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• Richard Hamann, Chair • Robert A. Manning, Co-editor • Joseph D. Richards, Co-editor •

The Nature of Small Scale Development Amendments: *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*

by Jody Lamar Finklea

In *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*,[1] a unanimous Supreme Court of Florida definitively answered the question[2] of whether small scale development amendments are quasi-judicial decisions subject to the strict scrutiny standard of review or legislative decisions subject to the "fairly debatable" standard of review.

The Supreme Court of Florida decided that small scale development amendments are legislative decisions subject to the "fairly debatable" standard of review.

In *Coastal*, two landowners applied for a small scale development amendment to the applicable local comprehensive plan to develop their land in a more intensive manner than contemplated by the comprehensive plan.[3] The local planning commission denied the landowners' request and, on review, the local government legislative body also denied the request. On certiorari review, the circuit court determined that the competent substantial evidence standard of review applied and that the local government's denial of the landowner's application was not supported by competent substantial evidence.[4] Then, the circuit court ordered the local government to grant the landowner's application for a small scale development amendment.[5] On appeal to the First District Court of Appeal, the district court overturned the circuit court decision and held that small scale development amendments are legislative decisions subject to the "fairly debatable" standard of review.[6]

On appeal to the Florida Supreme Court, the landowners in *Coastal* argued that whether to adopt a small scale development amendment should be regarded as a quasi-judicial decision subject to the strict scrutiny standard of review.[7] However, the court rejected this argument. The court stated that it based its *Martin County v. Yusem*[8] opinion on four factors, and those four factors

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Chair's Column

by Richard Hamann

As my term as Chair draws to a close and I prepare for transfer to the used furniture department, I would like to reflect on why I have participated for so long and so extensively in the activities of the Environmental and Land Use Law Section. I do so in the hope that it might encourage others to become more involved.

It's the people. I have met, worked with and thereby grown to know and appreciate a great diversity of attorneys and affiliate members. I vehemently disagree with many of these people on matters of law and policy and, if not for our common work for the Section, we might only have known each other as antagonists. Having learned to work together in this context, however, we are able to communicate and work together more effectively in other arenas. And there is always hope for the misguided.

It's also the work. Our profession has never been more important than it is today. Environmental and land

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use law is a complex system, with some of the most challenging policy decisions that have ever confronted humanity. As those who operate the levers of power, we have the special responsibility of making the system work. The Environmental and Land Use Law Section helps all of us to discharge that responsibility.

Education is our primary function. We publish articles in the Florida Bar Journal, the Section Reporter and our Treatise on Florida Environmental and Land Use Law. We publish course materials and make oral presentations at seminars and workshops. We publish brochures for the public on environmental and land use law topics. We have the best website in The Florida Bar. This activity helps to inform our members and the public so they can participate more effectively in the system of environmental and land use law.

For information on how you can help, please visit our website *http://www.eluls.org* and contact any officer, committee chair or member of the Executive Council. Most of us will be at the Annual Update at Amelia Island, August 23-25 and available to discuss your participation. Several committees will meet there to plan their activities for the year. We look forward to working with you.

On Appeal

by Lawrence E. Sellers, Jr. and Susan L. Stephens

Note: Status of cases is as of May 21, 2001. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Panda Energy International v. Jacobs, et al., Case No. SC01284. Appeal of a determination of need issued by the Public Service Commission for construction of a new 530 megawatt power plant in Polk County. Status: Notice of appeal filed February 2.

Barley v. South Florida Water Management District, Case No. SC001998. Petition to review a Fifth DCA decision holding that the "Polluter Pays" amendment to the constitution did not bar the water management district from levying a tax to clean up the Everglades on *all* property owners within the district, because the amendment is not self-executing. 766 So. 2d 433 (Fla. 5th DCA 2000). Status: Notice of appeal filed September 25.

Board of County Commissioners of Clay County v. Qualls, Case No. SC0125. Petition to review a First DCA opinion holding that the trial court applied the incorrect standard of review in quashing the Board's decision not to approve Quall's small-scale comprehensive plan amendment and rezoning application. On December 6, 2000, the First DCA certified the following question to the Supreme Court: "Are decisions regarding small scale development amendments pursuant to section 163.3187(1)(c), Florida Statutes, legislative in nature and, therefore, subject to the fairly debatable standard of review; or quasi-judicial, and subject to strict scrutiny?" 772 So. 2d 544 (Fla. 1st DCA 2000). Status: Petition filed January 4. [*Editor's Note:* See related cases under this heading (*Coastal Development, Minnaugh*).]

Flo-Sun, Inc. v. Kirk, Case Nos. SC95044 and SC95045. Petition to review a Fourth DCA opinion overturning the dismissal of a lawsuit filed by former Governor Claude Kirk against various sugar growers that claimed the growers created a public nuisance by burning sugar cane fields, causing air pollution and a health hazard. *Kirk v. U.S. Sugar Corp.,* 726 So. 2d 822 (Fla. 4th DCA 1999). Status: On March 29, the court affirmed the lower court's holding that Chapter 403 did not implicitly repeal Chapter 823, but quashed the remainder, holding that the doctrine of primary jurisdiction barred the suit. 26 F.L.W. S189.

Las Olas Tower Co. v. City of Ft. Lauderdale, Case No. SC95674. Petition to review a Fourth DCA decision affirming the circuit court's determination that the City's Board of Adjustment properly interpreted the setback requirements of its zoning ordinance in denying site plan approval, but vacating the portion of the lower court's decision granting certiorari on the denial for the City's failure to advise the developer of changes that would make the plan acceptable. 742 So. 2d 308 (Fla. 4th DCA 1999). Status: Review dismissed on April 12. 2001 WL 359683.

Coastal Development of N. Florida, Inc. v. City of Jacksonville Beach, Case No. SC95686. Petition to review a First DCA opinion holding that small-scale development amendments to a comprehensive plan are subject to de novo review in circuit court under the deferential "fairly debatable" standard of review and certifying the following question of great public important to the Florida Supreme Court: Are decisions regarding small-scale development amendments pursuant to Section 163.3187 (1)(c), Florida Statutes, legislative in nature and, therefore, subject to the fairly debatable standard of review; or quasi-judicial and subject to strict scrutiny? 730 So. 2d 792 (Fla. 1st DCA 1999). Status: On April 12, the court affirmed, holding that small-scale development amendments made pursuant to § 163.3187 (1)(c) are legislative in nature and subject to the "fairly debatable" standard of review. 26 F.L.W. S224. [*Editor's note:* See related cases under this heading (*Qualls, Minnaugh*).]

Minnaugh v. County Commission of Brevard County, Case No. SC00875. Appeal of a Fourth DCA decision denying certiorari review of a circuit court decision applying the deferential "fairly debatable" standard of review of the county commission's de-

nial of an application for small-scale amendments to the County's land use plan, the Fourth DCA certified the following question to the Supreme Court as one of great public importance: Are decisions regarding small-scale amendments pursuant to Section 163.3187(1)(c), Florida Statutes, legislative in nature and, therefore, subject to the fairly debatable standard of review; or quasi-judicial, and subject to strict scrutiny? 752 So. 2d 1263 (Fla. 4th DCA 2000). Status: On April 12, the court affirmed, holding that small-scale development amendments made pursuant to § 163.3187(1)(c) are legislative in nature and subject to the "fairly debatable" standard of review. 26 F.L.W. S240 [*Editors note:* See related cases under this heading (*Qualls, Coastal Development*).]

FIRST DCA

Campbell v. Southern Hy Power Corp., Case No. 1D00-1857. Appeal of a DEP final order granting an environmental resource permit to Southern Hy Power to construct a three megawatt hydroelectric facility adjacent to the Inglis Bypass Dam in Levy County, which had been constructed as part of the Cross Florida Barge Canal, in part on the ground that DEP improperly relied upon approval of the project by the Federal Energy Regulatory Commission in making its decision. Status: The court affirmed *per curiam* on March 20.

Parlato v. Secret Oaks Owners Association, Case No. 1D99-1303. Appeal of a DEP final order denying a consent of use, but granting a wetland resource permit, for construction of a dock adjacent to petitioners' riparian property, ruling that DEP's concurrent review rules, adopted after DEP published its notice of intent to issue the permit, could not be applied at the hearing to impose additional conditions for issuance of the wetland resource permit. DEP Case Nos. 00-0269, 00-0306. Status: Oral argument will be held on June 27.

Florida Chapter of the Sierra Club, et al. v. Suwannee American Cement Company, Inc., et al., Case No. 1D00-2355. Appeal of a DEP final order granting air pollution permit authorizing the construction of a proposed cement plant approximately four miles west of the Ichetucknee River. 2000 WL 1185499 (DEP00-0514). Appellants argue that the air permit should be denied solely based on a failure to comply with certain water quality criteria. Status: Notice of appeal filed June 16, 2000.

Woodhouse, et al. v. Suwannee American Cement Company, Inc., et al., Case No. 1D00-2342. Appeal of a DEP final order dismissing request for administrative hearing to contest DEP intent to issue air permit for a proposed cement plant. The final order adopted the ALJ's recommendation to dismiss the amended petition. 2000 WL 1185503 (DEP00-0216). Status: Notice of appeal filed June 20, 2000.

City of Tallahassee, et al. v. Taoist Tai Chi Society, Case Nos. 1D00-2098 and -2099. Appeal of a circuit court order granting petition for writ of certiorari and quashing the final order of the Tallahassee-Leon County Planning Commission rejecting an application for a site plan for a religious facility to be located at a residential site. Status: Oral argument held February 14.

Florida Fish & Wildlife Conservation Commission v. Caribbean Conservation Corp., Case Nos. 1D00-1389 and -1804. Appeal of a circuit court decision holding that the Fish & Wildlife Conservation Commission (FWCC) has the constitutional authority to promulgate rules related to endangered or threatened species, that the FWCC is not an administrative agency subject to the APA, and that Chapter 99-245, Laws of Florida, is unconstitutional to the extent that it seeks to require the FWCC to comply with the APA. Status: Oral argument held March 20.

Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Case No. 1D00-1058. Appeal of a DOAH final order holding that a proposed Trustees rule prohibiting gambling "cruises to nowhere" from docking at sovereign submerged lands was an invalid exercise of delegated legislative authority. DOAH Case No. 99-4437RU. Status: Oral argument held November 7, 2000.

City of Sarasota v. Department of Transportation, Case Nos. 1D00-0609, 1D00-0644. Appeal from a final order of DOT approving DOT's decision to replace a drawbridge with a fixed-span bridge, holding that its decision to replace the bridge is not subject to review under the APA, and that the petitioners lacked standing. Status: On April 26, the court affirmed the decision to replace the bridge, but reversed those portions of the order holding that the decision was not subject to the APA and that the petitioners lacked standing. 2001 WL 420516.

FOURTH DCA

Board of Trustees of the Internal Improvement Trust Fund v. Lost Tree Village, Case No. 4D00-3405. Appeal of a circuit court decision holding that Lost Tree Village holds the title to submerged lands surrounding certain barrier islands in an aquatic preserve north of Vero Beach. Status: Oral argument scheduled for June 13.

Pinecrest Lakes, Inc. v. Brooks, et al., Case No. 4D99-2641, and *Pinecrest Lakes v. Martin County*, Case No. 4D99-2725. Appeal of a final judgment in a s. 163.3215 consistency challenge by adjacent homeowners to a development order, which held that the development order was inconsistent with the Martin County Comprehensive Plan and granting an injunction compelling removal of apartment buildings built pursuant to the order and prohibiting any further construction. Status: Oral argument held on June 13, 2000.

FIFTH DCA

City of St. Augustine v. Graubard, Case No. 5D00-2819. Petition for certiorari review of a circuit court decision quashing a city commission order denying a rezoning application. Status: On March 2, the court denied the petition, holding that the lower court afforded due process and applied the correct law by utilizing the *Snyder* test. 780 So. 2d 272.

U.S. SUPREME COURT

City of New Smyrna Beach v. Tampa Electric Company, Case No. 00-1052. Petition to review a Florida Supreme Court decision quashing an order of the Public Service Commission that granted a joint petition for determination of need for an electri-

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ON APPEAL
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cal power plant filed by Duke Energy and the City of New Smyrna Beach, on the ground that Florida law does not authorize so-called "merchant power plants" like the one proposed. 767 So. 2d 428 (Fla. 2000). Status: Petition denied March 5.

Whitman v. American Trucking Ass'n, Case Nos. 99-1257 and 99-1426. Petition to review a D.C. Circuit opinion which struck down EPA's new ozone and particulate matter air quality standards. 195 F.3d 4 (D.C. Cir. 1999). Status: On February 27, the court reversed in part and affirmed in part, holding that Congress had properly delegated authority to EPA to set the air standards and that EPA could not consider the economic costs of compliance in setting the standards. Nonetheless, the court remanded to require EPA to recast its terms and timetable for compliance. 531 U.S. 457.

Gibbs v. Norton, Case No. 00-844. Petition to review a Fourth Circuit decision upholding the validity of the Endangered Species Act as a proper exercise of power under the Commerce Clause, as implemented by rules making it illegal to kill endangered red wolves that wander onto private property unless the wolf is posing a danger to the property owner or his family or is caught in the act of killing livestock. 214 F. 3d 483 (4th Cir. 2000). Status: Petition denied February 20.

Atlantic Richfield Company (ARCO) v. Union Oil of California (Unocal), Case No. 00-249. Petition to review a Federal Circuit decision upholding Unocal's patent for reformulated unleaded gas, so-called "clean gasoline." 208 F. 3d 989 (Fed. Cir. 2000). Status: Petition denied February 20.

Steel Co. v. Citizens for a Better Environment, Case No. 99-2047. Petition to review a Seventh Circuit decision holding that a citizens suit brought under EPCRA for reporting violations and subsequently dismissed on standing grounds was not frivolous and therefore denying an award of attorneys fees to the Steel Co. 230 F. 3d 923 (7th Cir. 2000). Status: Petition denied April 23.

Allied Local and Regional Manufacturers Caucus v. EPA, Case No. 00-1125. Petition to review a D.C. Circuit decision upholding EPA's final rules limiting the content of volatile organic chemicals in architectural coatings. 215 F. 3d 61 (D.C. Cir. 2000). Status: Petition denied May 14.

Palazzolo v. Rhode Island ex rel Tavares, Case No. 99-2047. Petition to review a ruling by the Rhode Island Supreme Court holding that a coastal wetlands property owner lacked reasonable investment-backed expectations to develop the property and thus upholding dismissal of his inverse condemnation suit because the regulations barring development predated his acquisition of the property, and also holding that his claim was not ripe because he had not first filed a lesser-use application for development. 746 A.2d 707 (R.I. 2000). Status: Oral argument held February 26.

Appalachian Power Co. v. EPA, Case Nos. 00-445, -632, -633. Petition to review a D.C. Circuit Court opinion holding that EPA's NOx SIP call/ozone transport rule did not violate the constitutional non-delegation doctrine. *Michigan v. EPA,* 213 F.3d 663 (D.C. Cir. 2000). Status: Petitions denied March 5. [*Editor's Note*: See related cases under D.C. Circuit Court of Appeals heading (*Appalachian Power* cases).]

Rapanos v. United States, Case No. 00-1428. Petition to review a Sixth Circuit decision upholding Rapanos' conviction under the Clean Water Act for filling a wetlands without a permit. Rapanos is asserting that the Clean Water Act does not provide permitting jurisdiction over isolated intrastate wetlands and that his conviction violated due process. 235 F. 3d 256 (6th Cir. 2000). Status: Petition filed March 14.

Michigan v. EPA, Case No. 00-746. Petition to review a D.C. Circuit case holding that Congress unlawfully delegated authority under the Clean Air Act to Native American tribes to redesignate areas and alter air quality standards within reservation boundaries. *Arizona Public Service Co. v. EPA,* 211 F.3d 1280 (D.C. Cir. 2000). Status: Petition denied April 16.

Alexander v. Sandoval, Case No. 99-1908. Petition to review an Eleventh Circuit case holding that Title VI of the Civil Rights Act of 1964 created an implicit private right of action to enforce the disparate-impact regulations promulgated under Title VI. 197 F. 3d. 484 (11th Cir. 1999). Status: On April 24, the Court reversed, holding that no private right of action exists under Title VI. 121 S. Ct. 1511. [*Editor's note:* While this case occurred in a non-environmental setting, the decision may affect the rights of private parties to bring actions against state officials for permitting decisions alleged to cause disparate environmental impacts on low-income or minority citizens.]

FOURTH CIRCUIT

Gilmore v. Waste Management Holdings, Case No. 00-1185. Appeal of a district court summary judgment holding that Virginia statutes that capped the amount of waste landfills in the state could accept and restricting the use of barges to transport waste violated the federal Commerce Clause. 87 F. Supp.2d 536 (E.D.Va. 2000). Status: Oral argument held December 7, 2000.

NINTH CIRCUIT

Pronsolino v. United States, Case No. 00-16026. Appeal of a district court decision upholding EPA's authority to require TMDLs (cleanup plans) for waters impaired only by non-point sources of pollution. 91 F.Supp.2d 1337 (N.D. Cal. 2000). Status: Notice of appeal filed May 24, 2000.

A.G.G. Enterprises, Inc, v. Washington County, Oregon, Case No. 00-35510. Appeal of a district court decision holding that recyclable materials are "property," not "waste," and therefore not subject to federal regulation under RCRA. 2000 WL 361892 (D. Ore. 2000). Status: Notice of appeal filed June 8, 2000.

D.C. CIRCUIT

Environmental Defense Fund v.

Browner, Case No. 98-1363. Challenge to EPA's revocation of the one-hour ozone standard for 2,901 counties on June 5, 1998, on the ground that EPA must first formally redesignate the counties as being in attainment with the standard. Status: In abeyance until January 28, pending publication of the final rule.

Appalachian Power Co., et al. v. EPA, et al., Case Nos. 99-1268, et al. Challenge by electric utilities to EPA's approval of petitions filed under Section 126 of the Clean Air Act by eight Northeastern states which request EPA to regulate nitrogen oxide emissions from sources in the Midwest, on the ground that ozone transport from the Midwest prevented the eight states from attaining the ozone standard and EPA's subsequent NO_x SIP call. Status: Oral argument held March 23, 2001.

Appalachian Power Co. v. EPA, Case No. 99-1200, et al. Challenge to EPA's NO_x SIP rules published in January 2000, stemming from the Section 126 petitions filed by several northeastern states (see above), that require many NO_x-emitting facilities, particularly utilities, in the midwest and southeast to conform to a NO_x emissions cap to participate in an emissions trading program. Status: On May 15, the court upheld most portions of the rules, but remanded to allow EPA to justify the electric generating unit (EGU) growth factors used to estimate utilization in 2007 and to either alter or properly justify its categorization of cogenerators that sell electricity as EGUs. 2001 WL 505332.

American Corn Growers Assoc. v. EPA, Case No. 99-1348. Challenge to EPA's final regional haze rule, on the ground that EPA failed to consider adverse impacts of the rule on farmers. Status: Challenge filed on August 30, 1999; briefing format / schedule pending.

Specialty Steel Industries of North America v. EPA, Case No. 00-1435. Petition to review EPA's final air pollution monitoring rule and performance standard published August 10, 2000, for requiring use of continuous opacity monitors. Status: Petition filed October 10, 2000.

The TMDL Coalition v. EPA, Case No. 00-1468. Petition to review EPA's Total Maximum Daily Load (TMDL) rule. Status: Petition filed November 7, 2000.

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Florida Caselaw Update

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

The Air and Water Pollution Control Act did not repeal public nuisance statutes; however, the doctrine of primary jurisdiction counsels in favor of first deferring alleged air and water pollution issues to administrative agencies with special competence over the issue in dispute. Department of Environmental Protection. *Flo-Sun, Inc., et al. v. Kirk, et al.*, 26 Fla. L. Weekly S189 (Fla. March 29, 2001).

Multiple sugar cane producers and a sugar cane processing facility were sued by residents of Palm Beach County (including former Governor Claude Kirk suing on behalf of the State of Florida) who alleged that the activities of the defendants in cultivating, harvesting, and processing sugar cane constituted a public nuisance. On the defendants' motion to dismiss, the circuit court dismissed the complaint, with prejudice, finding that Chapter 403, the Florida Air and Water Pollution Act, implicitly repeals a cause of action for a public nuisance under Chapter 823 as far as the cause of action is based on air and water pollution elements. The court also held that the doctrine of primary jurisdiction mandated dismissal.

The Fourth District Court of Appeal reversed, holding that Chapter 403 did not supercede Chapter 823, and the doctrine of primary jurisdiction did not dispose of the case because the Plaintiffs' allegations fell within the "egregious and devastating agency errors" exception to the doctrine.

Although the Florida Supreme Court agreed that Chapter 403 did not repeal the public nuisance provisions of Chapter 823, it ultimately reversed the Fourth District by holding that the doctrine of primary jurisdiction mandated dismissal of the case to allow the issues to be first presented to administrative agencies with the special competence and expertise to address the complex issues presented in the complaint. However, unlike the trial court, the Supreme Court concluded that the dismissal of the case should be without prejudice as the doctrine of primary jurisdiction merely counsels for judicial deference to facilitate an administrative agency's special competence in addressing the question at hand but not to defeat the court's jurisdiction over the issue. The Supreme Court further held that the "egregious or devastating agency errors" exception to the doctrine of primary jurisdiction was not satisfied by the plaintiffs' general and vague allegations of governmental conspiracy nor was it established by the plaintiffs that they were without administrative remedies before the state agencies.

Differing standards of certiorari review between circuit and district courts create confusion. *Dusseau v. Metropolitan Dade County Bd. Of County Comm'rs., et al.*, 2001 WL 521311 (Fla. May 17, 2001).

University Baptist Church owns

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CASELAW UPDATE
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property in Miami-Dade County upon which it wants to construct a church facility. Charles Dusseau and other local homeowners opposed the building of a large church noting that the district is zoned for single-family residences. Although a special exception from the zoning ordinance is permitted for churches, the homeowners opposed such an exception in this circumstance. The project was approved by numerous local agencies but ultimately rejected by the Zoning Appeals Board.

The County Commission held a hearing and eventually approved the project. Dusseau and the other homeowners sought a writ of certiorari from the circuit court. The circuit court, in a 2-1 decision, reversed the County Commission, finding no competent substantial evidence that the church met the criteria for a special exception and that there was competent substantial evidence that the church failed to meet the criteria. The County then petitioned the Third District Court for certiorari review. In quashing the circuit court's decision, the Third DCA held that the circuit court departed from the essential requirements of law by reweighing the evidence. The District Court also found that there was competent substantial evidence in the record to support the County's decision.

The Florida Supreme Court reviewed the case based on a conflict with previous case law in which the Court had set out the appropriate standards for certiorari review. In *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000), the Court reviewed the standard of review for first-tier certiorari review by a circuit court: the circuit court must determine (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. As for second-tier certiorari review by a district court, the Supreme Court stated that the district court must determine whether the circuit court (1) afforded procedural due process; and (2) observed the essential requirements of law. A district court may not review the record to determine if competent substantial evidence supports the administrative decision.

Applying the above principles to this case, the Court held that the circuit court erred in reweighing the evidence before the Board to reach the conclusion that the church did not meet the criteria for the granting of a special exception. The circuit court must review the record to find evidentiary support for the decision and evidence contrary to the decision is irrelevant to its review. The DCA's decision was approved to the extent it found that the circuit court departed from the essential requirements of the law by reweighing the evidence and substituting its judgment for that of the County. However, the DCA erred in actually reviewing the record and determining that competent substantial evidence supported the County's decision. Instead, the matter should be remanded to the circuit court for a review of the record to determine whether competent substantial evidence was present to support the Board's decision.

Home rule county does not have to comply with additional requirements of Chapter 153 when the county adds reclaimed water improvements to its existing water system. *Pinellas County v. State,* 776 So. 2d 262 (Fla. 2001).

Pinellas County is a home rule charter County currently providing water services to multiple municipalities. The County proposed to add a reclaimed water service (RWS) to the existing water facilities and services. The County proposed funding the RWS through sewer revenue bonds, and proposed implementation of an "availability charge" as partial security for the bonds.

The County sought validation of these sewer bonds in circuit court. Several municipalities opposed the validation of the bonds because many of their citizens would not be able to use the reclaimed water. The circuit court denied the validation of the bonds, holding that, pursuant to Chapter 153, the county failed to get permission from the municipalities before adding the RWS, and the proposed "availability charge" was actually an impermissible tax.

The Supreme Court reversed the final judgment of the circuit court, vacated the order, and remanded the case. The Court held that the County did not have to comply with the additional requirements of Chapter 153 because the County was authorized by its home rule charter powers and special acts to add the RWS to the existing water system without any consent from the municipalities. The court also deemed the "availability charge" a valid fee, not an impermissible tax. The court reasoned that the

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charge was a fee because only through payment of the fee would a citizen receive unlimited access to reclaimed water.

The Water Quality Assurance Act does not prohibit a property owner from bringing a common law suit for diminution in value of property. *Courtney Enterprises, Inc. v. Publix Supermarkets, Inc.*, 26 Fla. L. Weekly D1038 (Fla. 2nd DCA 2001).

In October 1996, Courtney Enterprises, Inc. sued Publix Supermarkets for damages resulting from contamination caused by a dry-cleaning business on Publix's adjoining property. Courtney sought damages based on "the material reduction in the value of the premises." Publix moved to dismiss the complaint, but the court denied the motion.

Publix then raised an affirmative defense, stating that its eligibility for the dry-cleaning clean-up program under section 376.3078, Fla. Stat. (1995), effectively immunized Publix from the suit for damages. The trial court granted summary judgment to Publix, holding that Publix was immunized from suit under sections 376.3078(3) and (11), Fla. Stat.

The Second DCA disagreed and reversed the trial court's order granting summary judgment to Publix. It held that the immunity granted under 376.3078 extends only to actions seeking rehabilitation or payment for costs to rehabilitate the contamination but not to actions seeking common law damages as a result of the contamination. Therefore, Publix was not immune from Courtney's common law action for diminution in value to its real property. In so holding it is noteworthy that the DCA further recognized that its statutory interpretation renders the "immunity clause" of the Water Quality Assurance Act "toothless"; however, the court stated that this issue is best addressed by the legislature.

Several SWFWMD rules and agency statements governing issuance of water use permits validated, several invalidated. *Southwest Florida Water Management District v. Charlotte County*, 774 So. 2d 903 (Fla. 2nd DCA 2001).

Several counties filed petitions for administrative proceedings challenging SWFWMD's proposed and existing rules and agency statements governing the issuance of Water Use Permits (WUPs). The ALJ consolidated the challenges from all of the parties and held a 120.57 formal evidentiary hearing. The hearing occurred in 1995, but the ALJ's order was not entered until March 1997. The order upheld some proposed and existing rules, while invalidating other rules and statements.

The District appealed the parts of the ALJ's order that invalidated the District's existing rules, proposed rules, and agency statements. The petitioners cross appealed on those rules and agency statements which the ALJ failed to invalidate.

Chapter 120 was amended effective October 1, 1996, which was subsequent to the evidentiary hearing, but prior to the ALJ's entry of order. Prior to the 1996 amendments, the burden of persuasion to establish the invalidity of an existing rule and a proposed rule fell on the challenger. After the 1996 amendments, the challenger of a proposed rule has the burden of establishing a factual basis for the objections to the rule, and the agency has the burden of proving that the proposed rule is a valid exercise of delegated legislative authority. *See St. Johns River WMD v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998).* The District Court noted that a statute that determines who carries a burden is a procedural statute that is to operate retroactively, but that in this case, the court would reach identical conclusions even if the statute was not to be applied retroactively.

The District's Rule 40D-2.301, F.A.C., implementing the WUP test in section 373.223(1), Florida Statues, contains fourteen criteria that a WUP applicant must meet. The ALJ found that the requirement of each applicant to meet each of the fourteen criteria individually was an invalid exercise of delegated legislative authority. The ALJ based his reasoning on the apparent disagreement between the Water Policy Rules and the District's rule. The District Court reversed the ALJ's finding, holding that any challenge to the District's rule as being inconsistent with the Water Policy Rules must be heard by DEP, as it has exclusive jurisdiction over such matters.

Petitioners challenged on appeal the ALJ's ruling that Rule 40D-2.301(1) and the related "Basis of Review for Water Use Permits" (BOR) were not impermissibly vague. The District Court affirmed the ALJ's ruling, holding that the rule and applicable BOR provisions were not void due to vagueness. The DCA reversed the ALJ finding that a portion of BOR 4, allowing an applicant for a WUP to consider mitigation in meeting the conditions for issuance of the permit, was an invalid delegation of legislative authority because it granted unbridled discretion to the District. On this issue, the District Court noted the site specific considerations necessary in considering mitigation.

The District Court agreed with the ALJ's determination that the legislature did not intend to allow vested common law water rights to completely coexist with the statutory-permitting system; thus even renewal of permits issued prior to the adoption of the Florida Water Resources Act in 1972 are subject to analysis under the three prong test of section 373.223 (1), Fla. Stat.

The remainder of the petitioners' challenges to the validity of Rule 40D-2.301(1) were affirmed without discussion. The District Court noted that subsections (h) and (j) of Rule 40D-2.301(1) and BOR 4.7 were not appealed by the parties and thus the invalidation of these provisions by the ALJ are not disturbed.

The ALJ invalidated the proposed portion of BOR 3.1 that required WUP applicants in portions of the water management district to investigate the "feasibility of the use of reclaimed water" finding no statutory authority to support it. The DCA reversed, finding that the proposed portion of BOR 3.7 is authorized under the three prong test of section 373.223(1), Fla. Stat., that requires the use to be reasonable/beneficial and in the public interest. The ALJ also invalidated proposed BOR 3.1 on the basis that the terms "economically, environmentally and technically feasible" was impermissibly vague and granted unbridled discretion in the District. The DCA found the terms economically and techni-

continued...

cally feasible to have plain and ordinary meanings. Finding "environmentally feasible" more problematic, the DCA concluded that "environmentally feasible relates to whether reuse can be accomplished within the bounds of environmental regulations." Consequently, the DCA found that the language of proposed BOR 3.1 was not impermissibly vague.

In addition to the above provisions of the proposed or existing rules or BORs, the DCA made the following findings:

- BOR 3.1 is not inconsistent with section 125.01(1)(k)(1), Fla. Stat., empowering counties to provide and regulate reclaimed water.
- Existing BOR 7.3.6.4 and proposed BOR 3.1, requiring feasibility studies of desalination by WUP applicants, are not invalid exercises of delegated legislative authority nor are they impermissibly vague.
- Proposed BOR 3.6, which requires wholesale public supply customers within a portion of the District to obtain separate permits to effectuate the conservation requirements therein, is a valid exercise of delegated legislative authority.
- Existing 7.3.1.2 and proposed portion of BOR 3.6, which require water supply utilities to adopt a water-conserving rate structure, are valid.

DOT's road construction project is not a taking under the theory of inverse condemnation. *State of Florida Department of Transportation v. Gayety Theatres, Inc.*, 26 Fla. L. Weekly D520 (Fla. 3d DCA 2001).

Gayety Theatres filed a complaint against DOT for damages based on inverse condemnation. Gayety alleged that DOT, while enlarging a major boulevard, had substantially impaired access to Gayety's property. Before DOT's construction began, patrons could turn into Gayety's driveway while traveling either north or south on the main boulevard. After construction, a concrete median blocked northbound drivers from entering the Gayety property. The northbound traffic would have to continue northbound for one half mile before being able to loop back around to enter the Gayety Property.

The trial court held that DOT was liable for inverse condemnation. DOT appealed to the Third District Court of Appeal. The District Court reversed, finding that limiting direct access from one lane of a two lane road did not substantially diminish the property owner's right of access when viewed in light of the remaining access to the property.

Eminent Domain: Loss of aesthetic value must be included in an expert's calculations of severance damages, and all aspects of a proposed "cure" must be feasible. *Armadillo Partners, Inc. v. State of Florida Department of Transportation*, 780 So. 2d 234 (Fla. 4th DCA 2001).

DOT condemned part of a shopping center's parking lot, resulting in a reduction of parking spaces. The shopping center was entitled to both takings and severance damages. The state offered to "cure" the property's severance damages by converting portions of a sidewalk and an arbor area on the shopping center's property to parking spaces. At trial, DOT's appraiser failed to consider the loss in value of the sidewalk and arbor area. In addition, part of DOT's cure was not supported in its construction plans in evidence and in reality not allowed under the water management district's regulations. Over the shopping center's objections, the trial court allowed this testimony.

On appeal, the shopping center argued that the trial court erred in admitting the expert's testimony as to severance damages and in allowing evidence of a cure which was contrary to DOT's plans. The Fourth DCA reversed and remanded the case, holding that the trial court erred in allowing DOT's appraiser to testify regarding severance damages without considering the loss in value of the sidewalk and arbor area. Where property outside the parcel condemned is proposed for use to effectuate a cure for severance damages, the loss of that property must be included in calculating the severance damage. Additionally, the District Court held that it was error for the trial court to allow testimony of DOT's expert that was inconsistent with its own construction plans in evidence.

Ordinance requiring a 5,000 foot minimum separation between package stores deemed arbitrary and capricious and therefore unconstitutional. *Costco Wholesale Corp. v. Orange County*, 780 So. 2d 198 (Fla. 5th DCA 2001).

An Orange County ordinance, established in 1955, prohibited package stores from operating within 5,000 feet of another package store. In October of 1999, the Orange County Zoning Department proposed to the Planning and Zoning Commission that the distance requirement be repealed as it did not further public heath, safety, or welfare. The Zoning Department noted that the 5,000 foot requirement was "extreme when compared to other jurisdictions." The recommendation was then given to the Board of County Commissioners (BCC), but the BCC never acted on the recommendation.

The Plaintiff sought a variance from the 5,000 foot setback requirement. The BCC denied the variance. The Plaintiff then filed an action for declaratory and injunctive relief asserting that the regulation was arbitrary and capricious and should be deemed unconstitutional. The circuit court, finding the ordinance constitutional, held that the ordinance was substantially related to the promotion of the public health, safety, and welfare.

The District Court reversed, finding that the ordinance failed to bear a substantial relationship to the public health, morals, safety, and welfare of the community. Rather, the Court found that the evidence indicated that the ordinance provided economic protection for previously licensed package stores. "[A] zoning ordinance is invalid if it discloses no purpose to prevent some public evil or fill some public need." Accordingly, the Court held that the 5,000 feet requirement exceeded the bounds of necessity for the public welfare and had to be "stricken as an unconstitutional invasion of property rights."

Eminent Domain: Temporary easements over beachfront property granted as implementation of a beach renourishment project. *Cordones v. Brevard County*, 781 So. 2d 519 (Fla. 5th DCA 2001).

Brevard County brought a con-

demnation proceeding against landowners to establish temporary easements as part of the Brevard County Shore Protection Project. Through acquisition of such easements, the County would become eligible for federal funding of its beach renourishment project. The trial court granted the partial taking of easements, finding a reasonable necessity for the easements.

On appeal, several landowners argued that the taking of the property simply as a means of receiving federal funding for a project was insufficient to establish that the easements were necessary for the project. The District Court held that the County condemned only the amount of property necessary for the renourishment project and for receipt of federal funds as opposed to seeking easements on more land than necessary to implement the beach renourishment project. However, the 5th DCA held that the lower court erred in failing to include the duration of the temporary easement in the Order of Taking. Finally, the Court held that the trial court was correct in allowing testimony that the method of valuation of the easement was the difference in value to the parent tract before and after the taking.

Fact-based testimony of citizens held to be "competent, substantial evidence" upon which a County may rely in denying a special use permit. *Marion County v. Joe Priest*, 2001 WL 427367 (Fla. 5th DCA April 27, 2001).

In 1999, respondent applied for a special use permit for the installation of a well to pump up to 500,000 gallons of water per day and for the construction of a water transfer station. Later, in an effort to win approval for the permit, the number of gallons was amended to 100,000 gallons per day. The applicant intended to bottle the water for retail distribution. The County zoning department recommended approval of the special use permit.

In February 2000, the Marion County Board of County Commissioners held a public hearing to evaluate the recommendations of the zoning department. Three citizens of Marion County appeared at the hearing and contested the issuance of the permit based on the potential impact upon existing roads and on the citizen's own restricted water usage. The County Commissioners unanimously voted to deny the special use permit due to the adverse effect of the proposed use on the public.

Respondent filed a petition for a writ of certiorari with the circuit court. The circuit court granted the writ finding that there was no competent substantial evidence to support the Commission's determination that the public would be harmed through issuance of the special use permit. Marion County then petitioned the Fifth District Court of Appeal for a writ of certiorari. The DCA granted the petition and quashed the circuit court's order. The DCA found that the circuit court erred in finding that the fact-based testimony of the three citizens was not "competent, substantial evidence" upon which the County could deny the special use permit. Accordingly, the DCA held that it was improper for the circuit court, sitting in its appellate capacity, to reweigh the evidence and substitute its judgment for that of the County Commission. The DCA, citing *City of Jacksonville Beach v. Car Spa, Inc.*, 772 So. 2d 630 (Fla 1st DCA 2000), noted that the Circuit Court's role is only to determine whether the local board's decision was supported by competent substantial evidence, not to reweigh that evidence.

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What do you expect?
Reasonable, investment-backed expectations after *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

by T. Spencer Crowley, III

Author's Note: On June 28, 2001, the U. S. Supreme Court decided Palazzolo v. Rhode Island, *99-2047 (2001), a case which addressed many of the same issues raised in the Good case. While not specifically ruling on the issue of reasonable investment backed expectations, the Court's decision is likely to have a significant impact on the issues raised in this article.*

In 1999, the Federal Circuit Court of Appeals decided *Good v. United States*,[1] a takings case which turned solely on the court's analysis of reasonable, investment-backed expectations. In *Good*, the court examined the extent to which landowners must consider the future regulatory environment when forming their expectations of development. Although the unique circumstances of the case may limit its general applicability and effect, *Good* is an important decision that will significantly impact cases where a landowner's reasonable, investment backed expectations are at issue.

FACTS

In April 1973, Lloyd A. Good, Jr. acquired a parcel of land containing thirty-two acres of wetlands and eight acres of uplands on Lower Sugarloaf Key in the Florida Keys.[2] The sales contract for the land acknowledged that portions of the parcel were wetlands below the mean high water mark.[3] The contract further stated that "as of today there are certain problems in connection with ... obtaining ... State and Federal permission for dredging and filling operations" on the property.[4]

Good's intent with respect to the parcel was to fill 7.4 acres and excavate another 5.4 acres of salt marsh in order to create a 54-lot subdivision and a 48-slip marina.[5] In 1983, Good obtained a section 404 Clean Water Act permit from the Corps of Engineers to proceed with the dredge and fill work.[6] However, after securing the required State and County approval for his project, the Florida Department of Community Affairs (DCA) delayed the project by appealing the County's development order to the Florida Land and Water Adjudicatory Commission (FLWAC).[7]

By the time Good's legal issues with DCA and FLWAC were settled in 1987, the five-year time limit on his section 404 permit had nearly expired and Good was forced to reapply for the federal permit.[8] The Corps of Engineers approved a new permit in 1988 and Good secured conditional approval from Monroe County in 1989.[9] Monroe County's approval however, was contingent on Good's compliance with fifteen conditions, including approval of the project by the South Florida Water Management District.[10] After receiving notification from District staff of their intent to deny his permit,[11] Good requested that his application be removed from the District's agenda.[12]

At this point, Good substantially scaled back his development and submitted a new plan to the Corps which consisted of only sixteen homes, a small canal and a tennis court.[13] In the interim period however, a fatal problem developed when two species which inhabited Good's land, the Lower Keys marsh rabbit and the silver rice rat, were listed as endangered species under the federal Endangered Species Act (ESA).[14] In 1991, the Fish and Wildlife Service issued a biological opinion that both of Good's proposed developments would jeopardize the continued existence of the species.[15] By March of 1994 Good's second section 404 permit was no longer valid, and his application for a new federal permit was denied because of the presence of the two listed species on his property.[16]

THE FEDERAL LAWSUIT

In July of 1994, Good filed suit against the United States in the Court of Federal Claims.[17] Good alleged that the Corps' denial of his section 404 permit was an uncompensated taking of his property in violation of the Fifth Amendment.[18] On cross motions for summary judgment, the court ruled in favor of the government and dismissed Good's takings claim.[19] The court held, *inter alia*, that Good lacked reasonable, investment-backed expectations since federal and state regulations imposed significant restrictions on his ability to develop his property both at the time he purchased it and at the time he began to develop it.[20]

Upon appeal to the Federal Circuit, Good argued that the Corps' permit denial in his case was similar to the government's action in *Lucas v. South Carolina Coastal Council*.[21] In *Lucas*, the U.S. Supreme Court found a "categorical" taking when a "regulation denie[d] all economically beneficial or productive use of the land."[22] The Corps' permit denial, Good alleged, was a *Lucas*-type categorical taking and thus was not subject to the requirement that the landowner have reasonable, investment-backed expectations of developing his land.[23]

The Federal Circuit rejected Good's argument and reaffirmed its holding in *Loveladies Harbor* that reasonable, investment-backed expectations are an element of every regulatory takings case.[24] The Federal Circuit explained that when the Court found a categorical taking in Lucas, it was undisputed that Lucas had reasonable, investment-backed expectations of developing his property.[25] A *Lucas*-type taking, the court explained, is categorical only in the sense that a court will not balance the regulation's public interest benefit against the regulation's imposition on private property rights if there is a total deprivation of all economic value of the property.[26]

Alternatively, Good contended that he actually did have a reasonable, investment-backed expectation of developing his property into a residential subdivision.[27] Good reasoned that since the ESA did not exist when

he bought his land, his expectation to develop was not based on this new statute, but on the statutes and regulations in place when he purchased the property.[28] Good therefore argued that since development would have been feasible if not for the existence of the ESA, his expectation to develop was in fact reasonable.[29]

The Federal Circuit conceded that Good purchased the property before the enactment of the Endangered Species Act.[30] Nevertheless, the court noted that, "in view of the regulatory climate that existed when [Good] acquired the subject property, [he] could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."[31] In fact, the language in the 1973 purchase contract acknowledging regulatory restrictions on the property suggests that Good should have had an expectation that the regulatory climate would be expanded.[32]

The court was particularly troubled by the fact that Good, after acknowledging the regulatory restrictions on his land in 1973, waited eleven years before taking any steps to obtain the required approval for development.[33] Over this period of time, public awareness regarding environmental problems led to enactment of the federal Endangered Species Act,[34] the Corps' inclusion of wetlands in its section 404 permitting program,[35] and the enactment of an Endangered and Threatened Species Act within the State of Florida.[36] Considering this growing national and State consciousness of environmental issues, the court reasoned that Good must have been aware that the regulatory standards were changing to his detriment, and that regulatory approval could become harder to secure.[37]

ANALYSIS

The Federal Circuit's decision has to some extent limited the expectations that landowners should have of developing their property. After *Good*, a landowner's reasonable, investment-backed expectations of development will be diminished if the owner has actual or constructive notice of a regulatory program restricting development. Additionally, landowners are not only on notice about the regulatory programs that are in place when they purchase the property, but also that regulatory standards can become more stringent over time.

For the most part, the court's analysis is in accord with previous decisions of the Court of Federal Claims and the Federal Circuit that have upheld the importance of reasonable, investment-backed expectations in takings analysis, especially in a tightening regulatory environment.[38] *Good* takes these decisions one-step farther by requiring landowners to consider future development restrictions when forming their expectations of development. The case thus broadens the circumstances a landowner must consider when forming expectations of development.

However, the extreme circumstances of the Good case may limit its general applicability and effect. Lloyd Good waited nearly eleven years before he applied for a permit to develop his land on Sugarloaf Key. During this time, public sentiment over the health of the environment led to the enactment of the country's most significant environmental legislation. Mr. Good explicitly acknowledged this state of affairs in his purchase contract for the land dated 1973. Because of these specific circumstances, the Federal Circuit found that Good had lost the opportunity to develop his property. Yet in the absence of an extremely pervasive regulatory environment that has been explicitly acknowledged by the landowner, courts are unlikely to hold landowners to a standard that prohibits them from development when regulatory development restrictions are under consideration.

CONCLUSION

Land-use attorneys with clients who own land should take note of the decision, and advise their clients to remain cognizant of their surrounding regulatory environment. After *Good*, a landowner's expectation of development should not only be based on the laws and regulations that currently apply to their land, but also on laws and regulations which are under consideration by regulators. However, in the absence of facts as distinctive as those in the *Good* case, it is unlikely that a landowner's expectations of development will be eliminated when regulatory development restrictions are under consideration.

Endnotes:

[1] See 189 F.3d 1355 (Fed. Cir. 1999).
[2] See id. at 1357.
[3] See id.
[4] See id.
[5] See id.
[6] See id.
[7] See id. at 1358. Because the Florida Keys are designated as an Area of Critical State Concern under the Environmental Land and Water Management Act (Fla. Stat. §§380.012 – 380.12), the Department of Community Affairs is entitled to appeal local development orders to the FLWAC.
[8] See id.
[9] See id.
[10] See id.
[11] The decision to recommend denial was based on "the unmitigated loss of wetlands, the loss of habitat for the endangered species within them and the lack of reasonable assurance that future unmitigated wetlands destruction will not occur..."
[12] See id.
[13] See id. at 1358-59.
[14] See id. at 1359.
[15] See id.
[16] See id.
[17] See id.
[18] See id.
[19] See id.
[20] See id. at 1360.
[21] See 505 U.S. 1003 (1992).
[22] See id. at 1015.
[23] See *Good*, 189 F.3d at 1361.
[24] See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994).
[25] See *Good*, 189 F.3d at 1361.
[26] See id.
[27] See id.
[28] See id.
[29] See id.
[30] See id.
[31] See id. at 1361-62.
[32] See id. at 1362.
[33] See id. at 1363.
[34] 16 U.S.C. § 1531 et seq. (2001).
[35] See United States v. Riverside Bayview Homes, 474 U.S. 121, 123-24 (1985).
[36] See § 372.072 Fla. Stat. (2000)
[37] See id. at 1363.
[38] See *Loveladies*, 28 F.3d at 1179, *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981)(Deltona ... must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assurance that the permits would issue, but only an expectation).

T. Spencer Crowley III, *earned his undergraduate degree from Duke University and his JD and MBA from the University of Florida in May 2001. While in school, Mr. Crowley earned certificates of specialization in environmental and land-use law at the College of Law and in real estate and urban analysis at the College of Business. He has accepted an associate position in Tallahassee with Hopping, Green, Sams & Smith, P.A. and will take the bar in July 2001.*

DEP Update

by Jack Chisolm, DEP Deputy General Counsel

Kirby Green Departs DEP

Kirby Green, Deputy Secretary for the Regulatory Programs, has resigned that position with the Department. Secretary Struhs has named as his replacement Allan F. Bedwell.

Bedwell comes to DEP from the private sector, where he has been a top executive for Goal Line Environmental Technologies in Knoxville, TN, a firm that manufactures air pollution control equipment worldwide.

Bedwell began his environmental career with the federal government, serving as a park ranger at Yosemite National Park in California. He later moved to the Environmental Protection Agency's office of Pollution Prevention before joining the staff of the President's Council on Environmental Quality in the Executive Office of the President from 1990-93.

From 1995 to 1998 he was Deputy Commissioner of the Massachusetts Department of Environmental Protection, where he helped design new, more effective approaches to environmental regulation. Bedwell went to Massachusetts following two years as an electric and gas utility consultant with the Los Angeles-based Canyon Group.

Bedwell will begin his new role on June 11.

Significant Cases

Sunset Square General Partnership v. DEP, Case No. 2D 00-1587 (Fla. 2nd DCA May 2, 2001)

The Second District Court of Appeal *per curiam* affirmed the Department's Final Order, which upheld the cancellation of Sunset's eligibility for participation in the Drycleaning Solvent Cleanup Program. The Final Order adopted the ALJ's Recommended Order *in toto.*

Sunset Square was declared eligible for participation in the program prior to the January 1, 1997, statutory deadline requiring installation of secondary containment around all portions of a dry-cleaning facility where drycleaning solvents are used or stored. However, Chapter 376.3078, F.S., provides that a drycleaning facility is ineligible to participate in the Drycleaning Solvent Cleanup Program if it operates in a grossly negligent manner at any time after 1980. The statute also explicitly provides that failure to install secondary containment on or before the deadline constitutes operating the facility in a grossly negligent manner for purposes of eligibility.

Sunset Square failed to install secondary containment before the statutory deadline, or anytime thereafter. Nonetheless, it argued that it should be allowed to participate in the program because section 373.3078(3)(n) requires the Department to give notice when it intends to cancel a participant's eligibility and to allow the applicant an opportunity to resolve the reason or reasons for cancellation of eligibility. The Department found in the final order, and successfully argued on appeal, that the "resolution" provision, when read *in pari materia* with the balance of the statute, cannot allow late installation of secondary containment to cure non-compliance with the deadline, because once January 1, 1997, had passed, the facility had been operated in a grossly negligent manner, and could not thereafter be eligible for participation in the program.

Department of Environmental Protection vs. Youel, Case No. 5DD99-2945 (Fla. 5th DCA May 17, 2001)

Youel filled a portion of her property without a permit. She was served a Notice of Violation and Orders for Corrective Action directing her to restore the property. After long negotiations failed, the Department entered a Final Order finding Youel in violation and directing her to restore the property. She did not challenge the Final Order, nor did she apply for a permit to fill the property. Instead, she sued the Department, claiming a "taking". The Circuit Court found a temporary "taking" and the Department appealed. The Fifth DCA reversed. The Court noted that Youel had abandoned her plan to build on the lot before she was first contacted by the Department, had not challenged the Department's Final Order, whose findings became binding on her, and had never applied for a permit. Under these circumstances, the Court reversed and remanded for entry of a judgment in favor of the Department.

Save the Manatee Club, Inc. v. Whitley and DEP, DOAH No. 00-3482, OGC No. 99-1606 (DEP May 18, 2001)

The Department issued a Notice of Intent to Issue Environmental Resource Permit and Grant a Lease to Use Sovereign Submerged Lands to the applicants Whitley. The Notice contained express language requiring that any petitions challenging the decision be filed within 14 days after receipt of the notice. Counsel for Petitioners sent a letter to the Department asserting his belief that the filing period should be 21 days. Counsel for the Department erroneously concurred. Nineteen days after receipt, the third parties filed a Petition for Formal Administrative Hearing to challenge the Department's proposed action.

The applicants moved to dismiss the petition as untimely. Neither the challengers nor the Department responded. Accordingly, the ALJ entered a Recommended Order dismissing the petition. Both the Department and the challengers filed exceptions, after which the Department remanded the matter to DOAH for further proceedings concerning the timeliness of the petition. After an evidentiary hearing on the matter, the ALJ entered a second Recommended Order of dismissal. The Department affirmed the recommendation, although rejecting a number of the ALJ's conclusions on various issues presented in the exceptions to the Recommended Order.

In the Recommended Order, the

ALJ opined that the agency had no authority to grant extensions of time to the 14 day period stated in section 373.427(2)(c). Although expressing disagreement with this conclusion, the Final Order ruled that it was dicta, given the ALJ's finding that the challengers never requested an extension of time.

In the Recommended Order, the ALJ also ruled that the Department was a mere nominal party in this third party challenge to the Department's proposed action. The Department rejected this conclusion, noting that administrative proceedings are *de nove*, and are for the express purpose of allowing parties to attempt to persuade the agency to change its mind.

The ALJ also ruled that the doctrine of equitable tolling did not apply to the case because the applicants were not involved in the misrepresentation involving the filing deadline, only the Department, and because the applicant would be prejudiced by loss of its untimeliness defense if the doctrine were to be applied. Although the Department expressed disagreement with the conclusions, it reluctantly allowed them to stand, since there is no longer any clear statutory authority to reject this kind of conclusion made by an ALJ; the area appears to be outside the Department's substantive jurisdiction.

The Department also disagreed with the ALJ's holding that his acceptance of the remand was discretionary. However, since he had accepted the remand, the Department ruled that this holding was also dicta.

Michael L. Guttman v. DEP and ADR of Pensacola, DOAH Case No. 00-2524, OGC 00-1123 (DEP April 13, 2001)

DEP issued a Consolidated Notice of Intent to Issue Wetland Resource Permit and Authorization to use Sovereign Submerged Lands to ADR of Pensacola. This preliminary agency action authorized ADR to construct a 30-slip boat docking facility on the northern shore of Big Lagoon in Escambia County, Florida. Big Lagoon, located a few miles southwest of the City of Pensacola, is approximately six miles in length and is separated from the Gulf of Mexico by the barrier island, Perdido Key. The Petitioner, who resides in a nearby coastal home on Big Lagoon, filed a Petition for Administrative Hearing challenging this proposed agency action. DEP subsequently referred the matter to DOAH for formal proceedings. After a formal hearing, the ALJ entered the Recommended Order of denial. The ALJ concluded in his Recommended Order that the "evidence supports a conclusion that the proposed activity [dock facility] will adversely affect fish and their habitat" and "will adversely affect marine productivity because the fish nursery habitat will decline through a further thinning out of the seagrass colony in Big Lagoon." The ALJ also concluded that the negative impacts of the proposed dock facility outweigh the positive benefits and that "the project is contrary to the public interest and should not be permitted." The ALJ thus recommended that DEP enter a final order denying ADR's application for a wetland resource permit and related authorization to use sovereign submerged lands.

Rather than deny the permit, the Department remanded the matter to the ALJ. The Department noted that in this case the Department asserted throughout the proceedings that the applicant had met the criteria for issuance of the permit, so that measures offered in mitigation were never proposed nor considered. Under the unique circumstances of the case, the Department remanded to give the applicant an opportunity to present a proposal for mitigation for the Department to consider.

Committee Updates

CLE Committee

by Michelle Diffenderfer

The CLE Committee met on February 16, 2001 in Orlando in conjunction with the Executive Council meeting. We discussed upcoming programs which have since occurred including the March Public Interest Conference and the May Land Use Law Seminar. We also discussed and continued planning our upcoming Affiliates Workshop and the Section's Annual Update in Amelia Island. The committee also met on June 21, 2001 at 2:00pm in conjunction with the Executive Council meeting that day in Orlando.

Upcoming Meetings

Our next Committee meeting will be held on August 25, 2001, in conjunction with the Annual Update at Amelia Island. Please feel free to come and participate; newcomers are always welcome. Contact me for further information on meeting times, dates and places.

Upcoming Programs

Our next CLE programs will be the Section's Annual Update and Affiliates Workshop from August 23-25, 2001, which are being held for the second year running at the beautiful Amelia Island Plantation Resort. This year's Annual Update program features panel topics on the recent Endangered Species Act litigation on the Manatee and on making government decisions based on limited scientific information using the recent battles in the State Legislature over the funding and permitting of aquifer storage and recovery systems as a case study. As always we have our annual informative agency updates from the Agency General Counsels around the state. Our Affiliates Workshop which begins the Update on the morning of the 23rd features discussions on the *Liability and Ethics of Environmental and Land Use Professionals Practicing Outside of Their Field*. Mark your calendars now for these great programs.

If you have never visited the Amelia Island Plantation please check out their beautiful facilities at *http://www.aipfl.com*. Please keep an eye out for the agendas and sign

continued...

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up information for these programs which will be circulated soon. You will also be able to sign up for these programs directly via the web at our Section's website *www.eluls.org* very soon. We look forward to seeing you at this year's Update– a great place to meet new folks who work on similar issues in different parts of the state and catch up with friends.

As usual we shall begin the planning of next year's programs at our August 25th CLE Committee meeting. If you have any interest in participating in our CLE programs or if you have ideas for future programs please contact me at *Mdiffenderfer@llw-law.com* or by phone at (561) 640-0820 or come to the meeting.

Past Programs

The 7th Annual Public Interest Environmental Conference, "All Eyes on Florida: Revitalizing, Restoring, and Revisiting" was a fantastic success. The Conference which is the annual labor of love of between the Environmental and Land Use Law Section's Public Interest Committee and the law students and professors at the University of Florida College of Law was heartily enjoyed by all. This year's agenda featured folks from across Florida and the nation to discuss the restoration of areas such as the Ocklawaha River and the Everglades, the findings of the Growth Management and Energy Task Forces and also featured an Ethical Advocate's Boot Camp. The Conference was held in Gainesville at the University of Florida from March 22-24, 2001.

The Land Use Law Seminar this year featured the topic Growth Management: Boom or Bust and included updates from the Department of Community Affairs, the Growth Management Study Commission and Orange County on the inter-relationship of public education and infrastructure. The seminar was held on Friday, May 18, 2001 in Orlando. This seminar was audiotaped and the materials and audiotapes are available from The Florida Bar. If you were unable to attend these great programs the information for ordering audiotapes and course material is available on the Bar's website at *www.flabar.org* or by calling (850) 561-5600 x 6661.

It takes a great amount of energy and hard work to organize these programs for the Section and we always seek to address your comments. The programs could not be done without the immense dedication of the program chairs that put the programs together, our Section Administrator Jackie Werndli and the ELULS CLE Committee vice-chairs Melissa Gross-Arnold and Susan Trevarthen. Please provide us with your input and thoughts as the year progresses. We always need more help and like great ideas!

Internet Committee

by Joseph D. Richards

The participation on the section's internet mailing list, a.k.a. listserv, continues to grow. We appreciate everyone's participation on the listserv and would encourage each subscriber to share with the list recent developments regarding environmental and land use law. For those of you who are not on the list, you are missing out on recent case updates and bi-weekly legislative reports on happenings in Tallahassee, as well as announcements regarding upcoming section CLE programs and activities. To join the list, sign up at the next section-sponsored CLE program or visit our website at *www.eluls.org*.

Additionally, traffic on the section's website continues to grow as more and more section members discover the benefits of logging on to *www.eluls.org*. Not only can you use the website as a launching pad to research regarding numerous topics related to environmental and land use law, but you can also learn of upcoming section programs and other activities. We would also encourage you to help us make the website serve you better. If you could suggest links or other additions to the site, please send us your comments by clicking on the suggestion box on the opening page of the website.

Public Interest Committee

by Jane M. Gordon

The 7th Annual Public Interest Environmental Conference at the University of Florida was a great success once again this year. One of the more innovative & entertaining panels included the "Ethical Advocate's Boot Camp." Many thanks to the UF law students and faculty, and our section administrator, Jackie Werndli for the incredible efforts in organizing this annual production. Also, many thanks to the members of the PIC whose ideas and energy help make the Conference a timely, dynamic and enriching event. On top of being a great CLE program, the Conference provides a unique forum for law students to work closely with PIC members. I was very impressed with the communication and results of this innovative relationship between students and attorneys, and hope that the PIC continues to foster a mentoring approach with law students throughout the state.

On March 23, 2001, the PIC awarded Suzi Ruhl, the Founder and President of the Legal Environmental Assistance Foundation, with the "Advocate of the Year" award for her outstanding public interest advocacy on behalf of Florida's environment. Suzi Ruhl has served on the ELULS Executive Council for many years, is a former PIC Chairperson and was also a long-term ELULS Committee on Access to Justice Chair. Her career victories involve truly inspiring strides towards protecting Florida's underground drinking water supplies and promoting environmental justice in Florida.

I look forward to meeting with our members at this year's annual update, to be held once again at the beautiful Amelia Island Plantation Resort from August 23-25, 2001. If you are interested in joining the PIC, this is an excellent opportunity to meet everyone and get involved. PIC members should submit any changes to the PIC Contact list by August 1, 2001 so the revised information will be available at the update and online at *www.eluls.org*. This year we will be having elections for both the PIC Chair and Vice-Chair positions, so be sure to attend as absentee ballots will not be counted.

For any information on the Public Interest Committee please contact me, your Chair, Jane Gordon at (561)684-3000 or *jmglaw@att.net*.

Water Management District Updates

SFWMD and DEP Delegate Portions of the ERP Program to Broward County

by Susan Roeder Martin, Senior Attorney, SFWMD

I. BACKGROUND

The South Florida Water Management District (SFWMD) and the Department of Environmental Protection (DEP) held rule adoption hearings in May to delegate portions of the SFWMD's and DEP's Environmental Resource Permit (ERP) program responsibilities to Broward County's Department of Planning and Environmental Protection (Broward County). Broward County has an environmental permitting program that is similar to the SFWMD and DEP programs. Currently, permit applications are reviewed by either the SFWMD or DEP and County staff, creating duplicative permitting efforts. Broward County, therefore, requested delegation of a portion of the permitting, compliance and enforcement responsibilities.

The delegation was accomplished through adoption by reference into sections 40E-4.091 and 62-113.100, F.A.C of the delegation agreement between DEP, SFWMD and Broward County. The delegation is under the authority contained in section 373.441, Florida Statutes and Chapter 62-344, F.A.C.

II.DELEGATED PERMITTING, COMPLIANCE, AND ENFORCEMENT ACTIVITIES

The delegation provides Broward County with the authority and responsibility to review and take agency action on certain environmental resource permitting, compliance and enforcement activities under part IV of chapter 373, Florida Statutes and the rules promulgated thereunder.[1] The delegation also includes responsibilities for the Wetland Resource and Surface Water Management (SWM) permit programs under subsections 373.414(11)-(16), Florida Statutes, formal determinations of wetlands and other surface waters under section 373.421, Florida Statutes, and

action on certain requests for variances for mixing zones for turbidity and dissolved oxygen under sections 373.414(17) and 403.201, Florida Statutes. Delegated compliance and enforcement responsibilities include ERP, wetland resource and SWM permits issued by SFWMD and DEP prior to the effective date of the delegation.

III. ACTIVITIES *NOT* DELEGATED

The geographic scope of the delegation is not large. The delegation does not include special taxing districts; independent drainage districts; Seminole Tribe Reservation, Trust or other Tribal owned land; local water control (298) districts; or community development districts over which Broward County does not have regulatory authority. The SFWMD's designated Water Preserve and Water Conservation Areas are also not included in the delegation. These areas encompass most of the currently undeveloped lands in western Broward County.

Authority is not delegated to process and take action on joint coastal permits; activities on sovereign submerged lands; activities that require separate domestic wastewater, hazardous waste, industrial waste and certain solid waste permits; mining activities; mitigation banks; activities proposed by the Florida Department of Transportation, U.S. Coast Guard or Department of Defense; electric distribution and transmission lines; natural gas and petroleum activities partially located outside of the geographical area of the delegation; and authority to act on petitions for variances and waivers under section 120.542, Florida Statutes.

IV. EFFECT OF DELEGATION ON REGULATED COMMUNITY

The delegation will result in 'one-stop permitting' for the delegated activities. Permit applicants will apply for and receive one permit from Broward County that will satisfy both County and the SFWMD or DEP permitting requirements. The SFWMD and DEP will maintain an oversight role of County activities.

The rules are expected to become effective in July, 2001.

Endnote:

[1] Chapters 40E-4, 40E-4, and 40E-400, Fla. Admin. Code govern environmental resource, wetland resource and surface water management permitting, compliance and enforcement activities.

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

2001 Environmental and Land Use Law Annual Update

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: August 23-25, 2001

Amelia Island Plantation • Highway A1A South

Course No. 5160R
Audio No. 5197R

Schedule of Events

THURSDAY, August 23, 2001

8:35 a.m. – 11:55 a.m.
Don't Jump the Fence: Liability and Ethics of Environmental and Land Use Professionals Practicing Outside of Their Field (Separate Workshop Registration Fee)

11:55 a.m. – 12:45 p.m.
Annual Update Late Registration

12:45 p.m. – 1:00 p.m.
Opening Remarks
Melissa Gross-Arnold, Lewis Longman & Walker, P.A., Vice Chair, ELULS CLE Committee

1:00 p.m. – 1:40 p.m.
2001 Florida Legislative Update
Land Use: Terrell K. Arline, Legal Director, 1000 Friends of Florida
Environmental: Lawrence E. Sellers, Jr., Holland & Knight, LLP

1:40 p.m. – 2:10 p.m.
Redevelopment of Brownfields and Disaster Recovery Areas: Tradeoffs and Challenges
Julia A. Trevarthen, AICP, Assistant Director, South Florida Regional Planning Council

2:10 p.m. – 2:40 p.m.
Challenges in Permitting and Building Urban Mixed Use Development
Lynda J. Harris, Carlton Fields

2:40 p.m. – 3:10 p.m.
Florida and Federal Takings Update
Timothy J. Dowling, Community Rights Counsel

3:10 p.m. – 3:30 p.m. **Break**

3:30 p.m. – 4:00 p.m.
Administrative Law Update
Mary F. Smallwood, Ruden, McClosky, Smith, Schuster & Russell, P.A.

4:00 p.m. – 5:00 p.m.
Ethical Jeopardy
Hon. James R. Wolf, Judge, First District Court of Appeal
Moderator: Gary K. Oldehoff, Esq.

5:00 p.m. – 6:30 p.m.
Reception

FRIDAY, August 24, 2001

8:30 a.m. – 8:45 a.m.
Opening Remarks
Susan L. Trevarthen, Weiss Serota Helfman Pastoriza & Guedes, P.A., Vice Chair, ELULS CLE Committee

Agency Updates

8:45 a.m. – 9:15 a.m.
Water Management Districts
William S. Bilenky, General Counsel, Southwest Florida Water Management District

9:15 a.m. – 9:45 a.m.
Department of Environmental Protection
Teri L. Donaldson, General Counsel, Department of Environmental Protection

9:45 a.m. – 10:15 a.m.
U.S. Army Corps of Engineers Update
Brooks Wilkerson Moore, Assistant District Counsel for Jacksonville District, U.S. Army Corps of Engineers

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:00 a.m.
Department of Community Affairs Update
Cari L. Roth, General Counsel, Department of Community Affairs

11:00 a.m. – 12:00 noon
Endangered Species Act Litigation: The Manatee Settlement
Eric R. Glitzenstein, Meyer & Glitzenstein (Counsel for Save the Manatee Club)
Brooks Wilkerson Moore, Assistant District Counsel for Jacksonville District, U.S. Army Corps of Engineers
Dave Hankla, Field Supervisor, U.S. Fish & Wildlife Service
Virginia S. Albrecht, Hunton & Williams (Counsel for Assoc. for Fla. Community Developers, Marine Indus. Assoc. of Fla. Nat'l Marine Manu. Assoc. & Marina Oper. Assoc. of America)

12:00 noon – 2:00 p.m.
Luncheon and Section Annual Meeting with Presentation of Awards
Richard Hamann, Chair, Environmental and Land Use Law Section

Concurrent Sessions

Land Use	Environmental
2:00 p.m. – 2:30 p.m. **Regulating Religious Land Uses After Religious Land Use and Institutionalized Persons Act** *Nancy E. Stroud, Weiss Serota Helfman Pastoriza & Guedes, P.A.*	2:00 p.m. – 2:30 p.m. **Cleaning Up the Neighborhood: Petroleum, Dry Cleaning, Brownfields and Quality Assurance Programs** *Robert D. Fingar, Huey, Guilday & Tucker, P.A.*
2:30 p.m. – 3:00 p.m. **Land Use Law Update** *Thomas G. Pelham, Law Office of Thomas G. Pelham*	2:30 p.m. – 3:00 p.m. **Regulation of Wetlands** *Cindy Lee Bartin, Rogers, Towers, Bailey, Jones & Gay, P.A.*
3:00 p.m. – 3:30 p.m. **New Life for Growth Management Based on the Availability of School Facilities** *Barbara Alterman, Assistant County Attorney, Palm Beach County* *Frank M. Duke, A.I.C.P., Director of Planning, Palm Beach County* *Leo S. Noble, P.E., Consultant to Palm Beach County and Palm Beach County School District for School Concurrency*	3:00 p.m. – 3:30 p.m. **Minimum Flows and Levels for South Florida Waters** *Irene M. Kennedy Quincey, Pavese, Haverfield, Dalton, Harrison & Jensen, LLP*

3:30 p.m. – 4:00 p.m. **Break**

4:00 p.m. – 5:00 p.m. **Making Government Decisions Based on Limited Scientific Information - The Case Study of Aquifer Storage and Recovery**
Eric Draper, Conservation Director, Audubon of Florida
Mimi A. Drew, Water Resources Mgt. Division Director, DEP
Jim Ash, The Palm Beach Post, Capital Bureau Reporter
Frank E. Matthews, Hopping Green Sams & Smith, P.A.

5:00 p.m. **Closing Remarks**
Michelle Diffenderfer, Lewis Longman & Walker, P.A., Chair, ELULS CLE Committee

5:15 p.m. – 6:30 p.m. **Reception**

6:30 p.m. – 9:00 p.m. **Live Entertainment: The Non-Essentials featuring John Hankinson**

SATURDAY, August 25, 2001

ELULS Committee Meetings

8:30 a.m. – 10:00 a.m.
Affiliate Membership

10:00 a.m. – 11:30 a.m.
Continuing Legal Education

11:30 a.m. – 12:00 noon
Access to Justice

12:00 noon – 2:00 p.m.
Public Interest Representation

Hotel Information

A block of rooms has been reserved at The Amelia Island Plantation, at the rate of $156 single/double occupancy. To make reservations, call the Amelia Island Plantation direct at (888)261-6165 and reference our group number 749499. Reservations must be made by 7/22/01 to assure the group rate and availability. After that date, the group rate will be granted on a “space available” basis.

Ethics Workshop

Don’t Jump the Fence: Liability & Ethics of Environmental and Land Use Law Professionals Practicing Outside of Their Field.

Thursday, August 23, 8:35 a.m.
(Separate Registration Fee Required)

For registration information, check our website @ *www.eluls.org* or call Jackie Werndli at (850)561-5623.

Registration

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/audiotapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests. Registrants that do not notify The Florida Bar by 5:00 p.m., August 16, 2001, that they will be unable to attend the seminar, will have an additional $80 retained. Persons attending under the policy of fee waivers will be required to pay $80.

Register me for "2001 Environmental and Land Use Law Annual Update" Seminar

(060) AMELIA ISLAND PLANTATION (8/23-25/01)

TO REGISTER OR ORDER TAPES/BOOKS, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON SITE REGISTRATION, ADD $15.00. **On-site registration is by check only.**

Name_____ Florida Bar # _____

Address _____

City/State/Zip _____

(JMW) _____ **Course No. 5160R**

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (check one):

❑ Member of the Environmental and Land Use Law Section: $305
❑ Non-section member: $320
❑ Full-time law college faculty or full-time law student: $200
❑ Persons attending under the policy of fee waivers: $80
Includes Supreme Court, DCA, Circuit and County Judges, General Masters, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. *(We reserve the right to verify employment.)*

METHOD OF PAYMENT (check one):

❑ Check enclosed made payable to The Florida Bar
❑ Credit Card (Advance registration only!) ☐ MASTERCARD ☐ VISA
Name on Card: _____ Card No. _____
Expiration Date: _____/_____Signature: _____
_____ (MO./YR.)

❑ Enclosed is my separate check in the amount of $25 to join the Environmental and Land Use Law Section. Membership expires June 30, 2001.

COURSE BOOK — AUDIOTAPES
Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after August 22, 2001. PRICES BELOW DO NOT INCLUDE TAX.

_____ COURSE BOOK ONLY: Cost $30 plus tax TOTAL $_____

_____ AUDIOTAPES (includes course book) (Course No. 5197R)
Cost: $305 plus tax (section member)
$320 plus tax (nonsection member) TOTAL $_____

Certification/CLER credit is not awarded for the purchase of the course book only.

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 course books or tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

have the same applicability to small scale development amendments as they do to comprehensive plan amendments.

First, because the adoption of a local comprehensive plan is a legislative act, all proposed amendments to the local comprehensive plan are similarly legislative acts.[9] Second, "the integrated review process by several levels of government indicates that an action on a comprehensive plan amendment is a policy decision."[10] Third, section 163.3184(10)(a), *Florida Statutes*, mandates that the "fairly debatable" standard of review must be used in any administrative hearing to determine a small scale development amendment's compliance with the Act.[11] Finally, a holding that small scale development amendments are legislative decisions subject to the "fairly debatable" standard of review would remove uncertainty and promote uniformity in local government land use law.[12] As the court stated: "We conclude the same reasoning applies [to small scale development amendments], and we see no reason to deviate from it."[13]

The Florida Supreme Court applied its *Yusem* reasoning in the context of small scale development amendments because of the court's view that amendments to a Future Land Use Map (FLUM) require fundamental policy decisions to be made by a local government.[14] The landowners argued that a small scale development amendment altering the FLUM is a quasi-judicial application of policy and not a legislative formulation of policy.[15] In contrast, the court found a commentator's description of FLUM amendments to be persuasive; a FLUM is not separate and apart from a comprehensive plan, but an integrated component of the comprehensive plan.[16] Thus, an amendment to the FLUM is an amendment of the comprehensive plan itself.[17]

The Florida Supreme Court also found DCA's lack of an oversight role in the small scale development amendment process insufficient to brand small scale development amendments non-legislative applications of policy.[18] To the contrary, the court pointed out that administrative remedies exist for any "affected person" and those administrative remedies do not even require a showing of harm.[19] Further, DCA can intervene in any such administrative action. Thus, the Florida Supreme Court chose the greater good of uniformity for all comprehensive plan amendments, including small scale development amendments, by universally declaring such amendments to be legislative decisions subject to the "fairly debatable" standard of review.[20] As such, a landowner challenging a small scale development decision must file an original action in circuit court. Small scale development amendments are not subject to certiorari review in circuit court.[21]

The *Coastal* decision definitively answers the question of whether small scale development amendments are quasi-judicial decisions or legislative decisions. Small scale development amendments are legislative decisions subject to the "fairly debatable" standard of review. As decisions on policy implementation, small scale development amendment decisions are subject to challenge in an original action in circuit court. The Supreme Court of Florida's decision in *Coastal* affirms the application of the *Yusem* opinion in the small scale development amendment context.

Endnotes:

[1] No. SC95686, 2001 WL 360443 (Fla. Apr. 12, 2001).

[2] The same question on small scale development amendments has been certified to the Florida Supreme Court by four of the five district courts. *See Fleeman v. City of St. Augustine Beach*, 728 So. 2d 1178 (Fla. 5th DCA 1999); *City of Jacksonville Beach v. Coastal Dev. of North Fla., Inc.* 730 So. 2d 792 (Fla. 1st DCA 1999), *aff'd*, No. SC95686, 2001 WL 360443 (Fla. Apr. 12, 2001); *Palm Springs Gen. Hosp., Inc. v. City of Hialeah Gardens*, 740 So. 2d 596 (Fla. 3d DCA 1999); *Minnaugh v. County Comm'n of Broward County*, 752 So. 2d 1263 (Fla. 4th DCA 2000), *review granted*, 773 So. 2d 56 (Fla. 2000), *aff'd*, No. SC00-875, 2001 WL 360429 (Fla. Apr. 12, 2001).

[3] *See Coastal*, 2001 WL 360443, at *1. The landowners wanted to change the designation of the their property from "Residential-Low Density" to "Commercial Professional Office."

[4] *See Coastal Dev. of North Fla., Inc. v. City of Jacksonville Beach*, No. 97-000079-AP, slip op. at 10 (Fla. 4th Cir. Ct. June 30, 1998).

[5] *See id.* at 19.

[6] *See City of Jacksonville Beach*, 730 So. 2d at 794-95.

[7] *See Coastal*, 2001 WL 360443, at *3.

[8] 690 So. 2d 1288 (Fla. 1997).

[9] *See Coastal*, 2001 WL 360443, at *3.

[10] *Id.*

[11] *See Coastal*, 2001 WL 360443, at *3.

[12] *See id.*

[13] *Id.*

[14] *See id.* at *4 ("The FLUM is part of the comprehensive plan and represents a local government's fundamental policy decisions. Any proposed change to that established policy is likewise a policy decision."). Once the Florida Supreme Court labels a FLUM change as a "policy decision," *see infra* note 18, the Court's opinion becomes an exercise in reasoning from that label. That is, the Court's reasoning must be consistent with the artifice of labeling a FLUM change as a "policy decision," regardless of the correctness of that label.

[15] *See id.* at *3.

[16] *See id.* at *3-*4. (quoting Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the Synder Decision and the Consistency Requirement*, 9. J. LAND USE & ENVTL. L., 243, 300-01 (1994)).

[17] *See Coastal*, 2001 WL 360443, at *4 ("The FLUM itself is a policy decision.").

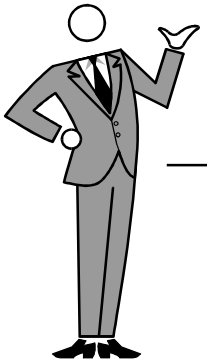
[18] *See id.* at *4.

[19] *See id.* at *4 n.25.

[20] *See id.* at *4 ("[O]ur conclusion in this case reinforces our policy underlying *Yusem*, which was to promote uniformity and certainty in land use planning decisions.").

[21] *See id.* ("We answer the certified question by holding that small-scale development amendments sought pursuant to section 163.3187(1)(c) are legislative decisions which are subject to the fairly debatable standard of review. A challenge to a local government's decision on a small-scale development amendment may be commenced as an original action in the circuit court.").

Jody L. Finklea *received his J.D. from Florida State University College of Law in 2000, an M.P.A. in Urban Management and Administration from the University of North Florida in 1997 and a B.A. in Philosophy from The Catholic University of America in 1995. He is an associate with Hopping Green Sams & Smith, P.A. in Tallahassee, Florida, where his practice focuses on local government and special district law, special district finance and taxation, and administrative litigation.*



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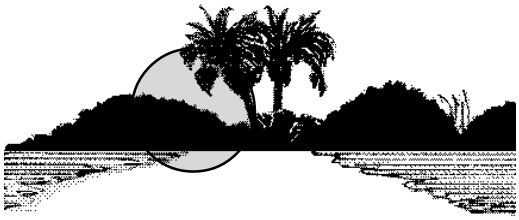


Environmental & Land Use Law Section Membership Application

This is a special invitation for you to become a member of the Environmental & Land Use Law Section of The Florida Bar. Membership in the Section will provide you with interesting and informative ideas and keep you informed on new developments the field of Environmental & Land Use Law. As a Section member, you will meet lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, complete this application form and return it with your check in the amount of $25 made payable to The Florida Bar. Mail both to THE ENVIRONMENTAL & LAND USE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

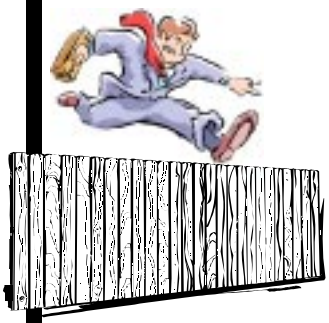
NAME:_____ ATTORNEY NO.:_____

OFFICE ADDRESS: _____

CITY/STATE/ZIP: _____

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

The Florida Bar Environmental & Land Use Law Section presents



Don't Jump the Fence:
Liability & Ethics of Environmental and Land Use Law Professionals Practicing Outside of Their Field

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location:

August 23, 2001 • Amelia Island Plantation • Highway A1A South

Course No. 5133R

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

8:30 a.m. – 8:40 a.m.
Opening Remarks/Introductions
Neil D. Hancock, Golder Associates Inc., Program Co-Chair

8:40 a.m. – 9:25 a.m.
The Ethics of Maintaining the Independence of Consultants/ Planners/Geologists/Engineers/Architects/Attorneys
Mary D. Hansen, Storch Hansen & Morris
Kennard F. Kosky, Golder Associates Inc.

9:25 a.m. – 10:10 a.m.
Federal & State Reporting Requirements: When Are You Ethically Obligated to Report?
George F. Gramling III, Frank & Gramling

10:10 a.m. – 10:25 a.m.
Break

10:25 a.m. – 11:10 a.m.
The Ethical Limits of Interaction with Agencies After Litigation Begins
David L. Jordan, Department of Community Affairs
Robert J. Riggio, Riggio & Mitchell

11:10 a.m. – 11:55 a.m.
Consultants' Ethical/Legal Obligations
Thomas M. Missimer, CDM/Missimer International
Gary V. Perko, Hopping Green Sams & Smith

This workshop is in conjunction with the Section's 2001 Annual Update (5160R). Update registration information is available by calling (850)561-5831 or at *www.eluls.org*.

CLER PROGRAM

(Maximum Credit: 3.5 hours)
General: 3.5 hours
Ethics: 3.5 hours

CERTIFICATION PROGRAM

(Maximum Credit: 2.0 hours)

Appellate Practice ..... 2.0 hours
Business Litigation ..... 2.0 hours
Civil Trial ..... 2.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5)

ENVIRONMENTAL AND LAND USE LAW SECTION

Richard Hamann, Gainesville — Chair
Sidney F. Ansbacher, St. Augustine — Chair-elect
Michelle Diffenderfer, West Palm Beach — CLE Chair

FACULTY & STEERING COMMITTEE

Neil D. Hancock — Program Co-Chair
Sidney F. Ansbacher, St. Augustine — Program Co-Chair
George F. Gramling III, Tampa
Mary D. Hansen, Daytona Beach
David L. Jordan, Tallahassee
Kennard F. Kosky, Gainesville
Thomas M. Missimer, Ft. Myers
Gary V. Perko, Tallahassee
Robert J. Riggio, Daytona Beach

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Amelia Island Plantation, at the rate of $156 single/ double occupancy. To make reservations, call 888-261-6165 and reference group number 749499. Reservations must be made by 7/22/01 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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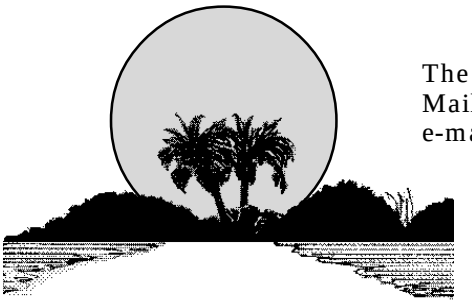

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