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

Wade Hopping (1931-2009)

by Lawrence E. Sellers, Jr.

Note: These remarks were presented during the ELULS Annual Luncheon on Friday, August 21, 2009.

I was very honored to be asked to say a few words about Wade Hopping, who passed away just last week.

Wade was the dean of the lawyers and lobbyists who worked on environmental and growth management legislation. He was involved with almost every significant environmental and land use law that passed in Florida for the last four decades.

He also worked to make sure that some measures didn't pass—at least not without some of his suggested improvements.

Wade was a friend and counselor to governors, from Claude Kirk to Charlie Crist, as well as many legislators and other leaders.

Wade served on the various blue ribbon or advisory commissions that developed Florida's landmark environmental and growth management laws.

He also chaired the Law Revision Council that drafted Florida's Administrative Procedure Act (APA).

It has been said that Wade probably created more legal work for Tallahassee lawyers than any other single person; notably by requiring state agencies to adopt numerous implementing rules and by authorizing many appeals to or decisions by the Governor and Cabinet— like DRI appeals, and the power plant and transmission line siting acts, just to name a few.

For that, those of us who practice in the Capital city are grateful. I think.

Many of us specialize in a particular area of environmental or land use law, and we pride ourselves on knowing a lot about that little area of the law. Wade seemed to be one of those few lawyers who knew a lot about a lot of law— no doubt, because he was involved in writing much of it.

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Breaching the Trust Fund

by Sidney F. Ansbacher and Robert D. Fingar

The 2009 Florida Legislature faced a massive budget deficit. The State responded by diverting money into general revenue from a number of state trust funds, including the Inland Protection Trust Fund (IPTF), Section 376.3071, F.S. The 2009 Legislature bonded some $90 million for clean-up of petroleum contaminated sites under the IPTF. The IPTF previously generated about $200 million annually, of which about $150 million or more should have been available for actual clean-up costs. While the IPTF may not be the most important state trust fund, one would think that the protection of drinking water supplies would make nearly everyone's Top Five. Nonetheless, the Legislature's second major diversion from the IPTF (it diverted $20 million in 2002) presents some interesting policy considerations.

Some background here is necessary. The IPTF was created in 1986 to respond to "incidents of inland contamination from petroleum storage tanks," and is funded by a tax on "pollutants" imported into, or produced in Florida. Subsection 376.3071 (3), F.S.

The 1986 Legislature also created

See "Trust Fund," page 14

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WADE HOPPING
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Wade also was active in our Section of the Bar. He helped form and was the first chair of the fledgling environmental law committee that ultimately became what is now our Environmental and Land Use Law Section.[1] He was a frequent speaker at our Section programs. For years, his legislative update at our annual meeting was one of the most popular and entertaining presentations.

Wade also built a fine law firm that bears his name. Many of his partners and associates followed his example of service to the Bar and to our Section, including former chairs Ralph DeMeo, Maribel Nicholson-Choice, Robert Manning, and Gary Hunter. Wade's partner Carl Eldred chairs the Section's CLE committee. And Ralph DeMeo and Doug Roberts were speakers here yesterday.

Notwithstanding all of his many accomplishments, Wade was very modest. Terry Lewis and I often appeared on panels with Wade. Wade would introduce our panel and he would always give glowing —and often greatly embellished— introductions of the rest of us. And then he'd introduce himself as simply "Wade Hopping, a Tallahassee lawyer." At first, I was struck by this. But then it occurred to me that Wade really needed no introduction at all. Wade was one of those few people who are so famous that they are known simply by their first name. Like Sonny or Cher. Or Madonna. Well, maybe not exactly like them.

And not just because he had an uncommon name, but because he was an uncommon lawyer.

Wade also was unflappable. Although he worked on some of the most contentious legislation, I never once saw him lose his temper or raise his voice. Or get mad or even very excited— unlike some others.

As everyone knows, Wade typically represented large corporations seeking government approvals to build things, most of which were quite controversial. Many were for his electric utility clients.

But not long ago, Wade spoke out against and tried to block the Taoist Tai Chi Society from building a new exercise center in his neighborhood in Tallahassee. When a reporter noted the irony, Wade was unmoved and responded by saying something like, "I'd be OK with it if it were a nuclear power plant."

We will miss Wade, his good humor, and his wise counsel; it simply won't be the same without him. But his significant contributions to Florida and to our Section will long be remembered.

Endnote:

[1] For very informative summaries of the earlier years of the Section, see Ross A. McVoy, *Observations on the Section's Tenth Anniversary* (Aug. 1987), and Robert M. Rhodes, *Happy Silver Anniversary ELULS (*Jan. 2003)

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Florida Caselaw Update
August 2009

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

Business damages must be determined with respect to the economic realities of a given case, including probable financial impact reasonably suffered, when the business owner continues the business at a new location after a qualified partial taking destroys the business at its prior location. *System Components Corporation v. Florida Department of Transportation*, 34 Fla. L. Weekly S393 (Fla. July 9, 2009).

Systems Components Corporation ("Systems") owned land which the Florida Department of Transportation ("FDOT") required for expansion of a state road in Ocala. Systems operated a large warehouse on the parcel, and System's business anticipated significant future growth, which would require expansion. FDOT and Systems agreed that FDOT's taking would negate Systems' ability to expand; therefore, for Systems to continue its business, Systems must relocate. FDOT deposited a good-faith estimate for the value of the land under the chapter 74, Florida Statutes, quick-take procedure, while Systems relocated and continued its business. FDOT and Systems then went to trial to determine the proper value of business-damages.

At trial, the judge instructed the jury to calculate two business-damage awards. The first award would be the total value of the business damage on the date of the taking, which followed the precedent of *Florida Department of Transportation v. Tire Centers, LLC*, 895 So. 2d 1110 (Fla. 4th DCA 2005). The second award would be the business damage sustained taking into account the relocation and continued success of the business, which could significantly reduce the compensation. The trial court awarded the second value, which was $1 million less than the first value. Systems appealed, arguing the trial court could not ignore the precedent in Tire Centers.

The 5th DCA agreed with the trial court, finding a business-damage award should be the value of the business as if it ceased to exist reduced by taking into account the successful relocation and continued operation. The 5th DCA reasoned the statutory business-damages provision should compensate for the trouble of relocation, not for the fiction the business ceased to exist. The 5th DCA certified the conflict to the Florida Supreme Court.

The Supreme Court agreed with the reasons of the 5th DCA and disapproved of the 4th DCA's Tire Centers decision. The Court disagreed with the 4th DCA's use of the "cost to cure" doctrine to award business-damages based on the notion the business ceased on the date of the taking. Though "cost to cure" is limited to the tract the business vacates, the Court agreed with the 5th DCA in that the compensation must account for continuing business at a new location. The Court also noted there is no affirmative duty to relocate as the statute is written. Therefore, if a business chooses to relocate after a qualified partial taking, the business-damage award will be based on the economic realities of the situation taking into account a successful relocation and continued business activities.

Section 3.4.1(b) of the St. John's River Water Management District's Applicant Handbook, adopted by reference in Rule 40C-4.091 of the Florida Administrative Code, is invalid, because it excessively limits the scope of the statutory agricultural exemption. *A. Duda and Sons, Inc. v. St. Johns River Water Management District*, 34 Fla. L. Weekly D1454 (Fla. 5th DCA July 17, 2009).

A. Duda and Sons ("Duda") operates large farms and groves throughout the State. At one, Duda constructed numerous drainage ditches without consulting the St. Johns River Water Management District (the "District"). The District served an administrative complaint on Duda alleging the drainage ditches required permits. Duda argued it was exempt under the statutory agricultural exemption, section 373.406(2), Florida Statutes. Duda also challenged portions of the District's handbook as being contrary to the statutory exemption. At an administrative hearing, the ALJ agreed with the District denying all of Duda's challenges.

On appeal, the 5th DCA agreed with Duda that section 3.4.1(b) of the handbook is invalid. The debate centered on the meaning of the word "predominant" in the statutory agricultural exemption. The District's position, as embodied in section 3.4.1(b), is that predominant means "more than incidental." The 5th DCA agreed with Duda that predominant means an amount of a significantly higher degree than "more than incidental." Therefore, the portion of the handbook interpreting predominant is invalid, as is its incorporation by reference in Rule 40C-4.091, F.A.C. The 5th DCA did not define predominant, but the court's discussion suggests predominant should be a majority or a fifty percent plus one type of analysis.

A resort condominium is not a dwelling as that term is used in comprehensive plans, and a resort condominium is not affected by a comp plan that only restricts the number of dwellings per acre. *Bay County v. Harrison*, 34 Fla. L. Weekly D1099 (Fla. 1st DCA May 29, 2009).

Bay County issued a development order ("DO") authorizing the construction of a 279 unit resort condominium by Laguna Beach Properties, LLC, which was deemed inconsistent by the circuit court. Bay County's comprehensive plan focuses on future uses of beach areas as resort category land uses. Also, the plan restricts development to 15 dwellings per acre. Bay County issued the DO on the grounds that the resort condominium would mesh with the county's objective of turning an older residential beachfront into a vibrant, new resort area. However, the circuit court found the 279 unit condominium would exceed the plan's 15 dwellings per acre restriction. The circuit court went on to find the plan must be amended to "definitively" allow this type of

continued...

construction before a DO would be valid.

On appeal, the 1st DCA reversed the lower court finding the DO did conform to the plan. First, the court noted a "resort condominium" is regulated under chapter 509, Florida Statutes, which is the same chapter that regulates hotels and motels. The court stated the term dwelling is frequently linked to or synonymous with the term residence, and a resort condominium, being in the same statutory realm as hotels and motels, cannot be considered to fall within the standard meaning of dwelling. Therefore, the 15 dwelling per acre density cap did not apply to the resort condominium.

Furthermore, the plan is evidence of an interest to convert the area to resort type land uses. The plan specifically lists hotels as allowable uses, and the court found the resort condominium, by definition, as characteristically similar to a hotel for comp plan purposes. Moreover, the plan only limited dwellings per acre, not hotel or resort densities. Therefore, the plan places no restriction on the density of resort condominiums or hotels in the area. The court found the DO in compliance, because the project met the future goal of conversion to resort type land uses and was not restricted by density requirements.

A church's homeless shelter, operated on church property, is not an "exercise of religion" for the purposes of Florida's Religious Freedom Restoration Act or the federal Religious Land Use and Institutionalized Persons Act of 2000. ***Westgate Tabernacle, Inc. v. Palm Beach County,*** **34 Fla. L. Weekly D997 (Fla. 4th DCA May 20, 2009).**

Westgate Tabernacle owned and operated a church containing a homeless shelter in an area of Palm Beach County zoned as residential high density. Under the zoning requirements, a living facility could house up to 14 people before requiring board approval as a conditional use. At several times, Westgate had more than 20 people living at its facility and admitted it was operating without the necessary permits. After the county levied $22,700 in fines, Westgate filed complaints against the county for violating Florida's Religious Freedom Restoration Act ("FRFRA") and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") by infringing on the exercise of religion.

Westgate argued the operation of a shelter was mandated by the church's religious beliefs. However, the jury found the zoning restrictions were the least restrictive means of furthering a compelling interest. Westgate appealed arguing the zoning restrictions did constitute a "substantial burden" on its exercise of religion.

The 4th DCA agreed with the jury. After discussing the meaning of "substantial burden" in the context of FRFRA and RLUIPA, the court held the requirement of applying for a special exception to zoning is not a "substantial burden." Since Westgate did apply for the special permit and withdrew its application, the court held Westgate unjustified in assuming it would not receive a permit, and those assumptions did not qualify as substantial burdens either. Furthermore, although religious groups frequently operate homeless shelters as part of helping others, the court found the operation of the homeless shelter was not the exercise of religion. The land use restrictions were valid, neutral zoning provisions that did not violate FRFRA or RLUIPA.

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On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of August 14, 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 filed August 4, 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.

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 filed April 21, 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 filed April 6, 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.

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 No. 1D08-4881. Petition for review of DEP final order issuing permits for construction and operation of electrical generating unit. Status: Oral argument set September 15, 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.

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 lobbyist compensation reporting requirements. Status: Affirmed. 34 Fla. L. Weekly D1199f (Fla. 1st DCA 2009).

SECOND DCA

Lee County v. DEP and Mosaic, Case No. 2D09-931. Petition for review of DEP final order granting permits and approvals for Mosaic's at the 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: All briefs filed.

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 (5th DCA 2009), July 17, 2009.

DCA Update

by Sarah Shuler, Certified Legal Intern

Developments of Regional Impact

Northwest Florida Water Management District v. Department of Community Affairs, 7 So. 3d 1129 (Fla. 1st DCA 2009). The St. George Island Plantation Development of Regional Impact (DRI) was approved in 1977. One of the conditions of the Plantation DRI Development Order was a prohibition on the installation of freshwater wells. This condition was modified in 1993 to allow temporary wells under very limited circumstances. No freshwater wells were ever permitted in the Plantation DRI. In 2008, three applications were filed with the Northwest Florida Water Management District seeking permits to install freshwater irrigation wells in the Plantation DRI. In August 2008, the District issued Notices of Proposed Agency Action to grant these permits. In September 2008, the Department of Community Affairs issued three Notices of Violation and Orders to the permit applicants. The Department informed the applicants that the installation of freshwater wells would violate the DRI Development Order; that they were subject to the Development Order by virtue of being owners of property in the DRI; and that they should not install the wells. Shortly thereafter, the District filed a Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Quo Warranto. The District alleged that the Department exceeded its authority in seeking to enforce the Development Order's prohibition on freshwater wells because Section 373.217, Florida Statutes, bestows upon the District the sole authority to regulate the consumptive use of water. The District Court denied the Petition for Writ of Prohibition but granted the Petition for Writ of Quo Warranto, finding that the Legislature has granted the exclusive authority to regulate the consumptive use of water to the water management districts: "[P]ermitting by the water management district is all that is required to obtain approval for the consumptive use of water in this state." *Nw. Fla. Water Mgmt. Dist.*, 7 So. 3d at 1131. The Department's Motion for Clarification was denied. No party sought further judicial review and the time for doing so has expired.

Comprehensive Planning

DCA v. City of Fellsmere; DOAH 08-4768GM. After an initial finding by the Department that the City's comprehensive plan amendments were not "in compliance," the City adopted remedial amendments pursuant to a stipulated settlement agreement. DCA found these remedial amendments in compliance and filed for voluntary dismissal. The ALJ issued an order closing the case.

DCA v. Broward County; DOAH 08-3767GM. DCA filed a petition alleging that the Broward County Plan Amendment Package was not "in compliance". The two parties entered into a compliance agreement pursuant to the Alternate State Review Process Pilot Program, Section 163.32465(6)(h), Florida Statutes. Upon notice of the compliance agreement, the County's adoption of a remedial amendment, and the expiration of time for affected persons to file a challenge, the ALJ entered an Order closing the file. The Department then issued its Final Order dismissing the case.

DCA v. Marion County, et al; DOAH 07-0867GM. The Department found the plan amendments passed by the County to be not "in compliance." The County passed a remedial comprehensive plan amendment, which DCA found to be "in compliance." After DCA filed a motion to close the file, the ALJ issued a Final Order closing the file.

Acorn at Willoughby, LLC v. Martin County and DCA; DOAH 08-4930GM. DCA found the comprehensive plan amendments not "in compliance" and filed a petition to initiate an administrative proceeding. Acorn at Willoughby, LLC was granted leave to intervene. The Department and the County entered into a stipulated settlement agreement which Acorn did not join. As a result, the parties were realigned with Acorn as the sole petitioner. Acorn eventually agreed with the Department that the remedial amendment was "in compliance," and with no remaining issues in dispute, the ALJ issued an order closing the case.

Triple H. Ranch Property, Ltd., Debuys Property Investment Group, Ltd., and City of Parkland v. Palm Beach County and DCA; DOAH 07-5238GM. DCA found the comprehensive plan amendment not "in compliance," and Triple H, Debuys, and the City of Parkland were granted leave to intervene. Though the City supported the stipulated settlement agreement that the other parties entered into with DCA, the City did not sign it. The County adopted a remedial amendment which DCA found to be in compliance. No party challenged the remedial amendment, and the ALJ issued his Order closing the file.

DCA, et al. v. City of Jacksonville, et al.; DOAH 07-3539GM and 08-4193GM. As summarized in the March 2009 Reporter, an ALJ found a comprehensive plan text amendment updating the definition of the Coastal High Hazard Area for the City of Jacksonville, "in compliance," and found a Future Land Use Map (FLUM) amendment not "in compliance." On June 10, 2009, the Administration Commission issued a Final Order finding the text amendment "in compliance," and the FLUM amendment not "incompliance." The Administration Commission ordered the City's working group to reevaluate the definition of Coastal High Hazard Area as defined in its Conservation/Coastal Management Element Policy 7.3.1. The Commission also ordered the working group to consider policies by December 2009 that would allow for a citywide local mitigation program that would take the place of the site-specific and case-by-case approach that is currently used to determine appropriate mitigation when a future land use map amendment is proposed that would impact hurricane evacuation time. The order also prohibits the City from transmitting any FLUM amendment which relies on the CHHA definition in Policy 7.3.1 until the City's working group policies are adopted into

the comprehensive plan. In addition, the Commission ordered a remedial amendment limiting residential development for the FLUM amendment and restricting development to the 23.88 acres above 5.0 feet in elevation deemed not to be in the CHHA.

Tierra Verde Community Association, Inc., et al. v. City of St. Petersburg; DOAH 09-3408GM. This administrative proceeding merits monitoring as it raises questions not directly answered by the *City of Jacksonville* Final Order discussed immediately above. The City of St. Petersburg annexed approximately 18.25 acres in an area known as Tierra Verde, a barrier island community, and adopted amendments to the local comprehensive plan which would increase the residential development potential of this area. Because these amendments were processed under the alternative state review process in Section 163.32465, Florida Statutes, the Department did not issue a notice of intent. An association and two individuals timely filed a petition for administrative review of the amendments. These petitioners admit that the portion of the amendment site on which development is sought to be increased is not within the new statutory definition of coastal high-hazard area. However, the petition asserts that the amendments should be found not in compliance with the state's coastal growth management laws because of local conditions, including uncertainty about wave height and tidal influences on the projected category one storm surge elevation, evacuation routes that will allegedly be inundated by that surge, and an evacuation time estimated at one time by the Tampa Bay Regional Planning Council to be at best 23 hours (in-county to shelter) and at worst 55 hours (out-of-county). This proceeding is set for a final hearing commencing November 2, 2009. A motion to dismiss filed by the City was denied.

The Jensen Beach Group, Inc., et al. v. Martin County, et al.; DOAH 07-5422GM. As summarized in the December 2008 Reporter, Martin County adopted an amendment to the future land use map of the local comprehensive plan to re-designate 13.7 acres from mobile home to low density residential. 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. The principle issue raised by Petitioners was affordable housing. Martin County expressly recognizes mobile homes as an important part of its affordable housing stock. Conversions of mobile home sites have been of some concern to the County, so much so that the County imposed a temporary moratorium on conversions as a result of the real estate boom of 2004-05. On the record presented, the ALJ found and concluded that Petitioners had not demonstrated that the conversion accomplished by the instant amendment impacted affordable housing in a manner that violated the local plan or state statutes and rules. Petitioners filed numerous exceptions to the recommended order, arguing that the ALJ had erred. However, no party to the proceeding ordered a transcript of the final hearing. The failure to include the transcript in the record precluded the Department from modifying the disputed findings of fact. Accordingly, a Final Order was entered upholding the ALJ's recommendation and finding the amendment in compliance. No party appealed the Final Order and the time for so doing has expired.

Department of Community Affairs, et al. v. City of Tampa, et al.; DOAH Case No. 08-4820GM. The City of Tampa adopted an amendment to the future land use map of the local comprehensive plan to re-designate approximately 25 acres from light industrial to community mixed use. The Department reviewed the amendment and issued a notice of intent to find it not in compliance. The main issue raised by the Department is compatibility with MacDill Air Force Base. 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. The parcel is currently being used as a distribution center. The amendment would allow the development of thirty five residential units per acres. The Department's position is that residential uses in this location are not compatible with the Base. This matter proceeded to final hearing and proposed recommended orders have been filed.

DCA, et al. v. Miami-Dade County, et al.; DOAH 08-3614. 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 re-designate 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 re-designate 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

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DCA UPDATE
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basic issue raised by the Department 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 ALJ entered his recommended order. The ALJ 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 ALJ recommended that the amendments for the Brown Parcel be found in compliance. The Administration Commission issued a Final Order adopting the ALJ's recommendations for the Lowe's and the Brown Parcels, and directed Miami-Dade County to rescind the "Lowe's Amendment."

Rulemaking

Florida Land Council, Inc., et al. v. Department of Community Affairs; DOAH 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. Proposed final orders were due to be filed August 14, 2009. The ALJ anticipates issuing a final order by September 14, 2009.

Law School Liaison Committee Update

The Law School Liaison Committee is continuing its efforts to provide outreach to faculty and students at each of Florida's law schools. One of our main goals is to increase student awareness of and involvement in the Section. This Update will provide you with an overview of recent and upcoming activities.

Section Funding. Each year the Section makes grants available to the schools for environmental and land use law related activities. This year the Section awarded a total of $16,000 in grants to eight schools. These funds will be used for a variety of purposes including reimbursement of FSU and Nova moot court travel expenses, partial funding of seminars at UF, Stetson and Coastal, funding activities of the student environmental organization at Barry, and funding a speaker series at FIU. The grants are awarded based on applications submitted by the schools and consistent with the Section's Funding Guidelines.

Maloney Writing Contest. This past year students from six schools submitted papers for the contest. The Section recently announced the results and invited the students to join the Section at the Annual Update. Again, our congratulations to Tara Nelson (UF); Karen Green (Barry); and Carolyn Haslam (FSU).

Student Membership Brochure. To better get the word out about the benefits of student membership in the Section, David Bass (E Sciences) put together a brochure which is now being circulated among the schools. You can access the brochure at the Section's website www.eluls.org.

Upcoming Activities. Section members serving as volunteer liaisons are continuing their individual efforts interacting with students and facility through speaking engagements, career panels, and similar activities. For the 2009-2010 school year the liaisons are:

- Brynna Ross (Brynna.Ross@dep.state.fl.us) (FSU)
- Keith Rizzardi (KRizzar@sfwmd.gov) (UF)
- Sid Ansbacher (sansbacher@gray-robinson.com) (Coastal)
- Erin Deady and Thomas Mullen (edeady@llw-law.com and Thomas.mullin@ruden.com) (Nova)
- Vivien Monaco (vivien.monaco@ocfl.net) (Barry)
- Robert Guthrie and David Bass (Robert.guthrie@ocfl.net and dbass@esciencesinc.com) (FAMU)
- Gary Oldehoff (goldehoff@lsdlaw.net) (Stetson)
- Jim Porter (Jim@jamesmporterpa.com) (St. Thomas and UM)
- Mellissa Tapanes (mtapanes@brzoninglaw.com) (FIU)

Please feel free to contact any of the liaisons if you have questions or ideas you would like to share.

Section Budget/Financial Operations

	2008-2009 Budget	2008-2009 Actual	2009-2010 Budget
REVENUE			
Section Dues	68,950	65,590	68,250
Affiliate Dues	3,500	4,470	3,500
Admin Fee to TFB	(35,875)	(35,019)	(35,525)
CLE Courses	24,000	305	18,400
Section Differential	8,000	5,502	8,000
Sponsorships	12,000	12,564	12,000
Investment Allocation	17,392	(24,667)	4,475
Miscellaneous	1,000	714	0
TOTAL REVENUE	**98,967**	**29,459**	**79,100**
EXPENSE			
Credit Card Fees	0	21	57
Staff Travel	3,999	2,958	4,326
Internet Charges	0	405	400
Postage	1,350	1,064	1,000
Printing	400	133	200
Newsletter	14,800	3,790	0
Membership	2,000	0	1,000
Supplies	50	0	50
Photocopying	225	147	200
Officer Travel	3,000	1,854	2,500
Meeting Travel	11,000	4,099	6,500
CLE Speaker Expense	1,000	0	1,000
Committees	1,000	259	500
Council Meetings	3,000	736	2,500
Bar Annual Meeting	2,500	1,735	2,500
Section Annual Meeting	32,000	13,469	26,000
Section Service Programs	0	0	4,000
Retreat	3,000	3,926	2,000
Land Use Law Manual	13,000	12,600	13,000
Pubic Interest Committee	500	246	500
Awards	2,500	1,594	1,700
Scholarships	4,000	0	4,000
Law School Liaison	29,000	26,650	29,000
Dean Maloney Contest	1,000	1,053	1,000
Website	4,500	5,135	5,000
Council of Sections	300	0	300
Operating Reserve	13,845	0	11,332
Miscellaneous	1,000	55	600
TFB Support Services	3,327	3,346	3,485
TOTAL EXPENSE	**152,296**	**85,275**	**124,650**
BEGINNING FUND BALANCE	**248,454**	**277,108**	**223,737**
PLUS REVENUE	**98,967**	**29,459**	**79,100**
LESS EXPENSE	**(152,296)**	**(85,275)**	**(124,650)**
OTHER COST CENTER	**(4,000)**	**(990)**	**0**
ENDING FUND BALANCE	**191,125**	**220,302**	**178,187**

SECTION REIMBURSEMENT POLICIES:
General: All travel and office expense payments are in accordance with Standing Board Policy 5.61.
Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.

ELULS Fellowships

ABA SEER Fellowship – Summary of Summer 2009 Fellowship Experience

by Wendi L. Ribaudo

I remain truly appreciative of the American Bar Association, Section of Environment, Energy, and Resources *Fellowships in Environmental L*aw program. The 2009 ABA SEER/ELUS Fellowship gave me the opportunity to work with the Everglades Law Center, a not-for-profit law firm dedicated to representing the public interest in environmental and land use matters, with specific focus on restoring the Everglades and the Florida Keys and advocating for responsible development that minimizes urban sprawl and holds the Urban Development Boundary.

While working for the Everglades Law Center, I had the opportunity to work on a variety of projects in multiple legal capacities. I worked specifically on public interest concerns in Miami-Dade County including issues surrounding mining proposals and permitting that would encourage development, threatening the Everglades, the Florida potable water supply, and several endangered species. While the majority of my work involved legal research and writing, I also attended and participated in meetings with clients and agency officials to discuss potential problems stemming from permitting, mining, and development.

My first few days at the Everglades Law Center were exhilarating. Within the first twenty-four hours, I had the opportunity to represent the firm and our clients at a hearing in front of the Miami-Dade Board of County Commissioners. From that moment, my experiences remained engaging. My supervising attorney, Richard Grosso, General Counsel and Executive Director of the Everglades Law Center, encouraged my full participation in conferences among the firm's attorneys and with our clients, as well as at public hearings. Through the process, I received a crash course in Florida land-use law and Everglades Restoration, taking advantage of every opportunity to discuss Florida specific environmental issues with our clients, who remain exceedingly knowledgeable in the scientific aspects of the field.

I am grateful for the opportunity to work with the Everglades Law Center. It has been an educational experience I will carry with me throughout my career. Without the Fellowship from the American Bar Association Land Use and Environment Section, it would not have been possible. Thank you.

Green Opportunities at The Florida Bar

by Bonnie Malloy, 2009 FEPI Summer Fellow

Starting in 2008, the Florida Bar began sponsoring a *Florida Environmental Public Interest (FEPI) Summer Fellowship*, which is a program designed to encourage Florida law students who want to study and pursue careers in public interest environmental or land use law. The Program requires full-time work for an 8-10 week period with a qualifying nonprofit public interest organization, private law firm, or solo practitioner working in the field of public interest environmental or land use law. Qualified first and second year law students with an interest in public interest environmental or land use law can seek out any of the above organizations, firms, or practices with an office in Florida to be their host organization.

In addition, the *FEPI Summer Fellowship* provides an excellent opportunity, especially in these economic times, for law students to obtain invaluable paid experience in the public interest environmental or land use law field. The substantial debt accrued during law school can discourage many students from pursing careers in not-for-profit organizations. Fortunately, the *FEPI Summer Fellowship* enables students to work on repaying their loans while experiencing the gratifying world of public interest work.

I was the fortunate recipient of this year's summer fellowship, and had the pleasure of working at Earthjustice's Tallahassee office with several inspiring attorneys, namely, Alisa Coe, David Guest, Monica Reimer, and Colin Adams. Through the *FEPI Summer Fellowship*, I was able to work on novel issues of critical importance—some that affect mainly Floridians and others with nation wide implications. My supervising attorney, Alisa Coe, was always open for questions and did not hesitate to give me challenging tasks to help foster my educational experience. My research required use of state and federal case law, regulations, rules, statutes, legislative history, and numerous other resources. My assignments spanned several areas including environmental law, ethics, civil procedure, contract law, administrative law, constitutional law, and property law. I was required to analyze legal issues, identify and investigate potential evidence, develop legal theories, ascertain proper court procedures, and present my findings to my supervisor.

Clerking at Earthjustice has vastly expanded my knowledge and interest in public interest environmental law. My experience at Earthjustice has been incredibly fulfilling and left me with no doubt that public interest environmental and land use law is a perfect career for me. The *FEPI Summer Fellowship* enabled my continued education in an expansive and complex area of law. In addition, this experience provided a unique opportunity to refine my advocacy, research, and writing skills.

Law School Liaisons

Center for Earth Jurisprudence Updates

The Center for Earth Jurisprudence (CEJ), a joint initiative of St. Thomas and Barry law schools, partners with a variety of organizations to encourage a shift away from legal modalities that are ill adapted to protect anything but human interests toward legal responses more respectful of the Earth's carrying capacities and of other species. Among the CEJ's partners are the United Kingdom Environmental Law Association (UKELA) and the Gaia Foundation; together they launched **"Wild Law - Is there any evidence of Earth jurisprudence in existing law and practice?"** on March 24, 2009.

The authors of the report studied laws across five legal systems to discern where elements of Earth jurisprudence exist. They examined the rules against a set of Earth jurisprudence indicators to assess whether the legislation contains elements of Earth-centered governance, as opposed to homocentric governance; to what degree the legislation promotes the well-being and complex interactions and interdependence of all species and ecosystems; to what extent the legislation upholds community involvement, including such factors as access to information, participation in decision-making, access to justice, respect for traditional knowledge and community land rights.

CEJ director Sister Patricia Siemen participated in the coordination of the project, and CEJ legal director Mary Munson authored the chapter on United States legislation. In it Munson examines the Earth jurisprudence content of the National Environmental Policy Act; the U.S. Endangered Species Act; the National Park Service Organic Act, which guides the federal government regarding the acquisition, management and protection of public lands; and the recent Supreme Court decision in ***Massachusetts v. Environmental Protection Agency***, 549 U.S. 497 (2007), in which the U.S. Supreme Court ruled that the Environmental Protection Agency must regulate carbon dioxide (CO2) and other greenhouse gases as an air pollutant under the U.S. Clean Air Act. To read the report, visit *www.gaiafoundation.org/documents/wild-law-report.pdf*.

A forthcoming monograph by the Center for Earth Jurisprudence delves into **the legal and theological grounding for recognition of the intrinsic value of nature**. CEJ legal director Mary Munson, J.D., LL.M., considers arguments for incorporating respect for the intrinsic value of nature in law from three jurisprudential perspectives: the view that law is a system of morally justified rules; a positivist view of law as a system to organize human action to promote necessary social change, independent of morality; and the view of laws as the embodiment of higher spiritual precepts. Sister Gloria L. Schaab, Ph.D. assistant professor of systematic theology and associate dean for general education curriculum at Barry University, leads the theological exploration of models of relationship between God and the natural world, covering deism, pantheism and theism, ultimately concentrating on panentheism. The publication will be available this summer; if you are interested in obtaining a copy, please contact ngerard@stu.edu. For more information about the monograph, CEJ partners and the work of the Center, visit *http://earthjuris.org*.

Exciting Developments in Florida State University College of Law's Environmental and Land Use Program

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

The most recent (2009) U.S. News & World Report ranks Florida State University College of Law's Environmental Law program 11th in the United States, tied with Stanford and Tulane. We're delighted to share two exciting new developments at the College of Law as we build on this strong foundation. We also include a brief update on recent and upcoming programs and on our recent Certificate Graduates.

Our new *Sustainable Energy Research Project*

This spring the Law School named Uma Outka, former General Counsel with 1000 Friends of Florida, the College of Law's Visiting Scholar in Energy and Land Use Law. Professor Outka will direct the College of Law's Sustainable Energy Research Project (SERP), a project that is intended to promote development of sustainable energy statewide and beyond. The project is associated with Florida State's Sustainable Energy and Governance Center and is supported by the interdisciplinary Institute for Energy Systems, Economics and Sustainability (IESES). The project will help to answer questions of practical importance to Florida's (and the nation's) energy future, including the role land use laws play in facilitating and impeding development of renewable energy sources. For more information on SERP, please check the following link: *http://www.law.fsu.edu/academic_programs/environmental/sustainableenergy.html*

The College of Law's new Environmental LL.M. Program

The College of Law has also launched a new LL.M. program in Environmental Law and Policy. Florida State Law's program is designed

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to provide LL.M. students with individualized, one-on-one attention. Incoming students are matched with faculty members who will work with them to design a curriculum that best suits their background and professional interests. The master's program capitalizes on the law school's nationally-recognized faculty, who teach a broad curriculum in the fields of environmental law, natural resources law, land use law, and energy law. Students also may take advantage of courses offered in other Departments at Florida State. In addition to a rich array of courses, students benefit from Florida State Law's location in Tallahassee, which offers unparalleled opportunities in Florida for working with State agencies, public interest groups, and the private sector on environmental issues. For more information on the LL.M. program, please contact Environmental_LandUse@law.fsu.edu or see: *http://www.law.fsu.edu/academic_programs/environmental/llm_environmental_law_policy.html*

Recent and Upcoming Programs

The College of Law hosted a terrific Spring '09 *Environmental Forum* on **Growth Management in a Shrinking Economy**. Featured presenters included leading members of the Section and other prominent figures in the land use arena, including DCA Secretary Tom Pelham, Nancy G. Linnan, Rebecca O'Hara, Professor Uma Outka, Linda Loomis Shelley, and Professor Tim Chapin of FSU's Department of Urban & Regional Planning.

We are delighted to invite Section members to this Fall's Distinguished Environmental Lecture, which will be held at the College of Law on October 28th at 3:30 p.m. Our featured speaker will be Tony Arnold, Boehl Chair in Property and Land Use, Professor of Law, Affiliated Professor of Urban Planning, and Chair of the Center for Land Use and Environmental Responsibility at the University of Louisville. Prof. Arnold is a nationally recognized scholar in the environmental regulation of land use, water and property. For more information about our Distinguished Lectures and our *Environmental Forum* series, and to keep apprised of other programs at the College of Law, please see: http://www.law.fsu.edu/academic_programs/environmental/events.html

The College of Law's 2009 Environmental Certificate Graduates

We are pleased to congratulate, and recognize, our 19 graduates this year who completed the requirements for our Environmental and Land Use Law Certificate:

Caroline Brady
Karlie Clemons*
Susan Harbin
Carolyn Haslam
Nathaniel Kennedy
Christopher Leal
Gareth Leonard*
Charles McLane*
James Moore*
Eric Neiberger
Neil Paradise*
Jeffery Patenaude*
David Phillips
Carlena Seeba
John Terrezza
Ramona Thomas
Reid Wakefield*
David Weiss*
Terry Wood

* Denotes students who completed the Certificate with Honors

University of Florida Levin College of Law Update

By Alyson C. Flournoy

For a complete update on recent events in the Environmental and Land Use Law Program at UF Law you are invited to download and read our ELULP Spring 2009 Newsletter at *http://www.law.ufl.edu/elulp/events.shtml*. Upcoming events at the Law School will be featured in the next ELULS Section Reporter.

UF LL.M. Program Update

The first two students to receive Masters of Law degrees in Environmental and Land Use Law from UF graduated this past May. This fall, the LL.M. program will have a class of five students. The program is designed to be a small full-time program in which each student develops an individualized course of study and has the opportunity to work with faculty in the student's areas of interest. It is geared towards students with an interest in studying both law and closely related fields such as land use planning, wildlife ecology, public health, and environmental engineering. LL.M. students complete 26 hours of coursework during their one-year program, 6 credits of which are in courses with substantial non-law content. For more information, visit our website at: *http://www.law.ufl.edu/elulp/llm/index.shtml*.

Faculty & Staff Update

Faculty & Staff News

Adjunct Professor and CGR Associate in Law Research **Richard Hamann** was appointed by Governor Crist to serve a four-year term in an at-large seat on the Governing Board of the St. Johns River Water Management District this past May.

ELULP Program Assistant **Lena Hinson** was recognized with a Davis Productivity Award in 2009.

This annual program honoring stat government employees throughout Florida, recognized Ms. Hinson for her work in streamlining procedures for both the ELULP and the International Programs at UF Law.

UF is pleased to welcome two visitors to teach in the environmental and land use curriculum this year. **Professor Tony Arnold** is the Boehl Chair in Property and Land Use at Louisville Law School. He is the Hurst Visiting Eminent scholar for the fall semester and will teach Water Law and Natural Resources Law while Professor Klein is on sabbatical. **Professor Judd Snierson** will be visiting all year from the University of Oregon. He will teach several courses in the corporate law curriculum in the fall and a seminar on Sustainability and Corporate Governance in the spring.

Among the adjunct faculty who will be teaching at UF this fall, **Cathy Sellers** will return to teach Florida Administrative Law and **Jeff Dollinger** to teach Real Estate Transactions. **Andrew Hand** will teach a new one-credit course in Florida Land Use Law.

Faculty Research 2008-09

Mary Jane Angelo
Associate Professor

"Stumbling Toward Success: A Story of Adaptive Law and Ecological Resilience," 87 *Nebraska L. Rev. 950* (2009) • "Modernizing Water Law: The Example of Florida" (with Christine Klein & Richard Hamann), 61 *Florida L. Rev.* 403 (2009) • "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) • *The Florida Water Resources Act of 1972: Beyond the First 35 Years* (with Christine Klein and Richard Hamann) (University of Florida, 2008) • "The Killing Fields: Reducing the Casualties in the Battle Between U.S. Endangered Species and Pesticide Law," 32 *Harvard Envtl. L. Rev.* 95 (2008)

Mark Fenster
Professor; UF Research Foundation Professor; Associate Dean for Faculty Development

"The Stubborn Incoherence of Regulatory Takings," 28 *Stanford Envtl. L. J.* 525 (2009) • Designing Transparency: The 9/11 Commission and Institutional Form," 65 *Washington & Lee L. Rev.* 1239 (2008) • *Conspiracy Theories: Secrecy and Power in American Culture* (revised 2nd ed.) (University of Minnesota Press, 2008)

Alyson Craig Flournoy
Professor; Alumni Research Scholar; Director, Environmental and Land Use Law Program

"Protecting a Natural Resource Legacy While Promoting Resilience: Can It Be Done?," 87 *Nebraska L. Rev.* 1008 (2009) • "Recommendation No. 5: Adopt Model National Environmental Legacy Act—NELA," in *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (Climate Legacy Initiative, Vermont Law School, 2009) • "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)

Richard Hamann
Adjunct Professor; Associate in Law Research, Center for Governmental Responsibility

"Modernizing Water Law: The Example of Florida" (with Mary Jane Angelo & Christine Klein), 61 *Florida L. Rev.* 403 (2009)

Dawn Jourdan
Assistant Professor; Assistant Professor, Urban and Regional Planning (joint appointment)

"Wal-Mart in the Garden District-Does the Arbitrary and Capricious Standard of Review Lessen the Right of Citizens to Participate" (with Kevin Gifford), 18 *J. Affordable Housing and Community Development Law* 260 (2009) • "Small Town Housing Needs: Resource Inefficiencies and Urban Bias in the United States" (with Shannon VanZandt, Cecilia Guisti, and June Martin) *J. of the Community Development Society* (June 2009), at 75 • "Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes" (with Elizabeth Garvin) 23 J. Land Use and Envtl. L. 394 (2008) • "Enhancing HOPE VI Revitalization Processes with Participation," *J. of the Community Development Society* (December, 2008), at 75 • "Reducing Pre-Relocation Grief with Participation in a HOPE VI Grant Application Process," 2 *Int'l J. Public Participation* 42 (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* (Balasubramanyam Chandramohan & Stephen Fallows, eds.) (London: Routledge Falmer (2008)) • "Grounding Theory: Developing New Theory on Intergenerational Participation in Qualitative Methods for Housing Research," in *Qualitative Housing Research Methods* (Paul Maquin, ed.) (London: Elsevier, 2008)

Christine A. Klein
Chesterfield Smith Professor

Natural Resources Law: A Place-Based Book of Problems and Cases (with Frederico Cheever & Bret C. Birdsong) (Aspen, 2d ed. 2009) • "The Environmental Deficit: Applying Lessons from the Economic Recession," 53 *Arizona L. Rev.* 555 (2009) • "Modernizing Water Law: The Example of Florida" (with Mary Jane Angelo & Richard Hamann), 61 *Florida L. Rev.* 403 (2009) • "Cultural Norms as a Source of Law: The Example of Bottled Water," 30 *Cardozo L. Rev.* 507 (2008) (with Ling-Yee Huang)

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) • "Peru-U.S. Trade Promotion Agreement: The New Economic Model for Civil Society?," *TLC Perú - Estados Unidos: Contenido y Aplicatión ch. 13* (Lima: La Universidad Peruana de Ciencas Aplicadas, Fernando Cantuarias y Pierino López Raygada, eds., 2008)

Thomas Ruppert
Assistant in Environmental Law, Center for Governmental Responsibility

"Eroding Long-Term Prospects for Florida's Beaches: Florida's Coastal

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Construction Control Line," 1 *Sea Grant L. & Pol'y* J. 65 (2008)

Jeffry S. Wade
Director, Environmental Division, Center for Governmental Responsibility

"Privatization and the Future of Water Services," 20 *Florida J. Int'l L.* 179 (2008)

Michael Allan Wolf
Richard E. Nelson Chair in Local Government Law; Professor

Powell on Real Property: Michael Allan Wolf Desk Edition (LexisNexis Matthew Bender 2009) • "Becoming a Legal Troublemaker," in *Law Touched Our Hearts: A Generation Remembers* Brown v. Board of Education (Mildred Wigfall Robinson & Richard J. Bonnie eds., Vanderbilt Univ. Press, 2009) • "Charles Warren," in *The Yale Biographical Dictionary of American Law* (Roger K. Neman, ed., Yale University Press, 2009) • *The Zoning of America:* Euclid v. Ambler (University Press of Kansas, 2008) • General Editor, *Powell on Real Property* (Matthew Bender-LexisNexis, 2000-present) • "William Faulkner, Legal Commentator: Humanity and Endurance in Hollywood's Yoknapatawpha," 77 *Mississippi L.J.* 957 (2008) • "Hysteria v. History: Public Use in the Public Eye," in *Private Property, Community, and Eminent Domain* (Robin Paul Malloy, ed., Ashgate Publishing, 2008) • "Lucas v. South Carolina Coastal Council," "Lujan v. Defenders of Wildlife," and "Village of Euclid v. Ambler Realty Co.," in *Encyclopedia of the Supreme Court of the United States* (D.S. Tanenhaus, ed., Macmillan/Gale, 2008

Danaya C. Wright
Professor; UF Research Foundation Professor

"The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. U.S. 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 *William & Mary Envtl. L & Pol'y Rev.* 1 (2008).

TRUST FUND
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the Early Detection Incentive (EDI) Program, subsections 376.3071 (9) and (12), F.S., which was essentially an "amnesty" program for petroleum clean-up. The EDI Program ran from 1986 to 1988, and over 7000 sites established eligibility.

The federal government decided to address the then-estimated 2 million underground petroleum storage tank (UST) systems nationwide at the same time. (1987 Congressional testimony by Ronald Brand of the EPA). In 1984, Congress enacted Subchapter IX, amending RCRA and creating federal regulation of USTs. (42 USC 6991). These amendments include technical, clean-up, and financial responsibility requirements for owners or operators of USTs, as well as procedures for EPA approval of state storage tank programs. The Superfund Amendments and Reauthorization Act of 1986 (SARA) set standards for payment out of a $500 million "Leaking Underground Storage Tank Trust Fund."

The RCRA steps were only a start. One commentator has stated: "[T]he costs of addressing LUST discharges are staggering." (Rawson, Are We Properly Controlling Our LUSTS?, 40 IDAHO L.REV. 111, 116 (2003)). Rawson cited a 2002 study that estimated it would take $29 billion to clean up just MTBE fuel additive contamination nationwide. A 2007 Government Accounting Office (GAO) Study cited state estimates that a total $12 billion was needed just in federal and state funds to clean up UST releases known as of September, 2005.

Congress directed EPA to adopt financial responsibility regulations allowing owners or operators to use insurance, guarantees, surety bonds, letters of credit, self insurance or state corrective action and compensation programs and other EPA-approved methods as allowable mechanisms for demonstrating financial responsibility. 42 USC 6991b (d)(1) and 6991c (c)(1). The regulations were to be effective by November 8, 1988.

EPA entered into UST rulemaking in 1985. The Agency enacted regulations requiring owners or operators of USTs to demonstrate financial responsibility for corrective action costs and for compensating third parties for bodily injury and property damage. (40 CFR Subpart H).

Against this background, the 1988 Florida Legislature ended the EDI Program and replaced it with the Petroleum Liability and Insurance Restoration Program (PLIRP), Section 376.3072, F.S. PLIRP authorized the IPTF to provide financial responsibility for participating "insureds" for corrective action. The DEP also contracted with a private insurer to provide a means by which insureds could purchase insurance coverage for third party liabilities. Briefly stated, PLIRP was the financial responsibility mechanism for more than 4400 claims for discharges reported from January 1, 1989 to December 31, 1998. In addition to the EDI "amnesty" discharges and PLIRP claims, the IPTF also funds sites that are eligible for funding assistance under the Abandoned Tank Restoration Program (ATRP), Section 376.307 (5), F.S., and the Petroleum Clean-up Participation Program (PCPP), Section 376.3071 (13), F.S.

Three questions arise for these technical and financial responsibility requirements. First, what is the legal relationship between the Florida and federal program. More specifically, can Florida divert IPTF revenues for purposes other than petroleum clean-up? In addition, what are the policy ramifications of taking revenues from a tax negotiated between industry and the legislature for a specific purpose and diverting those trust revenues to the general revenue

or some other unrelated use?

The starting point for the analysis is 42 USC 6991c, which authorizes each state to apply to EPA for federal approval of the state's UST program. An approved state program may be more stringent than the federal program, but Florida has not obtained EPA approval of its UST program. 42 USC 6991g preserves a State's right to adopt standards that are more stringent or impose additional liability with respect to a release. Florida may not, however, authorize standards or defenses that conflict with RCRA. *Boyes v. Shell Oil*, 199 F.3d 1260 (C.A.11 2000). In *Boyes*, the Eleventh Circuit held that subsection 376.308(5)'s bar against suits to compel clean-up in advance of a site's priority rank in clean-up schedule under subsection 376.3071(5)(a), F. S., was preempted by RCRA provisions allowing suit to imminent hazards caused by release of RCRA regulated substances. 199 F.3d at 1269. In particular, the *Boyes* Court stated:

> . . . . Florida has a comprehensive statutory scheme to regulate contamination caused by [USTs] . . . Its program, however, has never been approved by the EPA Administrator. Because Florida's [UST] program has not been approved pursuant to the RCRA, which would have allowed Florida law to supplant or replace federal law, the Florida program is preempted to the extent there is a conflict.

199 F.3d at 1269 (f.n.o.). *See also*, *Ashoff v. City of Ukiah*, 130 F.3d 409, 411(C.A. 9 1997) ("RCRA [also] allows citizens suits in approved states."); *Feikema v. Texaco*, 16 F.3d 1408 (C.A. 4 1994) (EPA Consent Order preempted state common law action for abatement of UST release); *G. J. Leasing v. Union Electric*, 825 F. Supp. 1363 (S.D. Ill. 1993), *vacated in part on other grounds*, 839 F.Supp. 21 (state UST program that is not approved by federal RCRA program is preempted where less strict than RCRA).

What happens when a state diverts financial responsibility trust fund monies? We note that if Florida had obtained program approval from EPA, it would be subject to 42 USC 6991c (f)(2)(B), which directs EPA to withhold federal Leaking Underground Storage Tank Trust Fund money from "any State that has diverted funds from a State fund or State assurance program for purposes other than those related to the regulation of underground storage tanks covered by this subchapter." Florida would have also been subject to withdrawal of authorization of program approval and "reestablishment" of the federal program if EPA found that Florida was not administering and enforcing the program in accordance with the provisions of federal law, 42 USC 6991c (e), or EPA could have determined that the IPTF was not proper financial responsibility under 42 USC 6291c (c)(6).

Given that Florida is not an approved state program, what if any, are the consequences of a sweep of the IPTF and bonding of an amount less than the proceeds available for UST program purposes? 42 USC 6991c (e) suggests, through the use of the term "reestablishment," that the federal program applies in states that do not have EPA UST program approval, with the caveat that under 42 USC 6991g, Florida could have more stringent standards and impose greater liabilities for a discharge than provided for by federal law, but inconsistent elements of Florida's program may be problematic.

In examining EPA's regulations, 40 CFR 280.101 contemplates that EPA will review a state fund to determine whether it is an acceptable means by which owners or operators may demonstrate financial responsibility. This regulation does not appear to be tied to the state UST program approval provisions in 42 USC 6991c, as described above, but instead applies "in a state where EPA is administering the requirements of this subpart." 40 CFR 280.101 (a). Theoretically, this would include Florida, a non-approved state.

In fact, by letter dated November 6, 1989, the DEP applied to EPA Region IV for approval of PLIRP as Florida's financial responsibility program. As part of the application, then-DER Secretary Dale Twachtmann advised EPA that the IPTF would "serve as a repository for funds which will enable the Department to respond without delay to incidents of inland contamination related to the storage of petroleum and petroleum products in order to protect the public health, safety and welfare and to minimize environmental damage." Secretary Twachtmann also advised that the IPTF would provide for investigation and assessment of contaminated sites; expeditious replacement or restoration of potable water supplies; clean-up and monitoring of contaminated sites; inspection and supervision; compliance verification; cost recovery actions; and reasonable costs of administration. Based on these assurances, EPA apparently approved Florida's trust fund as an allowable financial responsibility mechanism. *www.epa.go/oust/states/findstates.htm*. (No agency personnel have found the approval letter requested by one of the authors, but the above-noted site shows the Florida fund as approved by EPA).

Even where EPA approves a state fund as a financial responsibility mechanism (or as one of a combination of mechanisms), what happens when the funding mechanism is changed, such as has occurred here? By Memorandum dated November 22, 1989, entitled "Final Guidance for Reviewing State Funds for Financial Responsibility," the EPA Office of Underground Storage Tanks provided some illumination. According to the Memorandum: "A State must submit its fund to EPA if it wants formal approval of the fund as an alternative financial assurance mechanism for use by its UST owners and operators, to assist them in meeting the Federal financial responsibility requirements." Further, there must be a "definite funding source (e.g. tank fees) to make sure that funds will be available to owners and operators. A State fund that relies only on yearly appropriations out of general revenues from its legislature would not adequately assure that funds would be certain and available." As Florida is not an approved program state, it operates under a Memorandum of Agreement between EPA Region IV and the State of Florida, dated August 31, 2007. Under this Memorandum of Agreement, Florida is required to notify EPA of any "State changes that would affect FDEP's ability to implement the State's petroleum clean-up and discharge prevention program…including funding modifications that could negatively affect FDEP's ability to implement the State's program."

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Diversion of IPTF revenues from the approved uses of the Fund may jeopardize the status of the Fund as an approved financial responsibility program for the PLIRP insureds. (The extent to which other state restoration program participants have any vested rights to fund proceeds is a subject for a different day.)

The 2007 GAO study underscores substantial issues facing DEP. As of January 1, 2007, FDEP stated it had cleaned up about 350 sites with public funding. *Id*. at 18. The state expected a "particularly sizeable decline [ ]" in public clean-ups as Florida site owners or operators rely more on private sources of funding. *Id*. at 20. Nonetheless:

> Although the state's financial assurance fund stopped producing financial responsibility coverage for new releases in 1998, it is having difficulty paying for all of its clean-ups. The state fund is only able to actively conduct clean-up work at about one-third of the 12,000 remaining sites. The approximately 8,000 other sites in the Fund's backlog await clean-up. These clean-ups will not occur until money becomes available for them, or potentially, the risk posed by the sites increases so much that they require more urgent clean-up.

Id. at 28. This was before the 2009 Legislature diverted significantly more money from the IPTF.

GAO emphasized that a state fund must have sufficient money "available to clean-up releases in a timely and appropriate manner" in order to be financially sound. *Id*. at 29, citing EPA memorandum issued in 1993. Failure to ensure timely clean-up would mean "EPA would be concerned about the financial soundness of the fund." *Id*. The GAO focused on the impact of diversions of $20 million in 2002 from Florida's fund:

> As a result, financial assurance fund managers had to adjust the threshold for clean-up, meaning that the cleanup of less urgent releases, which otherwise would have been addressed, was delayed . . . .

Id. at 31. Again, these impacts arose from a far smaller diversion than occurred this past session.

Regardless of the legalities, what public policy considerations are raised by the diversion of IPTF revenues? A review of the legislative history behind the IPTF indicates a clearly collaborative effort in the late 1980s among various sectors of the regulated community (the major oil companies, petroleum marketers, property owners, and lenders, amongst others) in creating the IPTF as a tax on industry to solve an industry problem that could only be solved collectively because of the Past (the contamination problem was largely historical), the Present (insurance coverage was unavailable or unaffordable) and the Future (see the Present). Thus, the IPTF is the ultimate "user tax." Nonetheless, there is no IPTF "lock box." Given the seeming availability of the IPTF, its $200 million per year revenue stream an enticing target in down revenue years, how can the regulated community and the legislature ever again attempt to find a targeted, public solution to a matter of as urgent public importance as protection of the state's drinking water and natural resources, when ultimately, the deal comes undone? That is the unfortunate message of the 2009 Session for the IPTF. Either safeguards need to be built into the process or this public/private partnership will be unwound. Even if the fund is not sunsetted, it requires daunting, not diminishing, sums to meet its, and RCRA's public purpose.