



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Martha M. Collins, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

Update On Pace One Year Later: Litigation, Legislation and New Initiatives

by Erin L. Deady, Herb Thiele, Ed Steinmeyer & Chad Friedman¹

I. PACE UPDATE IN A NUTSHELL

In last year's ELULS Reporter, we provided an update on one of Harvard Business Review's "Breakthrough Ideas for 2010." Property assessed clean energy ("PACE") programs began forming in various states across the U.S. and then the Federal Housing and Finance Agency ("FHFA" a federal agency of the U.S. government), Fannie Mae ("Fannie") and Freddie Mac ("Freddie") threw cold water on the concept. A second fed-

eral bill has been introduced (H.R. 2599) to resolve the concerns raised by FHFA, Fannie and Freddie about the seniority of PACE liens, but in the interim, federal litigation continues. All is not lost though because while the legal issues remain a clear conflict between federal and state law, several Florida local governments continue efforts to begin forming various types of energy financing programs across the state.

Recall that in PACE programs,

local government non ad-valorem assessments are attached to a property tax bill voluntarily through a lien to fund energy efficiency or renewable energy improvements. This approach overcomes the largest hurdle in energy financing, the needed upfront infusion of cash to actually complete the improvements. The state or local government provides the financing for energy projects to real property owners (residences or businesses) and that financing is then collected

See "Pace Update," page 21

From the Chair

by Martha Collins

I have been with the Section for eleven years and this is my first article in the Section Reporter. I was not going to miss this opportunity to write everyone as incoming Chair. First and foremost, I want to thank Joe Richards who leaves us as outgoing Chair, and thank him for all of his work with the Section. He will be missed. To kick start the new year, Section leadership held their annual retreat in Melbourne Beach, FL. To keep in mind the diversity of the Section, the economy, and our environmental and land use interests, we held the retreat at the Archie Carr Wildlife Refuge and stayed in three local motels. We were provided an

ocean front classroom at the refuge during the day where we held our meetings, and at night we were treated to a private tour of the refuge to watch endangered sea turtles nest on the beach. We had our largest participation in years for the retreat and got a great start in planning for the upcoming year.

Our goal is to always keep in mind our Section member's needs, provide them with valuable services, and continue to grow and make our Section stronger. Along those lines, we look forward to continuing with our four substantive committees while also adding a fifth one on Energy. Our webinars have proven to be very

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CHAIR'S MESSAGE

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successful and we will continue to grow these programs. Our Section Reporter and Treatise can be found on our website so please visit www.eluls.org to utilize these resources. We have also started a monthly electronic newsletter to keep our members informed of upcoming CLE's and other opportunities. There are many ways to participate in the Section and I encourage you to review our website and contact us if you are interested in participating further, for example, by speaking at our one of our CLE's or writing for *The Florida Bar Journal*. We would value and appreciate your service.

I am very excited and humbled by the opportunity to serve as Section Chair and to continue to work with such wonderful and dedicated people. Thank you for the opportunity and we all look forward to another year.

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An Overview of Florida Fisheries Management

by Jeremy Monckton

In 1983, the regulation of marine life in Florida operated under a convoluted system with many separate participating entities, such as the Marine Fisheries Commission (“MFC”) (which initiated rulemaking procedures), the Department of Environmental Regulation (“DER”) (which held management and enforcement responsibility over marine life), the Governor and the Cabinet (whom approved or disapproved of the proposed MFC rules), and the Legislature. Public dissatisfaction with this fragmented system of regulation resulted in demand for the creation of a new centralized regulatory and enforcement agency. The Florida Fish and Wildlife Conservation Commission (FWC) was created on July 1, 1999, after voters approved an amendment to Article IV, Section 9 of the Florida Constitution. Section 9 states that FWC will exercise the state’s executive and regulatory power over marine, freshwater, and wild animal life within the state’s boundaries.¹ In addition, it gives the Legislature the authority to set license fees and penalties for violations of FWC rules, and the authority over budget, planning, personnel management, and purchasing.² The Legislature may also pass laws in aid of FWC, provided that the laws are not inconsistent with Article IV, Section 9.³

In order to implement the amendment, the Legislature passed a merger bill⁴ which combined the staffs of the previous agencies involved in wildlife regulation: MFC, the Game and Fresh Water Fish Commission (GFC), and select staff from DER (now The Florida Department of Environmental Protection (“DEP”)) relating to marine research, enforcement, and management. The execution of the merger bill left no doubt that FWC has the regulatory, enforcement, and management authority over all living resources in the state of Florida. FWC also operates as a law enforcement agency, and FWC officers perform many police functions in the course of their duties.

Chapter 379 of the Florida Statutes

contains the grant of regulatory and enforcement authority for FWC over all of the state’s living resources. The Florida regulations for marine fisheries can be found at <http://myfwc.com/fishing/saltwater/regulations>, and are codified in the Florida Administrative Code at division 68B, which is, for the most part, subdivided by species.⁵ Licensing remains an important tool for FWC to carry out its duties -- it issues more than 200 licenses, permits, and certifications that are required for a wide range of activities impacting fish, wildlife, and boater safety. Chapter 379 contains licensing provisions, which are divided into recreational⁶ and non-recreational (commercial)⁷ categories.

Recreational licenses and permits for residents and nonresidents are available at a variety of locations: on the internet, at retail agents (such as sporting good stores or other retailers that sell hunting or fishing equipment), by phone, and at county tax collectors’ offices. All license, permit, and issuance fees are subject to change by the legislature.

Before commercially harvesting or selling any marine fish or other saltwater products⁸ in Florida, a fisherman must be eligible for and comply with the FWC non-recreational licensing requirements. A Saltwater Products License (“SPL”) is required in order to do any of the following: sell, barter, or exchange any saltwater products for merchandise, harvest over the recreational bag limit, harvest over 100 pounds or 2 saltwater fish per person per day (whichever is greater) for species that do not have an established bag limit, and use certain gear or equipment. Also, there are certain trap certificates and tags required for those wishing to commercially harvest spiny lobster⁹, stone crab¹⁰, and blue crab¹¹ using traps. Civil and criminal penalties apply to those fishermen who violate these licensing and permitting laws, including suspension and forfeiture of those licenses and permits.¹²

The marine resources of Florida

are commonly owned by all the people of the state and are managed through the state government which serves as trustee for their safe-keeping.¹³ FWC manages these resources within the state’s jurisdiction, which extends three nautical miles from the shoreline on the Atlantic Ocean and nine nautical miles from the shoreline of the Gulf of Mexico.¹⁴ Because marine resources are mobile creatures that rarely respect jurisdictional boundaries, many marine species are jointly managed by the federal and state governments. The United States’ Exclusive Economic Zone (“EEZ”) extends seaward 200 miles beyond the state’s jurisdictional limits. National Marine Fisheries Service (“NMFS”) is the federal agency responsible for the stewardship and management of the nation’s living marine resources and their habitat within the EEZ. NMFS is a division of the National Oceanic and Atmospheric Administration (“NOAA”) and the Department of Commerce. NMFS assesses and predicts the status of fish stocks, ensures compliance with marine fisheries regulations, and works to end wasteful fishing practices. It achieves these goals with the mechanisms provided in the Magnuson-Stevens Fishery Conservation and Management Act (the “Act”)¹⁵, and with the assistance of eight regional fisheries management councils, six regional science centers, the coastal states and territories, and three interstate fisheries management commissions. Through this collaboration, NMFS is able to work with communities to address local fishery management issues. NMFS conserves and manages marine fisheries to promote sustainability, and to prevent economic loss associated with overfishing, declining species, and degraded habitats.

The NMFS regulatory program is one of the most active in the federal government, and most regulations are published to conserve marine fisheries under the Magnuson-Stevens Act. The Act is the primary law governing marine fisheries management

continued...

in the United States. It was originally enacted in 1976, although it has been amended significantly over the years in response to continued overfishing of major stocks; the Sustainable Fisheries Act (“SFA”) of 1996¹⁶ and the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act in 2006¹⁷ are the most notable amendments. The most recent version of the Act includes seven purposes: 1) acting to conserve marine fishery resources; 2) supporting enforcement of international fishing agreements; 3) promoting fishing pursuant to sound conservation principles; 4) providing for the implementation of fishery management plans (“FMPs”) which achieve optimum yield; 5) establishing regional Fishery Management Councils to steward fishery resources through the preparation, monitoring, and revising of plans which (a) enable stakeholders to participate in the administration of fisheries and (b) consider social and economic needs of the individual states; 6) developing underutilized fisheries; and 7) protecting essential fish habitats.¹⁸ The law additionally calls for the reduction of bycatch and the establishment of fishery information monitoring systems.¹⁹

Federal fishing regulations are not always the same as state fishing regulations -- the relationship between the federal and state governments is defined by Section 306 of the Act.²⁰ Generally, the state government is responsible for managing fisheries within their territorial boundaries and may “regulate and fishing vessel outside the boundaries of the State” in two circumstances: 1) if the vessel is registered in the state and there is no federal fishery management plan; or 2) if the federal fishery management plan expressly delegates management authority to the state and the state’s regulations are consistent with the plan.²¹ Furthermore, if a state fails to manage a fishery within its waters, to the detriment of a fishery predominantly located in federal waters, procedures are available to the federal government to preempt the state regulation and extend its own regulation into state waters.²²

Florida has decided to remain inconsistent with federal fisheries rules in the past. In 2008, FWC, with input from the fishing industry, remained inconsistent with federal rules for red snapper. Due to the increased fishing pressure, the federal government closed the red snapper season in federal waters. As a result, FWC has opted to go consistent with federal rules for red snapper as well as other species in order to maintain the longest possible open fishing seasons.

Section 311(h) of the Act authorizes the Governor of an eligible State to apply to the Secretary of Commerce to execute a joint enforcement agreement, which authorizes the deputization and funding of State law enforcement officers with federal marine law enforcement responsibilities. FWC officers work to enforce both federal and state regulations.²³

At the federal level, Regional Management Councils are charged to develop and implement FMPs to restore depleted fish stocks. The Councils will periodically amend those plans when they receive new information about the fishery (primarily through stock assessment reports).²⁴ The Secretary of Commerce, assisted by NMFS and state governments, appoints members to the regional Councils and evaluates and approves of the Council’s FMPs.²⁵ The FMPs that the Councils produce must specify the criteria which determine when a stock is overfished and the measures needed to rebuild it.²⁶ Rules implementing provisions of the FMPs are established by the Secretary of Commerce, through NMFS. The regulations are enforced with mechanisms including annual catch limits, individual catch limits, community development quotas, and more.

The State of Florida has coastal waters in the jurisdiction of two separate Regional Management Councils – the South Atlantic Fishery Management Council (“SAFMC”) and Gulf of Mexico Fishery Management Council (“GMFMC”). The boundary between the two coincides with the line of demarcation between the Atlantic Ocean and the Gulf of Mexico. The Councils are responsible for developing and monitoring FMPs to provide for the best use of the fishery resources in their respective jurisdictions.

Florida actively participates in the process of marine fisheries regulation by assisting the SAFMC and

the GMFMC in developing FMPs for different species. Pursuant to section 301 of the Magnuson-Stevens Act, any FMP developed by a council and any regulations to implement the FMP must conform to ten national standards.²⁷

National Standard One sets the bar that requires all conservation and management measures shall prevent overfishing while achieving “optimum yield.”²⁸ Optimum yield is a level of fishing below what might be the maximum sustainable yield and it allows for uncertainty and unexpected events. This standard has been cited frequently as the basis for regulations, and in general it takes precedence over all other standards. Standard Two sets the science standard for making management decisions: they shall be based on “upon the best scientific information available.”²⁹ Standard Five provides for use (harvest) of fishery resources.³⁰ A key provision is that allocation of harvest or use may *not* be based solely on economic values. For example, this prevents federal managers from allocating the harvest of a species between recreational and commercial fishing sectors based *solely* on the relative economic values of those two sectors. Standard Eight directs that socio-economic impacts be considered by managers, and fishermen often cite this standard as something that the Councils and NMFS either overlook or underestimate.³¹ As aforementioned, however, the conservation standard trumps most socio-economic considerations. The act also places high importance on minimizing or eliminating “bycatch” in fisheries, codified in Standard Nine.³² This standard has been used for regulations mostly related to commercial fisheries, and drives much of the gear or area restrictions that are implemented. More recently, bycatch in the form of “discard mortality” resulting from recreational harvest has become an issue. For example, in the South Atlantic recreational discard mortality is very high and managers are required to address that in ways that will hopefully minimize such mortality.

The Councils conduct public hearings at regularly scheduled meetings or other appointed times.³³ A common complaint lodged against the hearing procedure is that public testimony is not adequately considered during

the drafting of the FMPs. Yet the language of the Act does not require the Council do more than “allow all interested persons an opportunity to be heard.”³⁴ In addition to public comment, the Councils receive input and recommendations from knowledgeable people from other state and federal agencies, universities, and members of the public who serve on various committees and panels. For each FMP there may be an Advisory Panel (“AP”) made up of users of fishery resources, including recreational and commercial fishermen, buyers, sellers, and consumers.³⁵ APs are advisory in nature but provide a significant amount of input.

Another body that advises the Councils on developing FMPs is the Scientific and Statistical Committee (SSC), comprised of scientists who are experts in technical aspects of the regulated fish and resources. At section 302(h)(6) of the Act, there is explicit language regarding the role of the SSC in setting “fishing levels” for management purposes.³⁶ This significant new provision occurred in the 2006 reauthorization and requires an annual catch limit for every federally managed species, giving the SSC a more direct role in management plans than they had previously. This is where the Council’s SSC (or some other scientific peer review process) sets the fishing level recommendation and the Council may not exceed that. Other changes to the act stipulate strict deadlines to implement annual catch limits, and also require managers to adopt “accountability measures.” Accountability measures are more or less automatic management adjustments to fishing that take effect if annual catch limits are exceeded.

Section 302(h)(6) mandates that the Council or the Secretary of Commerce establish an annual catch limit and a minimum stock size threshold, based on SSC recommendations.³⁷ The determination of the annual catch limit is another area where SSC plays a significant role. When stock assessments are completed, the scientists evaluate whether fishing mortality is exceeding the threshold. If it is, it triggers immediate actions by the Council or the Secretary to reduce the fishing pressure and end

overfishing. Prior to the 2006 reauthorization, the Act gave managers just one year to prepare plans to end overfishing. Now, the timeframe has been adjusted to two years, but action is still required quickly. With more emphasis placed on ending overfishing regardless of the cost, this often results in frequent, dramatic regulation changes, making it difficult for fishermen to keep up with the sometimes unpredictable and sporadic regulations.

Section 303(b)(6) gives Councils or the Secretary the option of developing limited access systems for fisheries, and is typically applied to commercial fisheries.³⁸ Limited access programs have the potential to spawn controversy because qualifying criteria may exclude a percentage of fishermen from the fishery. Section 303(b)(6) spells out in detail how federal managers are to consider and apply a limited access privilege program. These types of programs are also known as individual fishing quota, individual transferable quota, and more recently, catch share programs.

Fisheries management on the state and federal levels is accomplished in a variety of ways. Federal catch limits, which apply cumulatively in both federal and state waters, is one example as mentioned above. In Florida waters and where jurisdiction has been extended into federal waters, FWC rules primarily manage the harvest of marine life through size limits and slots, gear restrictions, and seasons. Recent rule changes include season closures for gag grouper³⁹ and amberjack⁴⁰, a bag limit increase for swordfish⁴¹, and removal of prohibitions on the harvest of lionfish in John Pennekamp Coral Reef State Park.⁴²

In addition, the Florida Constitution contains a provision that places limits on marine net fishing.⁴³ This section prohibits the use of gill or entangling nets as well as nets over 500 square feet of mesh. Inclusion of the amendment in Florida’s Constitution, as well as FWC’s rules interpreting and enforcing the amendment, is still contentious with some fishers.

In sum, the regulation of marine life in Florida was streamlined in 1999 with the creation of the Florida Fish and Wildlife Conservation

Commission, which is vested with all of the regulatory, management, and enforcement authority over the state’s living resources. FWC manages these resources within the state’s jurisdiction, and in certain circumstances may extend its management into the federal waters of the EEZ. Florida also participates in joint planning and management with NMFS and the GMFMC and SAFMC.

Endnotes:

¹ FLA. CONST. art. IV, § 9.

² *Id.*

³ *Id.*

⁴ 1999 Fla. Laws 99-245.

⁵ FLA. ADMIN. CODE ANN. r. 68B.

⁶ FLA. STAT. § 379.35-359 (2010).

⁷ FLA. STAT. § 379.361-377 (2010).

⁸ A saltwater product is defined as any marine fish, shellfish, clam, invertebrate, sponge, jellyfish, coral, crustacean, lobster, crab shrimp, snail, marine plant, echinoderm, sea star, brittle star, urchin, etc., excluding non-living shells and salted, cured, canned, or smoked seafood.

⁹ FLA. STAT. § 379.367 (2010).

¹⁰ FLA. STAT. § 379.365 (2010).

¹¹ FLA. STAT. § 379.366 (2010).

¹² FLA. STAT. § 379.401-504 (2010).

¹³ Attorney General re: Fish & Wildlife Conservation Commission, 705 So. 2d 1351 (Fla. 1998).

¹⁴ FLA. CONST. art. II, § 1.

¹⁵ 16 U.S.C. §§ 1801-1884.

¹⁶ Pub. L. No. 104-297, 110 STAT. 3559 (1996).

¹⁷ Pub. L. No. 109-479, 120 STAT. 3575 (2006).

¹⁸ 16 U.S.C. § 1801(b).

¹⁹ 16 U.S.C. § 1801(c).

²⁰ 16 U.S.C. 1856.

²¹ 16 U.S.C. 1856(a)(3).

²² 16 U.S.C. 1856(b).

²³ 16 U.S.C. 1861(h).

²⁴ 16 U.S.C. 1852(h)(1).

²⁵ 16 U.S.C. 1852(b).

²⁶ 16 U.S.C. 1853(a)(10).

²⁷ 16 U.S.C. 1851.

²⁸ 16 U.S.C. 1851(a)(1).

²⁹ 16 U.S.C. 1851(a)(2).

³⁰ 16 U.S.C. 1851(a)(5).

³¹ 16 U.S.C. 1851(a)(8).

³² 16 U.S.C. 1851(a)(9).

³³ 16 U.S.C. 1852(h)(3).

³⁴ *Id.*

³⁵ 16 U.S.C. 1852(g)(2).

³⁶ 16 U.S.C. 1852(h)(6).

³⁷ *Id.*

³⁸ 16 U.S.C. 1853(b)(6).

³⁹ FLA. ADMIN. CODE ANN. r. 68B-14.0039.

⁴⁰ FLA. ADMIN. CODE ANN. r. 68B-14.004.

⁴¹ FLA. ADMIN. CODE ANN. r. 68B-33.0034, .004.

⁴² FLA. ADMIN. CODE ANN. r. 68B-5.002.

⁴³ FLA. CONST. art. X, § 16.

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Florida Case Law Update

by Gary K. Hunter, Jr. & Jacob T. Cremer, Hopping Green & Sams, P.A.

A city ordinance that does not provide for the possibility of obtaining a variance is constitutional so long as it does not create a “unique hardship” for the property owner. *Walthour v. Malibu Lodging Investments, LLC*, 2011 WL 2135594 (Fla. 3d DCA June 1, 2011).

Miami Dade County filed suit seeking injunctive relief against Malibu Lodging Investments, Inc., (Malibu) for selling outdoor advertising signage on its multi-story hotel. The County alleged Malibu’s practices violated several provisions of its Code of Ordinances, including one prohibiting outdoor advertising signage within 600 feet of the right-of-way of any expressway right-of-way. The trial court cited *Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach*, 460 So. 2d 379 (Fla. 5th DCA 1984), and ruled the County’s ordinances were unconstitutional because they did not provide for the possibility of obtaining a variance. *Walthour*, 2011 WL 2135594, at *3. Because the ordinances were unconstitutional, the trial court held the County had not shown it was likely to succeed on the merits and denied injunctive relief.

In reversing the trial court’s decision, the Third District Court of Appeal stated that it has been “well established under Florida law that local governments may legislate to protect the appearance of their communities as a legitimate exercise of their inherent police power.” *Id.* The Court clarified that the application of the ordinances in *Innkeepers* resulted in a “unique hardship” on the property owner that prohibited him from using the property according to its only reasonable use. This hardship made the zoning ordinance unconstitutional because it was “arbitrary, oppressive, or confiscatory as to a particular property.” *Id.* at *4.

Here, however, Malibu had not shown a “unique hardship” from the application of the ordinances to its property. *Id.* at *4. The Court held the “mere absence of a variance provision” from an ordinance does not automatically make the ordinance unconstitutional when the ordinance’s

application does not present a unique hardship. *Id.* Because the ordinances were within the County’s police power, the County was substantially likely to succeed on the merits and therefore entitled to injunctive relief enforcing its ordinances. *Id.* at *5.

The Right to Farm Act does not prohibit the enforcement of local government ordinances regulating farming activities adopted prior to June 2000; the definition of “development” in chapter 163, Fla. Stat. does not pre-empt all local government regulation of agricultural uses. *Wilson v. Palm Beach Cnty.*, 62 So. 3d (Fla. 4th DCA June 15, 2011).

Plaintiff Wilson and his two business entities sued Palm Beach County for declaratory and injunctive relief after the County issued Wilson a notice of violation of the Unified Land Development Code (ULDC). The County threatened to shut down Wilson’s businesses and alleged he was “operating a wholesale or retail nursery” and maintaining landscaping equipment and materials without zoning approval. Wilson and his business entities sued the County after it required his businesses to meet a number of land use conditions to be eligible for a required Special Permit. *Id.* at *1. Wilson alleged that Florida’s Right to Farm Act pre-empted the County’s local regulations and that his activities were “farming operations,” outside of the definition of development under the ULDC. *Id.* at *2. The County denied Wilson was a farmer or engaged in farming operations.

The County filed a motion for summary judgment arguing: 1) the Right to Farm Act allows pre-existing ordinances to regulate farming operations; 2) the County’s ordinances regulating nurseries are not implicated by the Right to Farm Act because they do not intend to restrict farming operations; and 3) the County’s ordinances are unaffected by chapters 163 and 380, Fla. Stat., because they were authorized under more general grants of constitutional and statutory authority. The trial court agreed and granted summary judgment, denying plaintiffs’

declaratory and injunctive relief. *Id.*

The Fourth District Court of Appeal, however, held the trial court erred in concluding no material facts remained. While the Fourth District held the Right to Farm Act did not prohibit pre-existing ordinances that regulated farming operations, it also held one of the ordinances the County sought to enact was adopted after the enactment of the Right to Farm Act. *Id.* at *3-4. To remain valid, the ordinance’s setbacks and other conditions must not impact farming operations. The Fourth District Court of Appeal held the County failed to carry its burden for summary judgment because it was a question of material fact whether the ordinance actually impacted farming operations. *Id.* at *4-5.

Finally, the Fourth District affirmed that the County’s ordinances were authorized by general constitutional home-rule powers and the statutory authority under chapter 125, Fla. Stat. As such, the definition of “development” in chapter 163, Fla. Stat., did not pre-empt enforcement of the County’s ordinances. *Id.* at *5.

Note: Chapter 2011-007, Laws of Florida, appears to reverse the holding in this case by making expanding the prohibition of local ordinances regulating bona fide agricultural operations to the “enforcement” of such ordinances.

When a controversy is anticipated, a property owner may be entitled to a declaration of rights, particularly when the other party concedes to the ripeness of the claim. However, a claim for inverse condemnation cannot stand where the property owner is merely planning activities or describes events occurring in the future. *Pembroke Ctr., LLC v. Dep’t of Transp.*, 2011 WL 2555569 (Fla. 4th DCA June 29, 2011).

Pembroke Center, a commercial property, is located adjacent to State Road 7 (SR 7) and is encumbered by a thoroughfare dedication and an easement allowing for on-site traffic and utility needs. The Florida Department

of Transportation (DOT) announced plans to widen SR 7 and adopted a right of way map and a roadway plan, which confirmed its intention to take Pembroke's thoroughfare and easement. Financial limitations placed the project on hold, but DOT's website indicated the project would continue once funding was available. *Id.* at *1.

Pembroke filed a complaint against DOT for declaratory relief and inverse condemnation. *Id.* In the declaratory relief action, which DOT conceded was ripe, the complaint alleged that a controversy existed as to Pembroke's property rights in an easement, that DOT had imposed a burden on Pembroke Center's easement (beyond the scope of its original dedication), and that DOT was required to acquire a right-of way to use the easement. *Id.* In the inverse condemnation action, the complaint alleged DOT was required to condemn the right-of-way and pay for the use of Pembroke's easement. *Id.* The trial court dismissed the declaratory relief and inverse condemnation claims with prejudice. *Id.*

The Fourth District Court of Appeals held the trial court erred by dismissing the claim for declaratory relief, but not the claim for inverse condemnation. *Id.* at *2-3. The Fourth District held a property owner only needs to show "an actual, present controversy" as to the property owner's rights, which Pembroke had done and DOT had conceded at the trial hearing. *Id.* at *2. The Court did not hold that the trial court erred in dismissing the inverse condemnation claim, though even DOT agreed the dismissal for lack of ripeness should not have been with prejudice. *Id.* at *1, *3. The Fourth District factually distinguished Pembroke from two cases, *Tampa-Hillsborough Cnty. Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) and *Dep't of Transp. v. DiGerlando*, 638 So. 2d 514 (Fla. 1994), both of which held that maps of reservation severely restricting development are not takings per se but could be used to support inverse condemnation claims. *Id.* at *3. In Pembroke's situation, however, the Court held DOT's actions were only planning activities for future events, and "[m]ere planning activities do not cause a current loss of access." *Id.*

In a special concurrence, Judge Levine stated that planning activities are those preparatory activities made

prior to a decision. *Id.* at *4. Since the property owner was alleging DOT had already made the decision to exercise the easement, the inverse condemnation claim could be considered ripe. *Id.*

Alterations to a man-made drainage schemes meant to preserve the natural surface flow and drainage of water are subject to the reasonable use rule. *Heritage 5, LLC v. Estrada*, 2011 WL 2848664 (Fla. 4th DCA July 20, 2011).

Estrada owned property adjacent to Heritage 5, LLC, a commercial nursery. *Id.* at *1. Historically, both properties had been transitioned from wetlands to agricultural use, requiring the installation of man-made canals and ditches to facilitate the natural flow and drainage of surface water. *Id.* Estrada made improvements to his property and altered the man-made drainage scheme by filling up drainage ditches and cutting off the flow of water. *Id.* Estrada's improvements significantly harmed Heritage 5's operations by flooding its nursery, destroying mature plants and spreading disease among the plants. *Id.*

The Fourth District Court of Appeals held Estrada violated the Florida's Supreme Court's reasonable use rule governing interference with surface waters flowing from improved property, adopted in *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959 (Fla. 1989). Because the earlier man-made canals and ditches facilitated, rather than altered, the natural flow of surface water, the reasonable use rule applied as if Estrada had altered surface water flow on natural land that had never been improved. *Id.*

Parties participating in quasi-judicial proceedings before local government bodies cannot be barred from subsequent certiorari proceedings. *Highwoods DLF EOLA, LLC v. Condo Dev., LLC*, 51 So. 3d 570 (Fla. 5th DCA 2010).

Highwoods appealed to the Fifth District Court of Appeal after the Circuit Court of Orange County denied its motion to intervene in a certiorari proceeding as a respondent. In a potential conflict with the Second District Court of Appeal, the Fifth District held Highwoods could not be barred from the appellate review of its own application for a zoning change.

Highwoods applied to the City for a master plan amendment that would allow it to build a forty-two story mixed-use high-rise building. Condo Developer owned a multifamily residential high-rise building across the street from Highwoods' site, and objected to Highwoods' request. In a quasi-judicial proceeding, the City approved Highwoods' request, and Condo Developer appealed to the Circuit Court, naming only the City (and not Highwoods) as a respondent. *Id.* at 571.

Subsequently, Highwoods filed a motion to dismiss for Condo Developer's failure to include it as a party, pursuant to the *Florida Rules of Appellate Procedure*, which states that for certiorari petitions challenging quasi-judicial land use proceedings, "all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondent." *Id.* at 571-72; Fla. R. App. P. 9.100(b). The Court denied Highwoods' motion, and Highwoods filed a motion to intervene as a party with an interest in the pending litigation. *Highwoods*, 51 So. 3d at 572. The Court denied this motion as well, citing *Brigham v. Dade Cnty.*, 305 So. 2d 756 (Fla. 1974); *Concerned Citizens of Bayshore Cmty. v. Lee Cnty.*, 923 So. 2d 521 (Fla. 2d DCA 2005); and *City of Saint Petersburg, Bd. of Adjustment v. Marelli*, 728 So. 2d 1197 (Fla. 2d DCA 1999; all of which held that a property owner and zoning applicant was not an indispensable party to a certiorari petition challenging the local government's decision. *Id.*

The Fifth District, however, held *Brigham* was no longer controlling because the Florida Supreme Court had subsequently amended the *Florida Rules of Appellate Procedure* to require that "all parties in the lower tribunal be named as either petitioners or respondents." *Id.* Because Highwoods should have been named a participant, the Fifth District held there was "no legal basis for the circuit court's denial of Highwood's motion to intervene." *Id.* The Court distinguished Highwood's situation from the *Concerned Citizens* and *Marelli* cases of the Second District, but it clearly stated that it disagreed with the holdings to the extent they conflicted with the Court's holding in *Highwoods*. *Id.* The Fifth District did not certify a conflict with the Second District.

On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of August 18, 2011. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Whiley v. Scott, Case No. SC11-592. Petition for writ of quo warranto seeking an order requiring Governor Scott to demonstrate that he has not exceeded his authority, in part, by suspending rulemaking through Executive Order 11-01 (since superseded by Executive Order 11-72). Status: On August 15, 2011, the Court granted the petition, but withheld issuance of the writ, trusting that any provision in Executive Order 11-72 suspending agency compliance with the APA's rulemaking requirements "will not be enforced against an agency at this time, and until such time as the Florida Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor."

SJRWMD v. Koontz, Case No. 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. 15 So.3d 581 (Fla. 5th DCA 2009). Status: Oral argument held April 5, 2010.

FIRST DCA

Clay County v. DCA, Case No. 1D11-3065. Appeal from final order determining a plan amendment to be "in compliance." The amendment includes criteria to be used to achieve the compatibility of lands adjacent or in close proximity to Camp Blanding. The final order generally adopts the recommended order, but makes certain changes. Status: Notice of appeal filed June 7, 2011.

Haridopolos, President of the Senate v. Alachua County, et al., Case No. 1D10-6433. Petition for writ of certiorari to quash the trial court's denial of a motion to dismiss in an action for declaratory relief, seeking to declare unconstitutional the 2009 impact fee legislation, s. 163.31801(5), *Florida Statutes*. Status: On May 9, 2011, the appellate court granted the petition and

quashed the order denying the motion to dismiss on legislative immunity grounds. 36 F.L.W. D978a. On May 23, Respondents filed a motion for rehearing *en banc* and motion for rehearing. On July 7, 2011, the court denied the motions, but issued a revised opinion quashing the order to dismiss. Note: During the 2011 Regular Session, the Legislature reenacted the challenged impact fee legislation. See Chapter 2011-149, *Laws of Florida*.

Guidry v. DEP, Case No. 1D10-6399. Petition for review of final order determining appellants' lack of standing to challenge as unadopted rules two conditions in a beach restoration permit and a position with regard to when erosion control lines must be established. Status: Proceedings stayed until August 29, 2011.

Mid-Continent Casualty Co. v. First Coast Energy, L.L.P. and DEP, Case No. 1D10-5740. Appeal from final judgment determining that the term "site check" in insurance policy has the same meaning as the term in EPA's regulations in 40 CFR 280.52 and may provide a basis for a "confirmed release" for which insurance coverage is provided. Status: On August 12, 2011, the court affirmed in part and reversed in part.

Honorable Jeff Atwater, et al. v. City of Weston, Florida, et al. Case No. 1D10-5094. Petition for review of final summary judgment determining that one provision in SB 360 (Chapter 2009-96), the 2009 growth management legislation, constitutes an unfunded mandate, and determining that the entirety of SB 360 "is declared unconstitutional. . . and the Secretary of State is ordered to expunge said law from the official records of the state." Status: On May 2, 2011, the court determined that none of the four named defendants was a proper party, and it therefore reversed and remanded to the trial court to dismiss the complaint. 36 F.L.W. D919d. The motions for rehearing were denied on June 28, 2011. Note: During the 2011 Regular Session, the Legislature reenacted the challenged growth management legislation. See Chapter 2011-14, *Laws of Florida*.

Kurt S. Browning v. Florida Pros-

cuting Attorneys, et al. Case No. 1D10-4532. Appeal from declaratory judgment declaring that a proviso in the 2010-11 General Appropriations Act providing that "no state agency may expend funds provided for Bar dues," is unconstitutional as volatile of III, Section 12, of the Florida Constitution, and ordering the Secretary of State to expunge the challenged proviso from the official records of the state. Status: Reversed on March 10, 2011, 36 F.L.W. D522a. Note: The appropriations bill approved during the 2011 Regular Session again includes a provision authorizing the payment of Bar dues.

Martin County Conservation, et al. v. Martin County, Case No. 1D09-4956. Petition for review of final order determining comprehensive plan amendments to be in compliance. Two appellees moved to dismiss the appeal for lack of standing, and requested attorneys fees. Status: Appeal dismissed *per curiam* on June 21, 2010, because "the appellants' have not demonstrated that their interest or the interest of a substantial number of members are adversely affected by the challenged order, so as to give them standing to appeal." On December 14, 2010, the court entered an order concluding that the appeal was filed in contravention of s. 57.105(1), F.S., and imposing sanctions against appellants and their counsel. 35 F.L.W. D2765a. Appellants have filed a motion for rehearing and a motion for rehearing *en banc*.

SECOND DCA

Florida Wildlife Federation v. DCA, et al., Case No. 2D11-3925. Petition for review of non-final order of the ALJ's Notice to Parties Regarding the Governing Law. Among other things, the petitioner asks the court to declare the 2011 Growth Management Law, Chapter 2011-139, to be unconstitutional. Status: Petition filed August 10, 2011; dismissed on August 18, 2011. Note: Another challenge to the 2011 Growth Management Law has been filed in the 2d Circuit, *Town of Yankeetown v. DCA, et al.*, Case No. 37 2011 CA 002036 (Amended Complaint filed August 9, 2011).

THIRD DCA

Flagler Retail Associates v. DCA, Case No. 3D11-948. Petition for review of a final order of the Administration Commission finding that an amendment to the Miami-Dade County Comprehensive Plan is in compliance. Status: Notice of appeal filed April 11, 2011.

FOURTH DCA

Rosenblum v Zimmet, Case No. 4D10-3049. Petition for review of DEP final order finding that Zimmet was entitled to a single family dock

exemption for his project and rejecting Rosenblum's claim that his navigation would be impeded to and from the south side of his dock. Status: Notice of appeal filed July 26, 2010; all briefs have been filed.

FIFTH DCA

Kennedy v SJRWMD, Case No. 5D10-3656. Appeal from a final summary judgment for SJRWMD, rejecting claims that its Governing Board violated the Sunshine Law at the meeting where it considered the ALJ's recommended order on a chal-

lenge by the St John's Riverkeeper to an application for a consumptive use permit by Seminole County. (That final order was affirmed by the 5th DCA.) The complaint sought a declaration that the meeting violated the Sunshine Law by not allowing Riverkeeper members an opportunity to speak during the public comment period and by not holding the Board meeting at a location that could seat all the people the SJRWMD "reasonably expected" to attend. Status: Notice of Appeal filed October 27, 2010; all briefs have been filed.

Department of Community Affairs Update

by Richard E. Shine, Assistant General Counsel

Department of Community Affairs v. Taylor County, DOAH Case No. 10-1283GM.

In April 2011, after going to hearing and submitting proposed recommended orders, the parties settled the case. The proceeding was initiated when Taylor County adopted three future land use amendments and the Department found the amendments not "in compliance" after review. The map amendments changed the future land use designations of two coastal parcels from Conservation and Agriculture/Rural Residential to Mixed Use-Urban Development with a density of 12 dwelling units per acre and are located in the Coastal High Hazard Area within the 100 year flood zone. The Parties entered into a Stipulated Settlement Agreement requiring the adoption of a Remedial Amendment limiting the maximum allowable density to 4 units per acre until such time as centralized sanitary sewer is available and to allow 10 units per acre after central sewer becomes available.

Long Term Master Plan Conservation Agreement For East Nassau Comprehensive Planning Area Pursuant to Florida Statutes Section 163.3245(10).

In August 2011, the Department and the Board of County Commissioners of Nassau County entered into a Long Term Master Plan Conservation Agreement for approximately 24,000 acres pursuant to Section 163.3245(10), Fla. Stat., as amended by Chapter 2011-139, Laws of Florida. The recent amendments to Section

163.3245(10), Fla. Stat., allow the Department to enter into an agreement with a local government, that on or before July 1, 2011 adopted a large-area comprehensive plan amendment that is to be implemented through a detailed specific area plan. The East Nassau Comprehensive Planning Area identifies the final boundaries of lands within the Conservation Habitat Network to be placed under conservation easements, and may be geographically phased or staged in coordination with each detailed specific area plan.

Herrin, ECARD v. Volusia Co., DCA, et al.; DOAH 10-2419 and 11-02527GM(Volusia-Farmton).

DCA found comprehensive plan amendments for Farmton project inconsistent with statute and rule on site suitability, coordination with adjacent local governments, internal consistency, and water supply. The Department subsequently entered into a Stipulated Settlement Agreement with Volusia County finding the plan amendment in compliance, requiring the adoption of a Remedial Amendment, and realigning the Department as a Respondent. Thereafter, the ALJ granted DCA's motion to be dismissed from the case pursuant to Chapter 2011-139, Laws of Florida, which amended the procedure for comprehensive plan amendment adoption and challenge located in Section 163.3184, Fla. Stat. The ALJ also granted Volusia County's Motion in Limine excluding evidence concerning financial feasibility, needs analysis, planning horizon, consistency or incon-

sistency with the state comprehensive plan and the provisions of Florida Administrative Code Chapter 9J-5 due to chapter 2011-139, Laws of Florida, and the amendments to the definition of in compliance found in section 163.3184(1)(b), Fla. Stat. The case is set for hearing starting August 2 – 5, 2011.

Cemex Construction Materials Florida, LLC, Old Corkscrew Plantation, LLC, Old Corkscrew Plantation V, LLC, and Troyer Brothers Florida v. Lee Co and DCA and Florida Wildlife Federation, Collier Co Audubon Society, Conservancy of Southwest Florida, Inc., Estero Council of Community Leaders, Inc., Nick Batos, Old Corkscrew Golf Club, LLC and Alico Land Development, Inc.; DOAH 10-2988GM, DCA11-GM-124.

The DCA found the plan amendment not in compliance with respect to the density rights program, public facilities and the transportation map series. In June 2011, the Department settled a not in compliance finding, the parties realigned and the DCA was dismissed as a party. Third parties have intervened regarding private mining rights. A hearing has been set for October 24-28 and November 2-4, 2011. The Florida Wildlife Federation filed an interlocutory appeal and contends that the ALJ's order dismissing the Department as a party respondent unconstitutionally applied Chapter 2011-139, Laws of Florida, retroactively; and that the ALJ's notice that states that new Chapter 2011-139 is the governing law in the instant case is unconstitutional.

ELULS Affiliate Update

by Terry Griffin, PG (Cardno TBE)

The August 2011 Ethical Challenges and Annual Update Sessions in Ponte Vedra Beach were a great success for the Environmental and Land Use Law Section (ELULS) affiliate members this year. I would like to thank *Chad Drummond (Geosyntec Consultants)* for his hard work in making the conference such a success, and for his outstanding service as the Affiliate Membership chair during the previous year. I would also like to thank the affiliate membership committee for entrusting the committee chairmanship to me for the upcoming year, and to *Bob Wojcik (Golder Associates)* for serving as Vice Chair.

The **Ethical Challenges for the Environmental Lawyer and Consultant** courses in Ponte Vedra Beach were sponsored by the Affiliate Membership Committee and were well received and well attended. Thanks to the following speakers for an exceptional program:

Practice Makes Perfect: Ethically Staying Within Your Practice Area

William L. Finger, William L. Finger, Attorney at Law
Robert Wojcik, Golder Associates, Inc.

Lawyers and Consultants: Preparing Each Other for the Presentation of Expert Testimony

Robert D. Fingar, Guilday Tucker Schwartz & Simpson
James Hirsch, F and H Consulting, LLC

Duty to Preserve Evidence and Protect Environmental Reports: Ethical and Practical Challenges

Rory C. Ryan, Ryan Law, P. A.
Joel Balmat, HSW Engineering, Inc.

Situational Ethics: Can the Circumstance Affect the Ethical Responsibilities of Environmental Attorneys and Professionals?

Anna H. Long, Lowndes Drosdick Doster et al
Nadia Locke, E Sciences, Inc.

The Affiliate Membership Committee also sponsored a stormwater management session (**Raining on Your Parade: Evolving Stormwater Management Issues in Florida**) at the Annual Update, which was also very well received. Much thanks to the following speakers for this insightful and informative session:

Mark W. Ellard, Geosyntec Consultants

W. Ray Scott, Department of Agriculture and Consumer Services

Robert A. Malinoski, Gunster, Attorneys at Law

Donald D. Carpenter, HSW Engineering, Inc.

The Affiliate members have already developed a tentative schedule for four Affiliate/Attorney mixers during the upcoming year. We also have the majority of sponsorships covered for these events; however, please contact me if you are willing to assist with sponsorship. The tentative schedule for the Mixers is:

Date	Location
October 2011	Orlando
January 2012	Tampa
Spring 2012	Tallahassee
Summer/Fall 2012	South Florida (site to be determined)

I encourage affiliate members and attorneys to attend a mixer near you for a fun evening of good food, drink, and networking with fellow practitioners.

Finally, I would like to congratulate *David J. Bass, Orange County Attorney*, for receiving the **R.S. Murali Memorial Affiliate Member Outstanding Service Award**. David has been an outstanding advocate for the affiliate membership over the years and this award was much deserved.

Once again, I appreciate the affiliate members entrusting the chairmanship position to me during the upcoming year. I am humbled by the confidence placed in me and I remain at the service of all ELULS members. The environmental and land use law areas of practice are very dynamic in the State of Florida at this time and it is a very exciting time to be involved with such an accomplished and dedicated group of professionals. Please do not hesitate to contact me if I can be of any assistance or if you have ideas to progress the goals and ideals of the ELULS membership. I can be contacted at Terry.Griffin@CardnoTBE.com.

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

- Martha M. Collins, Tampa Chair
- Erin L. Deady, West Palm Beach Chair-elect
- Nicole C. Kibert, Tampa Secretary
- Kelly K. Samek, Tallahassee Treasurer
- Jeffrey A. Collier, West Palm Beach Co-Editor
- Anthony J. Cotter, Orlando Co-Editor
- Colleen Bellia, Tallahassee Production Artist
- Jackie Werndli, Tallahassee Section Administrator

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

Law School Liaisons

Barry University School of Law

by Jane Goddard, Center for Earth Jurisprudence

(321) 206-5788; jgoddard@mail.barry.edu

Journalist and Author Cynthia Barnett to Launch *Blue Revolution* at Center for Earth Jurisprudence



BARNETT

Award-winning environmental journalist and author Cynthia Barnett will discuss Florida's need for a water ethic at a reception hosted by the Center for Earth Jurisprudence at 6:00 p.m. on October 5, 2011, at the Barry University School of Law. Cynthia's latest book, *Blue Revolution: Unmaking America's Water Crisis*, will be introduced to Orlando at the event.

Barnett will also be awarded the Indigo Award for Environmental Reporting by the Sierra Club of Central Florida during the evening. The Indigo Award recognizes the efforts of a writer/journalist who provides balanced reports on Florida's environmental issues.

Barnett will read from *Blue Revolution* and sign copies, which will be available for purchase. *Blue Revolution* reports on the many ways we have squandered our way to scarcity, and argues that a water ethic is the best, simplest, and least expensive solution.

"Cynthia's focus on water issues has helped lay the foundation for a water ethic in Florida," said Sister Pat Siemen, director of the Center for Earth Jurisprudence. "We are pleased to collaborate with the Sierra Club to honor her and to help introduce her new book."

Barnett's previous book, *Mirage: Florida and the Vanishing Water of the Eastern U.S.*, won the Florida Book Award gold medal for nonfiction in 2008. Barnett is a senior writer for *Florida Trend* magazine who writes frequently on environmental and public policy issues.

More information about this event is available at <http://earthjuris.org/events>.

Center for Earth Jurisprudence Premieres *The Journey of the Universe*

The Orlando premiere of an extraordinary new film, *The Journey of the Universe*, will be hosted by the Center for Earth Jurisprudence at the Orlando Science Center's Darden Theatre at 7:00 p.m. on September 28, 2011. The premiere is co-hosted by the First Unitarian Church of Orlando. Admission is free and open to the public.

Producer, co-creator, and historian of religions Mary Evelyn Tucker will lead a discussion and question-and-answer period immediately following the premiere. Tucker is a senior lecturer and research scholar at Yale University, where she co-directs the Forum on Religion and Ecology.

"We are pleased to welcome Mary Evelyn Tucker and to host the premiere of this spectacular film, which PBS will feature nationally in December. Come see it first with us in Orlando!" said Sister Pat Siemen, director of the Center for Earth Jurisprudence.

The film draws on the latest scientific knowledge to weave its themes of interdependence, relationship, and responsibility to future generations of all who share Earth as home. It has received outstanding reviews from scientists, environmentalists, and thought leaders from various disciplines.



SWIMME

The film project and companion book are a collaboration of Mary Evelyn Tucker and evolutionary philosopher Brian Thomas Swimme. Swimme is a professor at the California Institute of Integral Studies in San Francisco.

Visit <http://earthjuris.org/events> for more information about this event.

Introduction to Earth Jurisprudence Monograph Published

The Center for Earth Jurisprudence has published a teaching monograph entitled *An Introduction to Earth*

Jurisprudence: Guiding Principles and Wild Law Possibilities. The monograph collects foundational works in the field of Earth Jurisprudence, providing a succinct, accessible format that facilitates teaching and classroom discussion. It has been disseminated to environmental law professors throughout the United States and to more than 30 international educators.

Excerpts from Cormac Cullinan, The Gaia Foundation, the U.K. Environmental Law Association, Judith Koons, and Aldo Leopold are included, in a format designed to encourage reflection, analysis, and discussion.

A copy of the monograph can be downloaded at <http://earthjuris.org/publications/voices-of-earth-jurisprudence>.

Save the Date! Barry Law Hosts Environmental Justice Summit

The third annual Environmental Justice Summit will be held on October 21, 2011, at the Barry University School of Law in Orlando. The program brings together affected persons, community members, attorneys, academics and other professionals to enhance their impact on environmental justice challenges.

All Summit presenters, participants, and community members are invited to a pre-program reception at the law school on the evening of October 20, hosted by the Center for Earth Jurisprudence.

The Environmental Justice Summit is a program of the law school's Environmental Responsibility committee, in collaboration with student organizations, and with support from ELULS.

For further information, please contact EnvJusticeSummit@mail.barry.edu.

Founded in 2006, the Center for Earth Jurisprudence is an initiative of the Barry University School of Law to advance a transformative Earth-centered paradigm that advocates protecting the intrinsic value and legal rights of nature. The Center's work includes research, education, publication, and policy advocacy.

Law School Liaisons continued....

FIU College of Law Welcomes New Faculty and Grows Its Public Interest Environmental Law Clinic

The FIU College of Law is pleased to welcome Professor Melisa Luttrell to its faculty. Professor Luttrell, who joins the law school as a Visiting Assistant Professor, will be teaching a course in environmental law and a course in health law. Professor Luttrell's most recent article, *The Case for Differential Discounting: How a Small Rate Change Could Help Agencies Save More Lives and Make More Sense*, will soon be published in the forthcoming William & Mary Policy Review, Vol. 3, No. 1, 2011, available

at <http://ssrn.com/abstract=1769960>. Prior to joining FIU, Professor Luttrell practiced law in Los Angeles.

The FIU Environmental Law Clinic continued its work over the summer semester. Students handled matters on behalf of Audubon of Florida, Earthjustice, Friends of the Everglades, National Parks Conservation Association, and Tropical Audubon Society. Several students represented their clients before the Miami-Dade County Commission and the Governing Board of the South Florida Water

Management District. They worked on matters ranging from the Turkey Point nuclear power plant transmission line corridor NEPA process, to the Biscayne Bay water allocation rule, to matters relating to the Everglades litigation. In addition, the work of ELC student Gunnar Mandrisch on Florida BMPs was included in an article to be published by the National Research Council. Several of the summer students will be returning to the clinic in the fall to continue their client work.

A Summer 2011 Update on the Florida State University College of Law's Environmental and Land Use Program

by Profs. David Markell, Robin Craig, and Donna Christie

We are delighted to provide this update on recent developments and accomplishments at the Florida State University College of Law and on upcoming events. We continue to be gratified to be ranked the # 6 Environmental Law Program in the country by *U.S. News & World Report*. We are looking forward to another exciting and productive year for the Program.

Introducing a New Colleague

We are very pleased to welcome to our faculty one of the rising stars of the academic world. Professor Hannah Wiseman, an emerging national scholar in environmental, energy, and land use law, is joining the faculty for the spring 2012 semester from the University of Tulsa College of Law. Professor Wiseman is a graduate of Yale Law School, where she served as managing editor of the *Yale Journal on Regulation* and received the Israel H. Peres prize for the best student note or comment appearing in the *Yale Law Journal* in 2007. Professor Wiseman clerked for the Honorable Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit and spent two years as a Visiting As-

sistant Professor at the University of Texas School of Law. Professor Wiseman is a prolific author and will bring an enormous amount of energy and knowledge to the College of Law.

Our Class of 2011 Environmental Certificate Recipients

The College of Law congratulates the following 19 graduates who earned the 2010-2011 Environmental & Land Use Certificate:

Lauren M. Aguilar
 Christian L. Cutillo (Highest Honors)
 Jacqueline Davison
 Abigail Dean (Highest Honors)
 Carolyn Q. DeVita (Honors)
 Jason Ellis (Honors)
 Jonathan Greene
 Jason Holley
 Gina Iacona (Honors)
 Brian D. Kenyon (High Honors)
 Melanie Leitman (Highest Honors)
 Daniel J. Looke (Honors)
 Rebecca Lowrance
 Andrew Pierce-Mcguire
 John R. Seay (High Honors)
 Philip S. Traynor (Honors)
 Jesse I. Unruh (Highest Honors)
 Lindsay C. Walton (Honors)
 Joel P. Williams (Honors)

The College of Law's LL.M. in Environmental Law & Policy

The college is pleased to announce the first two graduates of our LL.M. Program in Environmental Law & Policy, Ann Drobot and Jordan Israel. In addition to several continuing LL.M. students, we have five new students joining the LL.M. Program in Environmental Law & Policy this fall.

College of Law Student Honors and Accomplishments

Jon Harris Maurer (FSU Law 2012) and **Xiaolin (Layne) Zhao** (FSU Law 2012) were selected by the Environmental and Land Use Law Section of the Florida Bar and Hopping, Green & Sams, P.A., as the first recipients of the Wade L. Hopping Memorial Scholarship.

Natalie Bristol, FSU Law 2012, recently completed her Environmental and Land Use Law Section Public Interest Fellowship with The Nature Conservancy.

Xiaolin (Layne) Zhao, FSU Law 2012, had an internship this summer with EPA's Region 3 in Philadelphia, Pennsylvania. Layne worked on matters under a range of environmental

statutes, including CERCLA, CWA, Oil Pollution Act (OPA), and Emergency Planning & Community Right-to-Know Act (EPCRA).

Trevor Smith, FSU Law 2013, was awarded a Public Service Fellowship for 2011-2012. He served as an intern during the 2011 summer with the Animal Welfare Institute in Washington, D.C.

Visitors on Campus

The Law School will feature several distinguished environmental law professors visiting with us this year. Fulbright Scholar **Jong Kul Kwon**, Associate Professor of Law, Yeungnam University, Republic of Korea, is visiting for the entire academic year to pursue research in Environmental Law.

During the fall semester, **Professor Christine Klein** from the University of Florida Law School will be featured during a faculty workshop and guest lecture to students in our Environmental Certificate Seminar. During the spring semester, we are delighted to welcome **Professor Peter Appel**, Alex W. Smith Professor of Law at the University of Georgia School of Law, as a Visiting Professor. Professor Appel will teach two courses, Wilderness Law & Policy, and Sustainable Business: Transactions & Strategy. We are very fortunate to have two rising stars join us for the spring semester as well. **Professor Emily H. Mezell**, Associate Dean for Academic Affairs and Associate Professor at the University of Oklahoma College of Law, and **Professor Sarah Schindler**, Associate Professor at the University of Maine School of Law, each will present forthcoming work during a faculty workshop and guest lecture to students in our Environmental Certificate Seminar.

Upcoming Programs

The Florida State University College of Law will feature a series of programs and lectures this academic year, including a special event to celebrate the 25th anniversary of our Distinguished Environmental Lecture Series. Please read our column in future ELULS Newsletters and monitor our website for upcoming events.

Alumni Updates and Honors

Bonnie A. Malloy ('10) is publishing her paper, entitled *Symbolic Gestures or our Saving Grace: The Relevance of Compensatory Mitigation for Florida's Wetlands in the Climate Change Era*, in the *Journal of Land Use and Environmental Law*.

L. Mary Thomas ('05) was recently named Assistant General Counsel in the Executive Office of Governor Rick Scott, where she has been assigned to oversee, for the Governor's Office, matters at the Department of Economic Opportunity (the Department of Community Affairs has moved to this new agency), the Department of Environmental Protection, the Water Management Districts, and various other agencies. Thomas' focus will be on land use and administrative law. She previously was an Assistant General Counsel at the Department of Community Affairs.

Daniel W. Langley ('02) has recently received AV - Preeminent Peer Review Rated status by Martindale-Hubbell. He is Board Certified by the Florida Bar as a specialist in City, County and Local Government Law and a partner at Fishback, Dominick, Bennett, Stepter, Ardaman, Ahlers & Langley LLP in Winter Park, Florida. Langley's practice is focused in the areas of Local Government Law, Eminent Domain, Land Use, and Real

Estate and Construction Litigation.

Ellen L. Wolfgang ('08), **Matt Davis** ('08) and **Ben Gibson** ('08) were integral in rewriting the State's growth management laws this year, Wolfgang in her capacity as a member of the Senate staff, Davis as an attorney with the Department of Community Affairs, and Gibson in his position with the Florida House of Representatives.

Terry E. Lewis ('78) and **Anne Longman** ('79), shareholders in Lewis, Longman & Walker, P.A., West Palm Beach and Tallahassee offices (respectively), have been selected as 2011 Florida Super Lawyers in the area of Environmental Law. Additionally, **R. Steven Lewis** ('84), from the Tallahassee Office, has recently been named one of Florida Trend Magazine's Legal Elite 2011.

Thomas K. Maurer ('81) was named national Environmental Practice Group leader for Foley & Lardner LLP in April 2011.

Jacob T. Cremer ('10) was recently elected to the Leadership Florida Program, Class II of Connect Florida for young professionals, receiving the support of his employer, Hopping Green & Sams. Cremer was also awarded the 40 Under 40 Young Leaders Program, Class of 2011 by the Florida Forestry Association. In addition, Cremer is co-author of the *Florida Case Law Update, Florida Environmental and Land Use Section Reporter*.

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. Please also feel free to contact David Markell, Steven M. Goldstein Professor, at dmarkell@law.fsu.edu.

St. Thomas Law: LL.M. - Environmental Sustainability

St. Thomas University School of Law's new LL.M. program in Environmental Sustainability has opened its doors to its inaugural class. The 24-credit program emphasizes a practical approach to environmental issues, motivating students to come up with multifaceted, real-life legal solutions. It offers skills-based foundational courses, structured as a series of two-day modules followed by

assignments similar to those lawyers carry out in legal practice; and immersion modules, in which students explore environmental topics onsite at research facilities, government agencies and industrial facilities. The learning environment accommodates the digital-age learner; students are encouraged to collaborate via videoconferencing outside of class, and technology reinforces innovative

teaching methods in class.

Keith Rizzardi, Esq., has joined St. Thomas Law as a visiting assistant professor. He will work closely with the LL.M. program in Environmental Sustainability director, Professor Alfred Light. Rizzardi is an experienced environmental lawyer: he has served as a trial attorney for the U.S. Department of Justice, and more recently, as managing attorney for the South
Law School Liaisons continued...

Florida Water Management District. He has litigated before the Florida Supreme Court, and in Federal district and circuit courts from coast to coast. He is Board Certified in State and Federal Government and Administrative Practice. Lexis/Nexis named his Endangered Species Act “Blawg” (www.esablawg.com) among the Top 50 environmental law blogs.

Environmental Sustainability and the Law – Short Course Series: St. Thomas Law’s LL.M.-E.S. program presents a series of short courses taught by individuals recognized for their work in various areas of environmental sustainability. Two-day classes are scheduled throughout the Fall, generally on a Friday - Saturday. The line-up features John C. Dernbach, professor of law at Widener University, “Environmentally Sustainable Development Law and

Institutions,” on August 19 - 20 (13 CLE credits approved). Keith Rizzardi, visiting assistant professor at St. Thomas University School of Law, teaches “Wildlife Law and the Citizen Suit” (September 16 - 17) and “Florida Water Law and State Administrative Practice,” with Beth Ross, SFWMD (October 7 - 8). James Strock, CEO of James Strock & Co. is a guest speaker for a one-hour seminar titled “Sustainability & 21st Century Leadership” (free admission); he examines the emergence of sustainability as a core element of business strategy and value creation in the context of broader trends in 21st-century leadership and management, Tuesday, October 11. Stan Bronson, executive director of Florida Earth Foundation, leads two courses and takes students on location to relevant sites: “Natural Systems: The Everglades and

the Loxahatchee” (October 14 - 15), and “In the Field – Everglades Agricultural Area,” (November 11 - 12). Finally, Randall S. Abate, associate professor of law and project director in the Environment, Development & Justice Program at Florida A & M College of Law, visits St. Thomas Law to lead a course in “Environmental Justice: Domestic and International,” (October 28 - 29); this course takes students to the agricultural area of Homestead. CLE credit is available for these courses; \$200 to register for CLE credit (James Strock seminar, free of charge). Classroom courses can be accessed via webinar; webinar not available on field trips. For more information about the Environmental Sustainability short course series or the LL.M. program, please visit www.stu.edu/law/environmentLLM or email environmentLLM@stu.edu.

University of Florida Levin College of Law: Transitions in the Environmental and Land Use Law Program, Professors Angelo, Klein Assume Leadership Roles

by Mary Jane Angelo, Director, Environmental and Land Use Law Program

On July 1, 2011, Alyson Flournoy, the Founding Director of UF’s ELULP assumed the role of Senior Associate Dean for Academic Affairs at the law school. The promotion of ELULP Director Flournoy to Senior Associate Dean created a series of transitions and developments for the program. Professor Mary Jane Angelo, who was recently announced as a UF Research Foundation Professor, has assumed the leadership of the ELULP, and Christine Klein, the Chesterfield Smith Professor of Law, has taken on a new role as Director of the LL.M. in the ELULP. Dean Flournoy will continue to be involved in the ELULP as a faculty member. Professors Angelo and Klein are both nationally recognized environmental law, natural resources law and water law scholars. Professor Angelo’s teaching and research interests include environmental law, agricultural

policy and the environment, pesticide law, endangered species and wildlife law, and water and wetlands law. She received her J.D. and M.S. from the University of Florida and her B.S. in biological sciences from Rutgers University. She joined the UF law faculty in 2004 after serving as Senior Assistant General Counsel at the St. Johns River Water Management District and as an Attorney at the U.S. Environmental Protection Agency in Washington, D.C. Professor Klein’s teaching and research interests include natural resources law and water law. She received an LL.M. from Columbia University School of Law; J.D. from the University of Colorado and B.A. from Middlebury College. She joined the UF law faculty in 2003. Her previous academic experience was at Michigan State University, the University of Denver, the University of Colorado, and the

Natural Resources Law Center. She also worked as a water rights litigator in the Natural Resources Section of the Colorado Attorney General’s Office and clerked for Judge Richard Matsch, of the U.S. District (Colorado) Court. A new position of Assistant Director of the ELULP has been created and is being filled by JoAnn Klein, who also is the Associate Director of the Center for Governmental Responsibility. Her activities will include outreach, communications, programs and events, alumni, the advisory board, and budget, working closely with Professor Angelo. CGR Senior Secretary Lenny Kennedy will be providing support. Long-time ELULP Program Assistant Lena Hinson continues in that role but will focus her attention on the administration of the academic programs, the LL.M. and the J.D. Certificate, working closely with Professor Klein.

National Academies, National Research Council, tap expertise of Angelo, Klein

Two members of the ELULP faculty are currently serving on the National Academies, National Research Council (NRC) committees. Professor Christine Klein is serving on the NRC's Sustainable Water and Environmental Management in the California Bay-Delta committee. This committee, which was formed at the request of Congress and the Departments of the Interior and Commerce, is a committee of independent experts who are tasked with reviewing the scientific basis of actions that have been and could be taken to simultaneously achieve both an environmentally sustainable Bay-Delta and a reliable water supply. Professor Mary Jane Angelo is serving on the NRC's Committee on Independent Scientific Review of Everglades Restoration Progress. This committee was established in response to a request from the U.S. Army Corps of Engineers, with support from the South Florida Water Management District and the Department of the Interior based on a Congressional mandate. The Committee's charge is to review the progress toward achieving the restoration goals of the Comprehensive Everglades Restoration Plan.

PROGRAM ACTIVITIES

More Than 200 Experts Participate in PIEC

More than 200 environmental practitioners participated in UF's 17th annual Public Interest Environmental Conference (PIEC) in February. The conference focused on renewable and nonrenewable sources of energy; how that energy is distributed and its relationship to economic development, environmental protection and social justice. Keynote speakers included former Florida Governor Kenneth H. (Buddy) MacKay and Princeton University Professor of Mechanical and Aerospace Engineering Robert Socolow, an expert on global energy resources and climate change mitigation and a pioneer in environmental studies. The conference featured a wide variety of panels dealing with various energy-related topics, including the 2010 BP Deepwater Horizon spill in the Gulf of Mexico and licens-

ing of new nuclear power plants in Florida. Workshops focused on green jobs and what endangered species laws mean to homeowners

10th Annual Richard E. Nelson Symposium Focuses on Coast

More than 200 environmental practitioners who participated in UF Law's 10th annual Richard E. Nelson Symposium focused on challenges facing coastal regions, examining issues of sea level rise mitigation, oil spill litigation, drilling moratoria, the U.S. Supreme Court 2010 decision in *Stop the Beach Renourishment*, ocean acidification, and judicial takings. The February event in Gainesville featured presentations by national experts, including Peter Byrne, Georgetown Law; Sarah Chasis, the Natural Resources Defense Council; Cynthia Drew, University of Miami; Scott D. Makar, Florida Solicitor General; William Rodgers, University of Washington; Buzz Thompson, Stanford University; and Michael Allan Wolf, UF law. The symposium was co-sponsored by the Florida Bar's Environmental and Land Use Section and the City, County, and Local Government Section.

Wolf Family Lecture Speaker Discusses Property Law

Harvard Law School Professor Joseph Singer, a nationally recognized expert in property law, presented the Fourth Annual Wolf Family Lecture on the American Law of Real Property in April. He spoke on "Property Law as the Infrastructure of Democracy." The Wolf Family Lecture was endowed by a gift from UF Law Professor Michael Allan Wolf and his wife, Betty. Past scholars who have delivered the Wolf Family Lecture include Thomas W. Merrill, Charles Evan Hughes Professor of Law at Columbia Law School; Gregory S. Alexander, A. Robert Noll Professor of Law at Cornell Law School; and Lee Fennel, Professor of Law at the University of Chicago.

Recent Graduate Awarded Prestigious Fellowship

Sean McDermott, who graduated in May 2011 with a joint J.D. and Master of Science in Interdisciplinary Ecology, was awarded the 2011 Knauss Marine Policy Fellowship.

He will be working with a member of Congress on marine policy issues. Recent ELULP graduates who have been selected for the Knauss Fellowship include Heather Coll (formerly Halter) and Melanie King.

New Space for ELULP

The Environmental and Land Use Law Program is unifying into new office space in Bruton-Geer Hall, which will allow students space for the Conservation Clinic, Moot Court Practice rooms, LL.M. student study space, and offices for the Public Interest Environmental Conference and GreenLaw. The offices are available because the UF Law Legal Research and Writing Program moved into the recently completed second floor of the Martin H. Levin Advocacy Center. The space also will provide offices for adjuncts or visiting faculty and a central conference area that can be used by all ELULP's constituencies. Anticipated completion date for the move is by the end of the semester.

ELULP Establishes New Fellowship Programs and Names Fellows

The ELULP has selected recipients for two new fellowships for LL.M. students. The program named Kevin Wozniak as the Florida Climate Institute LL.M. Fellow. As the Florida Climate Institute LL.M. Fellow, Wozniak will work on a project related to climate change under Professor Tom Ankersen's supervision, working through the Conservation Clinic. The fellowship included a grant of \$18,000. Sekita Grant was named the Conservation Law LL.M. Fellow and will receive a \$5,000 fellowship. She also works with Ankersen through the Conservation Clinic. Conservation Law Fellowships are awarded to LL.M. students who demonstrate exceptional commitment to and achievement in environmental and land use law. Conservation Clinic LL.M. fellows must commit to enroll in the Conservation Clinic for at least one semester and work as "senior associates" in the clinic under the supervision of the Clinic Director. Fellows take on significant responsibilities for the projects on which they work and are expected to help mentor J.D. students enrolled in the Clinic.



THE
FLORIDA
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CLE

The Florida Bar Continuing Legal Education Committee, the Environmental & Land Use Law Section and the General Practice, Solo & Small Firm Section and the Agricultural Law Committee presents

Agricultural Law Update

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: Friday, November 18, 2011

Florida Farm Bureau Federation Building • 5700 SW 34th Street
Gainesville, FL • 352-374-1504



Course No. 1306R

8:00 a.m. – 8:20 a.m.

Late Registration

8:20 a.m. – 8:35 a.m.

Welcome

Michael T. Olexa, Professor and Director, UF/IFAS Center for Agricultural and Natural Resource Law, Gainesville
John Hoblick, President and CEO, FFBF, Gainesville
Jack Payne, Senior Vice-President for Agriculture and Natural Resources, UF/IFAS

8:35 a.m. – 9:25 a.m.

Farm and Ranch Estate Planning

Michael D. Minton, Ft. Pierce

9:25 a.m. – 10:15 a.m.

Employment Laws Affecting Farm Operations

Michael G. Prendergast, Jacksonville

10:15 a.m. – 10:30 a.m.

Break

10:30 a.m. – 11:20 a.m.

Agricultural and Natural Resources: Toward a New Balance of Power

Patrice F. Boyes, Gainesville

11:20 a.m. – 12:10 p.m.

Ethics of Real Estate Practice in Farm Land Sale

Eugene E. Shuey, Gainesville

12:10 p.m. – 1:00 p.m.

Agricultural Legislative Update

Cindy Littlejohn, Tallahassee

CLE CREDITS

CLER PROGRAM

(Max. Credit: 5.0 hours)

General: 5.0 hours

Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 5.0 hours)

Elder Law: 1.0 hour

Labor & Employment: 1.0 hour

Real Estate: 1.0 hour

State & Federal Gov't & Administrative Practice: 2.0 hours

Wills, Trusts & Estates: 1.0 hour

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

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Sidney F. Ansbacher, Jacksonville — Program Co-Chair

Patrice F. Boyes, Gainesville

John Hoblick, Gainesville

Cindy Littlejohn, Tallahassee

Michael D. Minton, Ft. Pierce

Michael G. Prendergast, Jacksonville

Eugene E. Shuey, Gainesville

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www.floridabar.org/CLE**MAIL:**
Completed form with check**FAX:**
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Register me for the "Agricultural Law Update" Seminar

ONE LOCATION: (094) FLORIDA FARM BUREAU, GAINESVILLE (NOVEMBER 18, 2011)

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Name _____ Florida Bar # _____

Address _____ Phone: () _____

City/State/Zip _____ E-mail* _____

*E-mail address is required to receive electronic course material and will only be used for this order.

JMW: Course No. 1306R

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REGISTRATION FEE (CHECK ONE):

- Member of the Environmental & Land Use Law Section or the General Practice, Solo & Small Firm Section: \$135
- Non-section member: \$170
- Full-time law college faculty or full-time law student: \$85
- Persons attending under the policy of fee waivers: \$0

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

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 - MASTERCARD VISA DISCOVER AMEX
- Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____ Billing Zip Code: _____

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Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the media must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

COURSE BOOK ONLY (1306M)
Cost \$60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)

TOTAL \$ _____

AUDIO CD (1306C)
(includes Electronic Course Material)
\$135 plus tax (section member)
\$170 plus tax (non-section member)

TOTAL \$ _____

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



THE
FLORIDA
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CLE

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

Practice Before D.O.A.H.

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: October 21, 2011

Florida Division of Administrative Hearings • 1230 Apalachee Parkway
Tallahassee, FL 32399-0001 • 850-488-9675

Course No. 1295R

8:00 a.m. – 8:25 a.m.

Late Registration

8:25 a.m. – 8:30 a.m.

Opening Remarks

Francine M. Ffolkes, Department of Environmental Protection

8:30 a.m. – 9:20 a.m.

Welcome to DOAH eALJ!

*Susan T. Brown, Chief Information Officer, Division of
Administrative Hearings*

Claudia Llado, Clerk, Division of Administrative Hearings

9:20 a.m. – 10:00 a.m.

Evidentiary Issues in Administrative Proceedings

Amy W. Schrader, GrayRobinson, P.A.

10:00 a.m. – 10:20 a.m.

Break

10:20 a.m. – 11:10 a.m.

Expert Witnesses: Selection, Preparation, and Examination

Stephanie A. Daniel, Office of the Attorney General

11:10 a.m. – 11:50 a.m.

Preserving Issues for Appeal

*Garnett W. Chisenhall, Jr., Department of Business and
Professional Regulation*

11:50 a.m. – 1:15 p.m.

Lunch (on your own)

1:15 p.m. – 3:30 p.m.

Mock Administrative Hearing: License Discipline Issue

*ALJ: Hon. John D.C. Newton, II, Division of Administrative
Hearings*

*Moderator: Francine M. Ffolkes, Department of Environmental
Protection*

Agency Attorney: Edwin A. Bayo, Grossman Furlow and Bayo, LLC

Agency's Witness: Warren J. Pearson, Tallahassee

*Applicant's/Licensee's Attorney: Mary Ellen Clark, Office of the
Attorney General*

Applicant's Witness: Daniel E. Nordby, Department of State

3:30 p.m. – 3:45 p.m.

Break

3:45 p.m. – 5:00 p.m.

Practice Pointers and Ethical Considerations Q&A with the DOAH ALJs

Hon. John D.C. Newton, II

Hon. Bram D.E. Canter

Hon. June C. McKinney

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Terry L. Hill, Director, Programs Division

CLE CREDITS

CLER PROGRAM

(Max. Credit: 8.0 hours)

General: 8.0 hours

Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 8.0 hours)

Appellate Practice: .5 hours

City, County & Local Government: 8.0 hours

State & Federal Gov't & Administrative Practice: 8.0 hours

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Register me for the "Practice Before D.O.A.H." Seminar

ONE LOCATION: (315) DIVISION OF ADMINISTRATIVE HEARINGS, TALLAHASSEE (OCTOBER 21, 2011)

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Address _____ Phone: () _____

City/State/Zip _____ E-mail* _____

**E-mail address is required to receive electronic course material and will only be used for this order.*

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AUDIO CD (1295C)
(includes Electronic Course Material)
\$145 plus tax (section member)
\$170 plus tax (non-section member)

TOTAL \$ _____

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Section Budget/Financial Operations

	2010-2011 Budget	2010-2011 Actual	2011-2012 Budget
REVENUE			
Section Dues	76,000	66,400	70,800
Affiliate Dues	3,750	4,380	3,000
Admin Fee to TFB	(34,650)	(30,786)	(32,175)
CLE Courses	10,000	(9,129)	8,000
Section Differential	8,750	4,979	5,000
Sponsorships	12,000	14,150	12,000
Investment Allocation	9,782	24,922	10,502
TOTAL REVENUE	85,632	74,916	77,127
EXPENSE			
Credit Card Fees	125	114	125
Staff Travel	3,756	2,294	4,312
Internet Charges	408	417	420
Postage	1,000	474	1,000
Printing	150	46	150
Membership	1,000	0	1,000
Supplies	50	19	50
Photocopying	200	98	200
Officer Travel	2,500	1,016	2,500
Meeting Travel	6,500	1,400	6,500
CLE Speaker Expense	1,000	279	1,000
Sponsorship Expense		231	250
Committees	500	14	500
Council Meetings	2,000	2,105	2,000
Bar Annual Meeting	2,500	1,041	2,700
Section Annual Meeting	20,000	15,414	20,000
Section Service Programs	4,000	4,559	4,500
Retreat	2,000	897	2,000
Land Use Law Manual	13,000	12,600	13,000
Pubic Interest Committee	500	305	500
Awards	1,700	1,258	1,700
Scholarships	4,000	0	4,000
Law School Liaison	27,000	28,000	28,500
Dean Maloney Contest	1,000	1,000	1,000
Website	5,200	5,126	5,200
Council of Sections	300	300	300
Operating Reserve	10,458	0	10,815
Miscellaneous	500	0	500
TFB Support Services	3,691	6,397	4,238
TOTAL EXPENSE	115,038	85,404	118,960
BEGINNING FUND BALANCE	195,634	227,958	210,033
PLUS REVENUE	85,632	74,916	77,127
LESS EXPENSE	(115,038)	(85,404)	(118,960)
ENDING FUND BALANCE	166,228	217,470	168,200

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.

PACE UPDATE

from page 1

through property tax assessments similar to a water or wastewater assessment. The scope of the improvements depends upon state law and can include water efficiency improvements under some programs. Under Florida law (Section 163.08, F.S.) hurricane “hardening” projects are also authorized to reduce a property’s exposure to wind damage from storm events.

Fannie and Freddie, who own or guarantee a significant portion of residential mortgages across the U.S. are now controlled and regulated by the FHFA. All three (3) entities have raised concerns over the seniority of routine local government levied assessments central to PACE programs. They simply have argued that assessments for PACE programs are a “risk” to mortgage lenders, and to minimize that perceived risk, they have acted to prevent these types of property-based assessments.

II. THE GENESIS OF PACE

California leads the way in creating PACE programs and had the first such local government to do so (Berkley-FIRST launched in 2008).² Presently, 27 states plus the District of Columbia have enabling legislation providing the ability to create PACE programs. Most programs include specific criteria to ensure that the risk to the property owner and the property’s existing mortgage holder is minimized. Many of these attributes are found in the Department of Energy’s (DOE) “Best Practice Guidelines” to assist state and local governments in the creation and maintenance of PACE programs.³

Frustrating the issues, the DOE has encouraged the development and growth of PACE programs nationally and use of its grant programs to seek funding for doing so.⁴ DOE remains interested in the creation of mechanisms to deploy financing for energy efficiency and renewable energy project implementation at the individual property level.

The programs remain attractive to local governments because they provide significant (and documented) ancillary public benefits, including: reducing a community’s carbon footprint; better terms for incurring the financing for the energy projects; transfers

of the assessments with changeover in ownership; lowered utility bills; tax benefits; reduced transaction costs; job creation; and positive publicity.

III. PACE IN FLORIDA

Florida passed HB 7179 in the 2010 legislative session, which clarified supplemental authority for local governments to create the PACE programs, even though many have opined that PACE probably could have been implemented anyway under existing Florida law. The bill defined a “qualifying improvement” which is generally an energy efficiency, renewable energy or wind resistance project affixed to the existing structure on a property. The authority builds upon Florida county and municipal home rule powers granted in the Florida Constitution.

Akin to these powers, Florida has a long history of creating special districts with over 1,620 special districts existing in Florida. Under state law, their assessments take priority over all other obligations on a property, including purchase money mortgages, and subordinate and secondary mortgage obligations which is where FHFA, Fannie and Freddie have cried foul.⁵

In HB 7179, the Florida Legislature clarified the process and public purpose aspects of PACE programs, finding that all energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property from fossil fuel production, and improved property that has been retrofitted with energy-related qualifying improvements receives a “special benefit” reducing the property’s energy consumption.⁶ The Florida Legislature also found that “there is a compelling state interest” in the voluntary participation of property owners in the programs.⁷ Pursuant to HB 7179, a local government may incur debt to provide financing for the programs⁸ and levy non-ad valorem assessments to fund the programs.⁹ In addition, local governments can also partner with one or more other local governments for the purpose of providing upfront financing for the improvements.

IV. ACTIONS GIVING RISE TO THE PACE LAWSUITS

The FHFA, Fannie and Freddie, have made determinations regarding

the seniority of PACE liens in relation to a mortgage. Several state and local governments have challenged the actions of FHFA, Fannie and Freddie in Federal court including Leon County in the Northern District of Florida. Interestingly, the position of FHFA, Fannie and Freddie changed from the initial development of the programs. On September 18, 2009 Fannie Mae directed lenders to treat PACE assessments as any other tax assessments.¹⁰ However, a little less than a year later they reversed their earlier directions regarding PACE assessments.¹¹

On May 5, 2010, Fannie and Freddie issued advice letters to lending institutions stating that PACE assessments acquiring a “priority lien” over existing mortgages pose risk and are key alterations to traditional mortgage lending practice.¹² Additionally, they characterized the PACE assessments as “loans” rather than assessments.¹³ These determinations were upheld by the FHFA.¹⁴ Throughout the summer and fall of 2010 the FHFA, Fannie and Freddie continued to issue statements hostile to PACE programs.¹⁵ The impact remains significant. These actions have prohibited mortgage holders from entering into PACE programs and have had a chilling effect on numerous PACE programs because they control, at some point, upwards of up to 90 percent of mortgages underwritten.

V. THE FEDERAL PACE LAWSUITS

As a result of these actions, 8 complaints¹⁶ involving 16 parties¹⁷ were filed in federal courts in California, Florida and New York. On July 14, 2010, the State of California launched its legal efforts by filing a Complaint for Declaratory and Equitable Relief, Unfair Business Practices and Violation of the National Environmental Policy Act against the FHFA, Fannie and Freddie.¹⁸ Almost simultaneously with the California Complaint, the Sierra Club also filed for Declaratory and Equitable Relief, Violations of the Administrative Procedure Act and Violation of the National Environmental Policy Act.¹⁹ Sonoma County, California filed a similar Complaint for Declaratory and Equitable Relief²⁰ and Placer County moved to intervene in the Sonoma County case on September 23, 2010. The City of Palm Desert, California also filed a Complaint on October 4, 2010. The Natural

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Resource Defense Council, Inc. filed a Complaint on October 6, 2010, in the Southern District of New York against the same parties,²¹ but included John G. Walsh, as acting Comptroller of the Office of the Comptroller of the Currency, which has also weighed in on the issues.²² On October 8th, 2010, Leon County, Florida filed a Complaint in the Northern District of Florida, alleging violations of the Administrative Procedures Act, Tenth Amendment to the U.S. Constitution and the Florida Deceptive and Unfair Trade Practices Act (hereinafter “FDUTPA”), Section 501.204, F.S.²³ Finally, The Town of Babylon, New York filed its Complaint on October 26, 2010.

VI. THE PACE SUPPORTERS

The Plaintiffs argue that state and local governments have legitimate interests in: (1) not being denied the ability to preserve home rule and assessment powers; (2) pursuing energy conservation and greenhouse gas emissions reductions strategies; (3) protecting the health and welfare of their citizens; (4) protecting the economic interests of their residents in financing the improvements and from unfair trade practices or an unfair competitive advantage by Fannie and Freddie in prohibiting senior liens for assessments; and (6) receiving federal monies earmarked for these purposes.

The Tenth Amendment to the United States Constitution reserves to the states all powers except those limited powers granted to the federal government and ensures the division of powers between the states and federal government. The Plaintiffs argue that by statute, Fannie and Freddie have purchased and guaranteed mortgages subject to government assessment liens which already have a statutory priority over any underlying mortgage obligation. But, now the defendants cannot pick and choose which assessment liens have priority over mortgage obligations and which do not. The designation of a PACE assessment as either a loan or an assessment, and its lien status, is critical to the outcome of the lawsuits filed by the Plaintiffs because the terms of the Fannie/Freddie Uniform Security Instruments only prohibit loans, not liens, which have

senior status to a mortgage. Finally, a state legislature may, by statute, alter prospectively the priority of liens arising under state law so as to give priority to a public charge.²⁴ Additionally, state statutes give certain assessment liens, including PACE liens an automatic priority equal to that of liens for general taxes and superior to all other liens.²⁵ The plaintiffs also argue that the actions of FHFA are arbitrary and capricious under the Administrative Procedure Act and are rules subject to the typical rulemaking and notice procedures for these types of agency statements. Finally, Plaintiffs argue the unfair trade practices of Fannie and Freddie giving them an unfair competitive advantage in obtaining a senior lien status for mortgages and are in violation of various state laws.

Most Plaintiffs are seeking a finding that the assessments are liens, not loans; the assessments do not pose risk and do not alter traditional lending practices; the assessments constitute a lien of equal dignity to county taxes and assessments; and the assessments do not contravene Fannie or Freddie’s Uniform Security Instruments prohibiting loans that have senior lien status to a mortgage. Injunctive relief sought is to prevent adverse actions against any mortgagee who is participating in a program.

VII. THE DEFENDANTS’ RESPONSE

The Defendants argue that PACE liens are a serious financial risk and they engaged with state and local authorities regarding their concerns, sought changes to the programs (including necessary consumer protections and energy retrofit standards) and ultimately directed the Fannie and Freddie to take reasonable and prudential actions to protect against that risk. FHFA argues that, in a conservatorship role over Fannie and Freddie, they did what their federal charters authorized and what safe and sound financial practice dictates under the Housing and Economic Recovery Act of 2008.²⁶

FHFA argues that courts cannot even review their actions²⁷ and the state-law claims for unfair competition are pre-empted by federal law. FHFA asserts that the claims for a declaratory judgment that PACE programs involve “assessments” and not “loans” is non-justiciable because it’s a matter of semantics. They also ar-

gue they have acted within the scope of their authority and the Plaintiffs’ claims that FHFA’s actions contravene the Administrative Procedure Act fail because they are not in the zone of interests protected by the statute under which FHFA acted, and because FHFA has not issued any rule or regulation subject to notice and comment under the APA.

VIII. FLORIDA PROGRAM STATUS

Notwithstanding the federal issues and litigation discussed above, there are several local governments around the state that are considering or finalizing a PACE program. Leon County was the first in the state to form their program known as the Leon Energy Assistance Program or “LEAP.” The County adopted its ordinance in April 2010 before HB 7179 was even adopted and later made some small amendments to the Ordinance to be consistent with the recently passed state law. LEAP focuses on energy efficiency retrofits capping its program at \$7,000 to assure energy savings offset the cost of financing. The County is currently working through issues related to energy audits and program development. But for the Fannie-Freddie issues, the County would likely be in full launch mode.

Another example is the Green Corridor District PACE Program (the “Green Corridor”) in Miami-Dade County. The Town of Cutler Bay along with five local governments within Miami-Dade County is now in the final stages of creating the Green Corridor. The Green Corridor will be a separate legal entity created pursuant to Section 163.01, Florida Statutes, and will be governed by a board consisting of one representative from each local government as well as an at large member.

All of the “qualifying improvements” provided for in HB 7179 will be eligible for financing under the program. The Green Corridor will be a turnkey senior lien priority program that will include both residential and nonresidential properties. Since this will be a turnkey program, there will be no cost to the local governments to participate in the Green Corridor. Instead, the costs of the program will be borne by the administrator, which is a private entity that was selected through a competitively bid process.

In order to address the concerns

raised by the FHFA, Fannie and Freddie, the program will include consumer protection regulations to protect and educate the resident or business owner about their investment. In addition, the program will also include the necessary underwriting standards to ensure that the resident or business owner will have the ability to pay the special assessments. It should also be noted, that through successful negotiation with the administrator, the local governments within the Green Corridor are indemnified by the administrator from the federal concerns discussed in this article. Therefore, through the public/private partnership and the leadership of the local governments within the Green Corridor, hopefully this program will be successful and can serve as a model for other local programs around the state.

Another program within the Town of Lantana is currently being formed. The concept will be multi-jurisdictional in nature, following in the footsteps of the Green Corridor, but the program will immediately be focused on commercial properties and will be the first of its kind in the state. Program design will accommodate both residential and commercial properties but financing will be only provided to commercial properties until the federal legislation or the litigation provides more certainty on the residential side. Other models are being explored in Gulfport, Collier County and a state-wide financing mechanism.

IX. THE LITIGATION & LEGISLATION TODAY

The attractiveness of the senior lien model is the reduced risk for debt or capital lenders for the program and as such goes directly to the heart of the affordability of the financing rates. A positive ruling in the litigation or a legislative act is necessary to clarify the ability of local governments to provide these programs. Because of the conflict between federal and state law, either the litigation or legislation must clarify the issues. So far, the Plaintiffs have defeated a Motion to Consolidate before the Multi-District Panel on Litigation. The New York Plaintiffs have suffered some recent setbacks with some narrow rulings on the actions of FHFA on whether it was wearing its “conservatorship” or “regulator” role when issuing its various determinations. Motions to Dismiss

are still pending in the Florida and California cases as of the writing of this article.

With the increased conflict of federal and state law, and as a result of the lawsuits, certain members of Congress have also sought to clarify the issue with now a second attempt at passing a federal bill clarifying the issues. On July 20, 2011, five days short of one year from the first bill to be introduced, the “PACE Assessment Protection Act of 2011” has been filed with 14 Republican and 11 Democrat co-sponsors which requires underwriting standards consistent with the Guidelines issued by the DOE on May 7, 2010; declares that PACE liens comply with Fannie and Freddie’s Uniform Instruments; and declares that PACE liens shall not constitute a mortgage default.

Some models are also exploring residential assessments on properties not encumbered with a Fannie or Freddie mortgage, but these circumstances may be rare in today’s mortgage market. Until Congress acts, or the litigation provides a clear result, the likelihood is that residential PACE is on hold for full launch. All is not lost however, as some Florida local governments are continuing to implement and build these programs recognizing the clear benefits to residences and businesses across the state.

Endnotes:

¹ Erin L. Deady and Ed Steinmeyer, Lewis, Longman & Walker, Herb W. Thiele, County Attorney, Leon County. Chad Friedman, Weiss Serota Helfman Pastoriza Cole & Boniske. Lewis, Longman & Walker is representing Leon County in its action against FHFA, Fannie Mae and Freddie Mac. Weiss Serota Helfman Pastoriza Cole & Boniske is representing the Green Corridor PACE Program.

² California enacted Assembly Bill 811 and Assembly Bill 474 providing financial resources for property owners who lack financing to implement measures to be more responsible water users. Assemb. B. 811, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009) (amending CAL. STS. AND HIGHWAY CODE §§ 5898.12, 20, .22, .30 (West 2007) and creating CAL. STS. AND HIGHWAY CODE §§ 5898.14, .21 (West 2009)); Assemb. B. 474, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009); see also CAL. STS. AND HIGHWAY CODE §§ 5898.12(b), .14(b), .20(a)(1), for supporting text in statutes. Colorado enacted House Bill 08-1350 modifying chapters 29, 30, 31, and 40 of the *Colorado Revised Statutes*, permitting assessments to real property to fund energy projects. H.B. 08-1350, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2008); see also COLO. REV. STAT. §§ 30-20-601.5, 604 (2010), for language in statute permitting the assessments. Florida enacted House Bill 1719 creating section 163.08 of the *Florida Statutes*. H.B. 1719, 112th Leg., Reg. Sess. (Fla. 2010) (creating FLA. STAT. § 163.08

(2009)). Illinois enacted Senate Bill 583 allowing contractual assessments to finance energy projects. S.B. 583, 96th Gen. Assemb., Reg. Sess. (Ill. 2009) (creating 65 ILL. COMP. STAT. 5/1-1-11 (2009)); see also 65 ILL. COMP. STAT. 5/1-1-11 (2010), for language in the statute. Louisiana enacted Senate Bill 224 creating special financing districts for solar and energy efficient projects. S.B. 224, 2009 Leg., Reg. Sess. (La. 2009) (created LA. REV. STAT. ANN. § 33:130.70–73 (2009), re-designated as LA. REV. STAT. ANN. § 33:130.811–814 (2009)); see also LA. REV. STAT. ANN. § 33:130.811(A)–(D) (2010), for language in the resulting statute. Maryland enacted House Bill 1567 creating the Clean Energy Loan statute. H.B. 1567, 2009 Md. Gen. Assemb., Reg. Sess. (Md. 2009) (creating MD. CODE ANN., Clean Energy Loans, §§ 9-1501–07 (West 2009)); see also MD. CODE ANN., Clean Energy Loans, § 9-1502(a)–(c) (West 2010), for language in the statute authorizing clean energy loans for real property. Nevada enacted Senate Bill 358 which granted authority to create clean energy financing projects. S.B. 358, 75th Leg., Reg. Sess. (Nev. 2009) (amending chapter 271, NEV. REV. STAT. (2009)); see also NEV. REV. STAT. § 271.265 (2010), for language in the resulting statute granting authority for creating clean energy financing projects. New Mexico enacted S.B. 647 permitting the establishment of special assessment districts for renewable energy projects. S.B. 647, 49th Leg., 1st Sess. (N.M. 2009) (creating chapter 5, article 18, N.M. STAT. ANN. (2009); see also N.M. STAT. ANN. § 5-18-49A) (2010), for language in the statute. New York enacted S.B. 66004, 232d Leg., 2d Special Sess. (N.Y. 2009) (creating N.Y. General Municipal Law §§ 119-EE-GG (McKinney 2009)). North Carolina enacted S.B. 97 allowing special assessments for renewable energy sources. S.B. 97, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009) (amending chapters 153A, 160A N.C. GEN. STAT.); see also N.C. GEN. STAT. § 153A-210.2(a), (c) (2010), for language in the resulting statutes. Ohio enacted H.B. 1 permitting the financing of solar installations. H.B. 1, 128th Gen. Assemb., Reg. Sess. (Ohio 2009) (creating OHIO REV. CODE ANN. § 717.25 (West 2009)); see also OHIO REV. CODE ANN. § 717.25(B)(1) (West 2010), for language in the statute. Oklahoma enacted S.B. 668 enabling the creation of a county energy district. S.B. 668, 52d Leg., 1st Reg. Sess. (Okla. 2009) (creating OKLA. STAT. tit. 19, § 460.1–.7 (2009)); see also OKLA. STAT. tit. 19, § 460.2, 4–.5 (2010), for the statutory language. Oregon enacted H.B. 2626 creating an energy fund and permitting a property owner to obtain a loan that is secured by a first lien on his property. H.B. 2626, 75th Leg. Assemb., 1st Special Sess. (Or. 2009) (amending chapter 470 OR. REV. STAT. (2005)); see also OR. REV. STAT. § 470.130 (2010), for the resulting statutory language; see also OR. REV. STAT. § 460.150 (2010), for statement in statute that loan is secured by a first lien on the property. Texas enacted H.B. 1937 permitting assessments for energy efficient improvements at the consent of the property owner. H.B. 1937, 81st Leg., Reg. Sess. (Tex. 2009) (creating chapter 376 TEX. CONTRACTUAL ASSESSMENTS FOR ENERGY EFFICIENT IMPROVEMENTS CODE ANN. (West 2009)); see also TEX. CONTRACTUAL ASSESSMENTS FOR ENERGY EFFICIENT IMPROVEMENTS CODE ANN. §§ 376.001, .003 (West 2010), for language in statute indicating assessment is at consent of owner. Vermont enacted H.B. 446. H.B. 446, 2009–2010 Leg. Sess., Reg. Sess., (Vt. 2009) (amending VT. STAT. ANN. tit. 24, §§ 1751, 2291 (2009) and creating VT. STAT. ANN. §§ 3261–69 (2009)). Virginia enacted S.B. 1212

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permitting property assessments to fund clean energy projects. S.B. 1212, Gen. Assemb., Reg. Sess. (Va. 2009) (creating VA. CODE ANN. § 15.2-958.3 (West 2009)); see also VA. CODE ANN. § 15.2-958.3(A)–(C) (West 2010), for language in the resulting statute. Wisconsin enacted Assemb. B. 255 giving authority to local governments to lend money for energy efficient improvements. Assemb. B. 255, 99th Leg., Reg. Sess. (Wis. 2009) (amending Wis. STAT. §§ 66.0627 (2009)); see also Wis. Stat. § 66.0627(8) (2010), for language granting that authority.

³ DEPARTMENT OF ENERGY, GUIDELINES FOR PILOT PACE FINANCING PROGRAMS 1 (May 7, 2010), available at http://www1.eere.energy.gov/wip/pdfs/arra_guidelines_for_pilot_pace_programs.pdf. The Department of Energy's Best Practices enacted underwriting standards that were significantly greater than the underwriting standards applied to land secured financing districts and other assessment programs *Id.* at 1. The Best Practices Guidelines included suggestions for state and local governments to implement including: (1) enacting expected saving to investment ratios greater than one; (2) assessments should not exceed the useful life of the improvement; (3) mortgage holder of record receives notice when PACE liens are placed; (4) non-acceleration clauses upon property owner default of a PACE lien; (5) appropriately sized assessments; (6) enact quality assurance and anti-fraud measures; (7) allow PACE financing to be the net of any expected direct cash for rebates and tax credits; (8) require education participation; (9) provide a debt service reserve fund; (10) engage in data collection. *Id.* at 1–5. Additionally, the Department of Energy Best Practices also included assessment underwriting requiring that (1) property ownership be verified; (2) property based debt and property valuation is appropriate; and (3) the obligation to repay the improvement is attached to the property; and (4) other evidence of the property owner's ability to pay, such as he is current on property taxes and has not been late paying property taxes in the past three years or since the purchase of the house. *Id.* at 5–7. Also, property owners that have declared bankruptcy in seven years will be prohibited from PACE liens. *Id.*

⁴ "The Department of Energy (DOE) is announcing funding for model PACE projects, which will incorporate this Policy Framework's principles for PACE program design. Under the State Energy Program, DOE has received approximately \$80 million of applications for PACE-type programs to provide upfront capital. Additional

PACE programs are encouraged through a Funding Opportunity Announcement, released today, for competitive grants under the Energy Efficiency Conservation Block Grant Program." http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf.

⁵ *Id.* art. X, §§ 1-2

⁶ See FLA. STAT. § 163.08(1)(b) (2010).

⁷ H.B. 7179; see also *id.* § 163.08(1)(c) (stating "voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest").

⁸ H.B. 7179; see also FLA. STAT. 163.08(7).

⁹ H.B. 7179; see also FLA. STAT. 163.08(3).

¹⁰ Marianne E. Sullivan, *Energy Loan Tax Assessment Program*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 07-2009 (Sept. 18, 2009), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/ll0709.pdf>.

¹¹ Marianne E. Sullivan, *Property Assessed Clean Energy Loans*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 2010-06 (May 5, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1006.pdf>; see also John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1012.pdf>.

¹² Letter from Patricia J. McClung, Vice President, Offerings Mgmt., Freddie Mac, to Freddie Mac Seller/Services (May 5, 2010) (on file with Freddie Mac), <http://www.freddiemac.com/sell/guide/bulletins/pdf/iltr050510.pdf>; see also, Marianne E. Sullivan, *supra* note xv.

¹³ *Id.*; Sullivan, *supra* note xv.

¹⁴ Statement, Federal Housing Finance Agency, FHFA Statement on Certain Energy Retrofit Loan Programs (July 6, 2010) (on file with Federal Housing Finance Agency) <http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf>.

¹⁵ On July 6, 2010, the FHFA issued a "Statement on Certain Energy Retrofit Loan Programs," saying that PACE loans are "unlike routine tax assessments and pose unusual and difficult risk management challenges" and that they "do not have the traditional community benefits associated with taxing initiatives." FHFA Statement on Certain Energy Retrofit Loan Programs, *supra* note xviii. On August 31, 2010, Freddie Mac issued Bulletin Number 2010-20, which provides that financing energy efficient and renewable energy home improvements can be achieved without altering the lien priority status of first Mortgages or other underwriting requirements. *Mortgages Secured by Properties with an Outstanding Property*

Assessed Clean Energy (PACE) Obligation, BULL. No. 2010-20 (Freddie Mac, McLean, VA), Aug. 31, 2010 [hereinafter *Freddie Mac Bulletin*], <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1020.pdf>. On the same date, Fannie Mae issued a similar announcement in its *Options for Borrowers with a PACE Loan*. John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1012.pdf>. Freddie Mac "reminded Seller/Services that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac." *Freddie Mac Bulletin*, *supra* note xxi.

¹⁶ Plaintiffs include the town of Babylon, Placer County, Sierra Club, the Natural Resource Defense Council, Sonoma County, the California Attorney General, City of Palm Desert and Leon County.

¹⁷ The Defendants include: the FHFA, Fannie, Freddie, Ed Demarco, Charles Haldeman, Michael Williams, the Office of the Comptroller and John J. Walsh.

¹⁸ See *California v. Fed. Housing Fin. Agency*, No. C10-03084 (N.D. Cal. filed July 14, 2010).

¹⁹ *Sierra Club v. Fed. Housing Fin. Agency*, No. 10-3317 (N.D. Cal. filed July 29, 2010).

²⁰ *The County of Sonoma vs. Fed. Housing Fin. Agency*, No. 10-3270 (N.D. Cal. filed July 26, 2010).

²¹ The Office of the Comptroller of the Currency is a component of the United States Treasury.

²² *Nat'l Res. Def. Council, Inc. v. Fed. Housing Fin. Agency*, No. 10 Civ. 7647 (S.D.N.Y. filed Oct. 5, 2010).

²³ FDUPA prohibits "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."

²⁴ See *Provident Inst. For Savings v. Mayor and Alderman of Jersey City*, 113 U.S. 506 (1885); *Glisson v. Hancock*, 181 So. 379 (Fla. 1938); 51 Am. Jur.2d Liens s. 57 (1970).

²⁵ See, Footnote VI.

²⁶ As Conservator, FHFA is charged with taking any action "necessary to put the regulated entity into sound and solvent condition" and "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D).

²⁷ Defendants argue three specific statutory provisions — 12 U.S.C. § 4617(f), 12 U.S.C. § 4635(b), and 12 U.S.C. § 4623(d) — expressly preclude jurisdiction over Plaintiffs' claims.