Association of Florida (FWAF). She works throughout the state of Florida, attempting to assist farm-workers who are suffering from pesticide exposure and who have contracted life altering diseases. She also conducts farm-worker trainings and participates in local, state, national, and international coalitions and collaborations for farm-worker rights, health, and safety.

The final panelist, Joan Flocks, M.A., J.D., is the director for the Social Policy Division at the Center for Governmental Responsibility at the University of Florida College of Law. Ms. Flocks focuses her current research on inequities in natural and built environments. In this respect, she studies low-income housing, pesticide exposure of farm-workers, and outreach to Superfund communities.

Through the panelists' insight and roundtable discussion, Summit participants created working plans towards educating citizens on how to protect themselves and their families from the hazards in their backyards, affecting their homes and their health. In sum, the Summit brought awareness and hope to survivors of environmental hardships and set the stage for follow-up efforts to benefit these communities and our planet.

Law School Liaisons continued....

Nova Southeastern University: Annual Update

by Andrew L. Carter, J.D. Candidate 2011 and Richard Grosso, Professor

The Nova Southeastern University Shepard Broad School of Law's Environmental Law Society and environmental program has continued to offer its students a diversity of educational, guest speaker, and clinical practice opportunities, as well as several opportunities to experience south Florida's valuable ecosystems first hand. Among other highlights:

- This summer, *pro bono* law students Cristen Mercer, Michael Braunschweig, Jonathan Taylor, and Rebecca Knox Public Interest Law Fellow Emily Helmick worked at the Everglades Law Center, Inc. and were immersed in litigation relating to

local development orders granting mining approval, urban expansion comprehensive plan amendments, and policy advocacy concerning the Everglades and the Florida Keys. They received significant hands-on experience including interviewing and preparing expert witnesses, drafting affidavits, motions and legal memoranda, strategizing with clients, as well as preparing for and attending court hearings.

- The Fall 2009 Environmental and Land Use Law Clinic class includes Darren Ayoub, who is currently undertaking an externship with the Department of Environmental Protection in Tallahassee, and Justin Ortega, Ellie Engle Dykhne, Sarah Morgan Hayter and Emily Helmick, who are interning at the Everglades Law Center, Inc. The interns at the in-house Everglades Law Center are working full-time on several legal actions, including development order and comprehensive plan amendment challenges, at both the trial and appellate level, relating to the Keys and Everglades.

- Throughout the summer and fall, *pro bono* students and interns took advantage of several opportunities to observe and participate in quasi-judicial hearings, comprehensive plan amendment adoption hearings, and governing board meetings of the South Florida Water Management District, and Miami-Dade and Palm Beach County. A highlight of the Fall 2009 Semester intensive training course for the Clinic students was a field trip to Storm Water Treatment Area 1 East in the Everglades which included a series of lectures and a tour by high-ranking officials at the South Florida Water Management District.

- Among their first actions taken this fall semester, NSU law students along with students from NSU's Oceanographic Center decided they would not stand on the sidelines while the trash ruins their favorite beach, John U. Lloyd Beach State Park. They worked with Broward

County to organize a beach cleanup, and by doing so not only improved their local beach, they became partners in an international effort restore the health of our oceans and change destructive behaviors. The NSU cleanup corresponded with the 24th Annual International Coastal Cleanup, created by The Ocean Conservancy, a nonprofit environmental advocacy group based in Washington D.C.

- NSU welcomed again Louise Caro, a toxic tort attorney working at Legal Aid of Broward. Ms. Caro shared with a group of south Florida law students her knowledge gained while representing Florida residents who have been exposed to environmental contaminants such as arsenic, lead, and dioxin while living in close proximity to old landfills and incinerator sites, Superfund sites, and other contaminated sites.

- A group of NSU law students continued their tradition of learning about environmental issues facing Florida's marine ecosystems first hand while sailing and snorkeling in the Key Largo's John Pennekamp Coral Reef State Park. These students swam over Florida's coral reefs and witnessed the diverse life that depends upon them.

- NSU environmental law students represented their school and passion for the environment at the annual NSU Family and Friends Day celebration. These students taught the participants about sustainable food by providing some for the event. The food served was part of a growing environmental movement to eat locally to reduce our carbon footprint.

- Early this month, NSU law students took part in an excursion with the staff of Biscayne National Park for an environmental cleanup event. They canoed into the mangroves of Biscayne Bay, helping to ensure that the bay's beauty endures by collecting trash polluting its waters. Students learned of their particular importance for coastal flood prevention and providing fisheries habitat.

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Stetson University College of Law: Environmental Law Activities and Accomplishments

Stetson University College of Law continues its commitment to environmental education and service from the local to the global scale. Stetson's environmental programs are coordinated through its **Institute for Biodiversity Law and Policy**. Recent activities include the following:

Facilitating the designation of Corkscrew Swamp Sanctuary as a Wetland of International Importance: The United States is one of 159 countries that is a party to the Ramsar Convention, a treaty devoted to wetland conservation. The Ramsar Convention requires its parties to designate areas as "Wetlands of International Importance," also known as Ramsar sites. In October, **Corkscrew Swamp Sanctuary**, located in Naples and the largest remaining stand of virgin bald cypress in North America, **was listed as the 25th Ramsar site in the United States**. Two Stetson alumni, Ezequiel Lugo and Kristine Jones, played a significant role in the designation process. As students, they worked with the Audubon Society (the owner of the site) to draft the Ramsar Information Sheet, which became the basis for the designation application. Corkscrew Swamp Sanctuary joins Everglades National Park, Pelican Island National Wildlife Refuge, and (a portion of) Okefenokee National Wildlife Refuge as Florida's Ramsar sites. An on-site ceremony is planned for mid-February.

Contributing to worldwide wetland conservation efforts: In the summer, Professor Royal C. Gardner and students Stephanie Broad, Leah Ellington, and Noelle Nasif provided comments to the Rwanda Environment Management Authority (REMA) on a **draft Rwandan Marshlands Law**. The bill, which is scheduled to come into force by the end of 2009, governs the use and management of 860 Rwandan marshlands (10.6 percent of the country's total surface area) and incorporates the Ramsar principle of wise use of wetlands. REMA and the Ramsar Secretariat thanked Stetson for its contributions.

In September, Professor Gardner

presented for two days at a **Beijing Wetland Legislation International Workshop** in China. Dr. Cui Lijuan, China's top wetland scientist, organized the workshop, which brought together nine different government departments that work with various aspects of wetlands. The goal of the workshop was to explain the importance of wetlands and the need for wetland protection legislation in Beijing.

In October, Professor Gardner served as an instructor at the first **National Training Course for Canadian Ramsar Site Managers** at Creston Valley, British Columbia. Part of the course was devoted to discussing the role and value of the U.S. National Ramsar Committee (a group of NGOs, which includes Stetson, that support the goals of the Ramsar Convention) to help decide whether Canada should establish a similar committee. One of the outcomes of the course was a commitment to create such a national committee.

In November, Professor Paul Boudreaux presented at and participated in a scoping session of **World Delta Dialogues** (WDD) at the Royal Netherlands Embassy in Washington, D.C. WDD, which was created by America's WETLAND Foundation in cooperation with the Royal Netherlands Embassy and The Nature Conservancy, seeks to identify best practices and find comprehensive strategies for creating sustainable deltas.

Teaching developing areas of environmental law: During academic year 2009-2010, the Institute for Biodiversity Law and Policy is conducting an **Ecosystem Banking Workshop**, a voluntary enrichment program for students. Over the course of the year, the students will examine market-based approaches to restoring wetlands, conserving endangered species habitat, improving water quality, and reducing greenhouse gas emissions. Approximately twenty students are participating, and the workshop will culminate with student case studies and presentations in the spring. One of the goals of the workshop is to serve as a feeder program for in-

ternships with regulatory agencies, mitigation companies, and environmental groups.

Producing scholarship that makes a difference: In Winter 2009 the **Stetson Law Review** produced a special issue devoted to biodiversity protection and mitigation. A particular focus was the 2008 EPA-Corps of Engineers regulation on compensatory mitigation for impacts to aquatic resources. One of the impetuses for this federal regulation was a report by the National Research Council (NRC) Committee on Mitigating Wetland Losses. The special issue opens with a critique of the new regulation by nine former NRC committee members (including Professor Gardner). Other contributors commenting on the new regulation include academics, counsel for the National Mitigation Banking Association, representatives of the National Wildlife Federation, and an experienced land steward.

Stetson professors tie their scholarship to real world issues. For example, an article by Professor Theresa Pulley Radwan and Professor Gardner in the November-December 2009 issue of the **National Wetlands Newsletter** ("Corporate Shell Games: LLPs, LLCs and Responsibility for Mitigation Sites") offers advice to wetland regulators about the legal responsibility of various business entities (or lack thereof) for the long-term management and stewardship of mitigation sites.

Stetson also continues to serve 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 attorneys, regulators, and scientists.

Creating a dialogue about environmental challenges: Each semester, the Biodiversity Institute sponsors several **Biodiversity Lectures**, which are free and open to the public. The Fall 2009 lecturers were St. Petersburg Times reporter Craig Pittman, author of *Florida's Vanishing Wetlands*; Sheri Lewin, immediate

continued....

LAW SCHOOL LIAISONS

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past president of the National Mitigation Banking Association; and George Dennis, Trust Resources Supervisor for the U.S. Fish and Wildlife Service.

Stetson participated along with four other Tampa Bay area campuses in a **free public forum addressing sustainability** in September. Academic community leaders gathered to discuss how higher education institutions can model ways to combat global warming and educate students and others about the environment. Leah Ellington, member

of Stetson's Student Bar Association "Go Green" Committee and Professor Lance Long participated as panel speakers. Stetson's "Go Green" Committee facilitates a number of awareness campaigns on campus to educate staff, students and faculty about issues affecting the environment including public transportation options, recycling opportunities, water conservation and plastic water bottle waste.

Spring 2010 events: Mark your calendars for the **Stetson International Environmental Moot Court Competition** and the **International Wildlife Law Conference**, which will be held together at Stetson's Gulfport campus March 11-14, 2010.

We expect teams from China, India, Ireland, Latin America, North America, Southeast Asia, and Ukraine to participate in the finals. This year's moot problem involves a conflict between oil exploration and beaked whales. The wildlife law conference will have sessions on animal welfare considerations in the marine context, wildlife as food, the evolution of CITES, and procedural mechanisms for protecting wildlife. Moot court participants will be able to attend the conference, and conference attendees will have the opportunity to judge the moot. For more information about the conference, visit www.law.stetson.edu/conferences or email gardner@law.stetson.edu. We hope you can join us!

University of Florida Update: An Active Spring Schedule

As the fall semester draws to a close, we wanted to share with you the busy spring semester schedule of environmental and land use law programs at UF. We welcome your participation. Please visit our website at www.law.ufl.edu/elulp or contact elulp@law.ufl.edu for more information on any upcoming events.

UF will host its two annual environmental and land use law related conferences this spring — the Richard E. Nelson Symposium and the Public Interest Environmental Conference — in addition to hosting six visiting lecturers for the spring Environmental Speaker Series. Brief descriptions of each of these events follow.

Richard E. Nelson Symposium in Local Government Law

Date: Friday, February 12, 2010

Location: UF Hilton, Gainesville FL

Topic: *Local Government Liability Under Federal Law: Regulating the Sacred and the Profane*

Description:

The Ninth Annual Richard E. Nelson Symposium will once again bring together a distinguished group of national and state experts to explore the potential liability of local government

under federal constitutional and statutory law. Presentation topics include First Amendment problems posed by the land use regulation of adult business, challenges posed to zoning authorities by the Religious Land Use and Institutionalized Persons Act (RLUIPA), and constitutional pitfalls involved in crafting and enforcing residential restrictions for sex offenders. More and more landowners, businesses, and individuals are "making a federal case out of" the enforcement of regulations of land use, institutions, and people in these and other problematic areas, which means that local government and land use attorneys need to be up-to-date on the latest modes and theories of attack and defense.

Scheduled presenters include Ashira Ostrow, Associate Professor, Hofstra Law School; Asmara M. Tekle, Associate Professor, Thurgood Marshall School of Law, Texas Southern University; Alan C. Weinstein, Associate Professor, Cleveland-Marshall College of Law and Maxine Goodman Levin College of Urban Affairs, Cleveland State University; Franklin Zemel, esq., Arnstein and Lehr, Fort Lauderdale; Marie Hartman, esq., City

Attorney, Daytona Beach; Steven J. Wernick, esq., Bilzin Sumberg, Miami; Tara Nelson, J.D. Candidate, University of Florida Levin College of Law; Dwayne Robinson, J.D. Candidate, University of Florida Levin College of Law; and Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law.

This is the ninth symposium honoring Richard E. Nelson — who served with distinction as Sarasota County attorney for 30 years — and Jane Nelson, two loyal UF alumni who gave more than \$1 million to establish the Richard E. Nelson Chair in Local Government Law, which sponsors the annual event. Their support of the Levin College of Law's Environmental and Land Use Program has been key to the program's success and national recognition for excellence.

Registration and Information: Contact Barbara DeVoe at devoe@law.ufl.edu.

Public Interest Environmental Conference

Date: Thursday, February 25 - Saturday, February 27, 2010

Location: UF Levin College of Law
Topic: *Bringing it All Back Home: Leadership, Land Use and Local-nomics*

Description:

This year’s conference will focus on local solutions to our environmental challenges, emphasizing the power of local environmental leadership, the potential of innovative local land use tools, and the promise of place-based economics and agriculture (“local-nomics”). Tracks on these three topics will include panels on: “re-greening” the urban fabric; regulatory and planning hurdles for the local food movement; sustainable agriculture and environmental product certifications; incorporating sustainability into comprehensive planning; coastal communities, sea level rise and ecosystem migration; how legal and business professionals can encourage sustainability while satisfying ethical duties to clients; case studies of the “ripple effect” that local conservation leadership can generate, and the evolving role of environmental journalism in local conservation efforts. In addition, a workshop on Saturday organized by the Public Interest Committee of the ELULS will focus on the Nuts and

Bolts of Local Public Interest Advocacy. A second workshop geared for students and young professionals will offer tips and practical skills to help in Cultivating the Next Generation of Environmental Leadership.

This year, the PIEC is proud to present two distinguished keynote speakers: Julian Juergensmeyer and Bill Belleville. Julian Juergensmeyer, a professor of environmental law for thirty years at the University of Florida Levin College of Law, will kick off the conference, speaking at the reception on Thursday, February 25. Professor Juergensmeyer is now Ben F. Johnson Chair in Law at Georgia State University College of Law and Co-Director of the Center for the Comparative Study of Metropolitan Growth. Bill Belleville, keynote speaker at the Friday evening banquet, is an award-winning environmental author and documentary filmmaker and resident of Sanford, Florida. He has written five books, including *River of Lakes: A Journey on Florida’s St. Johns River* and *Losing It All to Sprawl: How Progress Ate My Cracker Landscape*. Other confirmed plenary speakers include Dr. Michael Rosenzweig, Professor of Ecology &

Evolutionary Biology, University of Arizona, Author “Win-Win Ecology.”

The PIEC is co-sponsored by the Public Interest Committee of the ELUL Section.

For more information, visit www.law.ufl.edu/piec. A complete agenda and registration information will be available online by early January. To request updates as more information is available, please contact elulp@law.ufl.edu.

2010 Environmental Speaker Series

The 2010 Environmental Speaker Series will bring six outstanding speakers from around the country to UF to talk on topics related to *Dimensions of Sustainability*. ELUL Section members are invited to join UF faculty and students at all seminars. Because space is limited, please contact Lena Hinson at elulp@law.ufl.edu to reserve a seat. All presentations are on Thursdays, 3-5 pm in the Faculty Dining Room, Bruton-Geer Hall. The Environmental Speaker Series is made possible by support from Hopping Green & Sams, P.A., and Lewis Longman & Walker, P.A.

All Sessions are on Thursdays 3:00 – 5:00 pm	2010 UF Environmental Speaker Series Speaker and Topic
Jan. 21	Judd Snierison Assistant Professor of Law University of Oregon Law School Visiting Professor, UF Law 2009-2010 <i>Topic: Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance</i>
Jan. 28	David Wilcove Professor of Ecology and Evolutionary Biology and Public Affairs, Woodrow Wilson School, Princeton University Director, Program in Environmental Studies <i>Topic: The Case of the Killer Potato Chip: Oil Palm Agriculture and the Loss of Biodiversity in Southeast Asia</i>
Feb. 4	Robert Martineau Partner and Regulatory and Environmental Practice Group Chair Waller Lansden Dortch & Davis <i>Topic: The Evolution of Environmental Practice: From Regulation to Sustainability</i>
Feb. 11	Doug Kysar Professor of Law Yale Law School <i>Topic: TBA</i>
March 18	Roberta Mann Professor of Law, University of Oregon Law School <i>Topic: The Water-Energy Nexus and Tax Policy</i>
March 25	Bryan Norton Distinguished Professor, Georgia Tech School of Public Policy <i>Topic: Approaches to Understanding and Measuring Sustainability</i>



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

Environmental and Land Use Law Audio Webinar Series

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Dates: December 17, 2009; January 14, 2010; February 18, 2010; March 25, 2010; and June 3, 2010

Course No. 0867R

The Florida Bar Environmental and Land Use Law Section is pleased to announce this 2009-2010 audio webinar series. Over the course of the next seven months, we will provide an easy and affordable manner to earn CLE credits (including an ethics credit), listen to presentations on environmental and land use hot topics by some of the top lawyers in the state, all from the comfort of your home or office. There is a discount for ordering the entire series.

Thursday, December 17, 2009

Endangered Species Act Update

Audio Webinar (12:00 noon – 1:00 p.m.)

*Keith W. Rizzardj, South Florida Water Management District
Michelle Diffenderfer, Lewis Longman & Walker, P.A.*

Thursday, January 14, 2010

Transportation Mobility Fees: Are We on the Right Road?

Audio Webinar (12:00 noon – 1:00 p.m.)

*Charles R. Gauthier, Department of Community Affairs
Cari L. Roth, Bryant Miller Olive*

Thursday, February 18, 2010*

Pre-Session Legislative Ethics

Audio Webinar (12:00 noon – 1:00 p.m.)

*E. Jason Vail, Senate General Counsel
Julia Cobb Costas, Florida Commission on Ethics
Kathy Baughman McLeod, Bryant Miller Olive*

Thursday, March 25, 2010

Addressing the Finding of Contamination While Performing Due Diligence in Florida

Audio Webinar (12:00 noon – 1:00 p.m.)

*Jonathan E. Shaw, Golder Associates Inc.
Robert A. Malinoski, Gunster, Yoakley & Stewart, P.A.*

Thursday, June 3, 2010

2010 Legislative Update

Audio Webinar (12:00 noon – 1:00 p.m.)

*Janet E. Bowman, Nature Conservancy
Gary K. Hunter, Jr., Hopping Green & Sams*

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the trial court erred by construing the term “building” in accord with the definition of “building” set forth in the Tallahassee Land Development Code. Citing *Gem Estates Mobile Home Village Ass’n, Inc. v. Bluhm*, 885 So. 2d 435, 438-39 (Fla. 2d DCA 2004), the 1st DCA stated, “the sole function of the definition of ‘building’ in the Tallahassee Land Development Code [is] to demarcate the types of buildings controlled by that code.” Therefore, reliance upon the government’s definition of “building” in interpreting the deed restriction was not controlling. The court must first consider the language of the deed restriction as a whole when determining the meaning of the word “building” as used in the deed restriction.

Florida Administrative Code Rule 14-10.007(2)(b), which allows the Florida Department of Transportation (FDOT) to revoke a license of a non-conforming advertising sign based on a change in the height above ground level (HAGL), is invalid because it is not supported by a specific grant by the legislature. *Lamar Outdoor Advertising-Lakeland v. Florida Dep’t of Transp.*, not yet published (Fla. 1st DCA August 19, 2009).

Appellant, Lamar Outdoor Advertising-Lakeland (Lamar), raised the HAGL of four billboard structures along Interstate 4 (I-4) to restore the signs visibility after a noise attenuation barrier was erected. FDOT issued Notices of Intent to Revoke the Sign Permits, claiming authority under Rule 14-10.007(2)(b) because raising the structures constituted an impermissible change. Appellants petitioned for a permanent waiver which was denied by FDOT. Appellants then filed a petition alleging FDOT did not have the authority to promulgate the rule, which challenge was denied by the Administrative Law Judge (ALJ).

The 1st DCA disagreed with the ALJ ruling, declaring that section 479.02, Florida Statutes (2009), did not give FDOT the authority to promulgate Rule 14-10.007(2)(b). The court stated that to adopt a rule, a grant of rulemaking authority is necessary, but not sufficient – “no agency . . . [has] the authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation.”

The 1st DCA ruled that section 479.02(1), Florida Statutes, which authorized FDOT to “administer and enforce” the Federal-State agreement of the Highway Beautification Act, only gave FDOT the authority to regulate the size, lighting and spacing of signs, not height. FDOT’s interpretation that section 479.02(2) gave it the authority to revoke a license because subsection (2) contained the word “height” was incorrect because the subsection could not be read in isolation – the statute “must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.”

Moreover, the 1st DCA ruled that section 339.05, Florida Statutes (2009), did not authorize FDOT to promulgate Rule 14-10.007(2)(b) because the plain language of the section states that it applies to the construction of roads. FDOT’s “regulation of a sign’s HAGL is not logically related to the construction of roads.” Therefore, section 339.05 does not provide FDOT with the required authority for Rule 14-10.007(2)(b).

As the agricultural exemption has been interpreted, the interplay between sections 403.927(2) & (4)(1) and 373.406(2), Florida Statutes; (2009), virtually eliminates the application of the agricultural exemption to alterations impacting wetlands. *A. Duda and Sons, Inc. v. St. Johns River Water Mgmt. Dist.*, not yet published (Fla. 5th DCA October 2, 2009) (Duda II).

Duda appealed an ALJ’s final order that required Duda to apply for necessary after-the-fact permits for certain enforcement ditches. In reaching this conclusion, the ALJ determined that Duda did not qualify for the agricultural exemption by applying a statutory interpretation that was invalidated in a previous 5th DCA opinion, *Duda & Sons, Inc. v. St. Johns River Water Mgmt. Dist. (Duda I)*, 34 Fla. L. Weekly D1454 (Fla. 5th DCA July 17, 2009).

In its analysis, the 5th DCA recognized that *Duda I* did not address the interplay between the language from sections 403.927(2) & (4)(a), and 373.406(2), Florida Statutes (2009). The opinion concluded that the interplay “virtually eliminates the agricultural exemption as it applies to alterations impacting wetlands.” Therefore, because Duda’s enforcement ditches impacted at least 500 acres of wetlands, the 5th DCA required Duda to either apply for after-the-fact permits or re-

store the impacted wetlands. As a result, the 5th DCA remanded the matter for additional proceedings consistent with the opinion as well as *Duda I*.

An appellate court does not have the power to reconsider and correct an erroneous ruling that has become the law of the case unless the prior ruling would result in a “manifest injustice.” A circuit court sitting in its appellate capacity failing to enforce the terms of its mandate on an issue remanded to the local government fails to apply the correct law. *Dougherty v. City of Miami*, not yet published (Fla. 3d DCA October 7, 2009).

As background necessary to explain the procedural context for the 3d DCA’s opinion, the City of Miami Commission (City) reversed the Miami Zoning Board’s decision to grant a Class II Special Permit in 2009, which the circuit court sitting in its appellate capacity reversed and remanded for a limited review of the issue. Instead of a limited review, the City conducted a de novo proceeding on remand applying substantive provisions of the Miami Zoning Ordinance that were not in effect at the time of the permit application and granted the permit subject to a height restriction.

Petitioner again appealed the City’s decision to the circuit court seeking to quash the City’s decision on “first tier” review, which the circuit court denied. The Petitioner then sought “second tier” review of the circuit court’s denial. The 3d DCA ruled that the circuit court’s 2006 opinion was “the law of the case,” which required the circuit court to correct the City’s failure to comply with the circuit court’s prior mandate. The 3d DCA recognized that absent manifest injustice, “an appellate court has the power to reconsider and correct an erroneous ruling.” The 3d DCA quashed the circuit court’s denial and directed the circuit court to enforce its prior mandate.

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