



# Cultivating Hemp

## What could go wrong; What could go right?

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The prospect of hemp cultivation continues to generate significant interest across the Sunshine State. As interest waxes, the State and Federal legal framework is undergoing a major transition. Recent changes in Federal and State law, along with anticipated changes in administrative rules, might just allow hemp cultivation to mature into a commercial crop. The State rules are literally being written while the Federal regulatory framework struggles to catch up.

At the outset, it is essential to understand that hemp and marijuana are different, but both belong to the *Cannabis sativa* plant species. The *Cannabis sativa* plant species in Florida legal parlance is divided into two broad categories: marijuana<sup>3</sup> and hemp<sup>4</sup>. These categories are distinguished by the percentage of Tetrahydrocannabinol (THC) produced by the plant. Specifically, the total delta-9 THC concentration on a dry-weight basis is the distinguishing factor between marijuana and hemp. By definition hemp “has a total delta-9 [THC] concentration that does not exceed 0.3 percent on a dry-weight basis.”<sup>5</sup> Generally, hemp plants exceeding the legal THC concentration are “hot” plants and provide government regulators and law enforcement the consternation associated with much of hemp regulation. This article focuses on hemp and the developing regulatory framework that will allow legal hemp cultivation.

The global market for hemp has more than 25,000<sup>6</sup> uses. The return of the “legal” cultivation of *Cannabis*

*sativa* signals a renewed demand for hemp with the goal of providing a new revenue source for Florida’s farmers that have been severely impacted by disease and natural disasters. This article will provide a brief history of hemp as an agricultural commodity and an overview of the new regulatory structure. Regardless of the government regulations, the success of hemp as a viable crop in Florida depends on discovering/developing varieties of the *Cannabis sativa* plant suitable for cultivation along with the development of a market for hemp products.

### Origins and History of Cultivation

Hemp likely originated in central Asia in the region generally between Siberia and the Himalayas.<sup>7</sup> The Chinese date hemp cultivation for textile fiber back to 2,800 B.C.<sup>8</sup> Hemp was first grown for fiber and then later for food and oil derived from the plant’s seeds.<sup>9</sup> However, cultivation of *Cannabis sativa* for narcotic purposes seems to have occurred many centuries later in central Asia or Persia.<sup>10</sup> Hemp was introduced to Europe around 1,500 B.C., probably by the Scythians and the crop was widely cultivated and used across Europe by the 16<sup>th</sup> century A.D.<sup>11</sup>

The Spanish brought hemp to Chile around 1545 and the plant was introduced to North America shortly after the Puritans settled in New England in the latter half of the 17<sup>th</sup> century. However, the demands of the household fiber industry in the Colonies were apparently dominated by flax.<sup>12</sup> Hemp cultivation was apparently thought to be a beneficial crop and the Virginia

Legislature promoted the industry as cultivation spread west. In 1775 Kentucky produced its first crop of hemp.<sup>13</sup> While hemp cultivation diminished in the Eastern states, export demand for Kentucky hemp flourished via the New Orleans market.<sup>14</sup> Demand for hemp fiber increased and U.S. Navy demand for hemp cordage and hemp sailcloth reached a peak between 1840 and 1860.<sup>15</sup> Thereafter, hemp cultivation steadily declined and by 1913 most cultivation was limited to Kentucky.<sup>16</sup>

In an apparent attempt to halt the use and spread of psychoactive *Cannabis* varieties the Marijuana Tax Act was enacted in 1937.<sup>17</sup> The Marijuana Tax Act required the U.S. Treasury Department to assert control over all *Cannabis* cultivation. All hemp growers were required to register and be licensed by the Federal government.<sup>18</sup> During World War II, (1943-1944) an emergency program was introduced to encourage the cultivation of hemp as a substitute to the unavailable foreign

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# From the Chair

by Jon Harris Maurer

As the Environmental and Land Use Law Section (ELULS) embarks on its 2019-2020 year, I am honored to serve as this year's Chair and thrilled about what we have in store for the coming year. Our immediate past Chair David Bass (City of Orlando) has put us on a great trajectory, and an engaged cohort of new Executive Council members has joined our leadership team.

Please join me in welcoming new members Executive Council members: Fred Aschauer (Lewis, Longman & Walker); Neysa Borkert (Garganese, Weiss, D'Agresta & Salzman);

Stacy Bjordahl (Charlotte County); Bryon Flagg (Byron Flagg); Pamela Jo Hatley (Pamela Jo Hatley); Jacki Lopez (Center for Biological Diversity); Angela Morrison (Earth & Water Law).

On October 21, we hosted a CLE on "Florida's Emerging Coastal Resiliency Policy and Law," featuring Whitney Gray, Florida's Resilient Coastlines Program Administrator for the Florida Department of Environmental Protection, and Thomas Ruppert, Coastal Planning Specialist for Florida Sea Grant. Given that Florida's 35 coastal counties

are home to approximately 76% of Florida's population and their public infrastructure, private property, and natural resources, this was a fitting and timely discussion of the significant risks from stronger and more numerous coastal hazards.

We held our first in-person Executive Council meeting of the year on October 24, graciously hosted by Watson Sloane PLLC in Orlando. The meeting was followed by happy hour at Ace Café. As always, be sure to follow us on Twitter (@FLBarELULS) for the latest updates on our events

Have a great fall and we hope to see you soon!

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## ON APPEAL

by Larry Sellers, Holland & Knight, LLP

*Note: Status of cases is as of September 22, 2019.* Readers are encouraged to advise the author of pending appeals that should be included.

### FLORIDA SUPREME COURT

*Lieupo v. Simon's Trucking, Inc.*, Case No. SC18-657. Petition for review of decision by 1<sup>st</sup> DCA in which the court certified the following question as one of great public importance: "Does the private cause of action contained in Section 376.313(3), Florida Statutes, permit recovery for personal injury?" *Simon's Trucking, Inc. v. Lieupo*, 244 So. 3d 370 (Fla. 1<sup>st</sup> DCA 2018). Status: Oral argument held on April 4, 2019.

### FIRST DCA

*Imhof, et al. v. Walton County, et al.*, Case No. 1D19-0980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the Second District's decision in *Heine v. Lee County*, 221 So.3d 1254 (Fla. 2d DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan.

(Regular readers will recall that the Third District recently affirmed *per curiam* a similar ruling in *Cruz v. City of Miami*, 259 So. 3d 97 (Fla 3rd DCA 2018).) Status: Notice of appeal filed March 14, 2019.

*Pelican Bay Foundation, Inc. v. Florida Fish and Wildlife Conservation Commission and City of Naples, Florida*, Case No. 1D18-4760. Appeal from a final order dismissing the Foundation's challenge to a proposed rule that updated manatee protection zones for all waterbodies within Collier County. The proposed rule considered but rejected protection for the Clam Bay system. Status: Notice of appeal filed January 29, 2018; all briefs filed; transferred from Second DCA Case No. 2D18-0353 to First DCA on November 9, 2018. Affirmed *per curiam* on August 27, 2019.

*Jose Oliva, Bill Galvano and the Florida Legislature v. Florida Wildlife Federation, Inc., Florida Defenders of the Environment, Inc., et al.* Case No. 1D18-3141. Appeal from final judgment for Plaintiffs: (1) interpreting Amendment 1 to limit the use of the funds in the Land Acquisition Trust Fund created by Article X, Section 28 to the acquisition of conservation lands or other property interests that the state did not own on the effective date of the Amendment and

thereafter, and to improve, manage, restore natural systems thereon, and enhance public access or enjoyment of those conservation lands; and (2) determining that numerous specific appropriations inconsistent with that interpretation are unconstitutional. Status: Oral argument held July 16, 2019, affirmed in part, reversed in part, and remanded on September 9, 2019.

### THIRD DCA

*City of Miami v. 3637 Corp., Inc.*, Case No. 3D19-941. Petition for review of trial court's decision reversing denial by the City of Miami Planning and Zoning Board of an appeal from the denial of a request for the issuance of a certificate of use. The trial court granted the petition for certiorari based in large part on a determination that the City is estopped to deny the request based on its prior conduct. Status: Petition for certiorari denied August 28, 2019.

*City of South Miami v. Florida Power & Light Company*, Case No. 3D19-0020. Appeal from final order on remand approving certification, after the matter was remanded to the Siting Board for further review to take action consistent with the court's opinion in *Miami-Dade County v. In Re: Florida Power & Light Co.*, 208 So. 3d 111 (Fla 3rd DCA 2016). Status: Notice of appeal filed January 3, 2019.

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**ON APPEAL**

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*Florida Retail Federation, Inc., et al. v. The City of Coral Gables*, Case No. 3D17-562. Appeal from final summary judgment upholding the City of Coral Gables ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court’s determination that three state laws preempting the ordinance are unconstitutional. Status: Reversed and remanded on August 14, 2019.

**FOURTH DCA**

*Everglades Law Center Inc. v. SF-WMD*, Case Nos. 4D18-1220, -1519 and -2124. Appeals from Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center’s Counterclaim. The Everglades Law Center sought to require disclosure of the transcripts of a “shade” meeting held by the SFWMD Governing Board involving discussions regarding mediation between the District and its Governing Board in attorney-client sessions. The order concludes that the transcripts of such discussions constitute communications at a mediation proceeding within the meaning of Section 44.102(3), Florida Statutes, and therefore are exempt from disclosure under the public records law. Status: Affirmed in part, reversed in part, and remanded September 18, 2019.

*Maggy Hurchalla v. Lake Point Phase I LLC*, Case Nos. 4D18-1221 and -1632. Plenary appeal from jury verdict finding Ms. Hurchalla liable for \$4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments in opposition to the project. Status: Affirmed on June 19, 2019; motion for rehearing *en banc* filed July 15, 2019 denied September 6, 2019.

**FIFTH DCA**

*Adele Simons, et al v. Orange County, et al*, Case No. 5D18-1418. Appeal from a final order of the Administration Commission finding to be “in compliance” the “Lake Pickett” plan amendments adopted by Orange County. The administrative law judge had recommended that the Administration Commission find the plan amendments not in compliance. Status: Oral argument held on March 19, 2019; affirmed *per curiam* on May 28, 2019; motion for rehearing denied on June 19, 2019.

**UNITED STATES SUPREME COURT**

*County of Maui, Hawaii, v. Hawaii Wildlife Fund*, Case No. 18-260. Petition to review decision by the U.S. Court of Appeals for the 9<sup>th</sup> Circuit upholding a district court ruling, rejecting the County’s argument that a “discharge” only occurs when pollutants are released directly into navigable waters. The County operates a

wastewater treatment plant that injects the treated wastewater through wells into the groundwater; some of that groundwater eventually enters the Pacific Ocean. Issue: Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source, such as groundwater. Status: Oral argument set for November 6, 2019.

*Atlantic Richfield Co. v. Christian, et al.*, Case No. 17-1498. Petition to review Montana Supreme Court decision that allows state residents to sue Atlantic Richfield Co. for clean-up costs related to the Anaconda Smelter Superfund site’s pollution despite remediation work that had already occurred. Issues: (1) Whether a common law claim for restoration seeking cleanup remedies that conflict with remedies the EPA ordered is a jurisdictionally barred “challenge” to the EPA’s cleanup under 42 U.S.C. § 9613 of CERCLA; (2) Whether a landowner at a superfund site is a “potentially responsible party” that must seek EPA approval under 42 U.S.C. § 9622(e)(6) of CERCLA before engaging in remedial action, even if the EPA has never ordered the landowner to pay for a cleanup; and (3) Whether CERCLA pre-empts state common law claims for restoration to seek cleanup remedies that conflict with EPA ordered remedies. Status: Oral argument set for December 3, 2019.

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# Putting Resiliency Planning into Action to Address Climate Change and Sea Level Rise

by Erin L. Deady, the President of Erin L. Deady, P.A. in Delray Beach Florida. Ms. Deady received her law degree from Nova Southeastern University and practices primarily in the fields of local government, climate, sustainability, energy and land use.

Resiliency planning in Florida is moving in new directions as the realities of climate change and sea level rise (SLR) become core principles of local government adaptation. But what is resilience? Merriam Webster tells us that it is “an ability to recover from or adjust easily to misfortune or change.”<sup>1</sup> So in the climate change and SLR context, planning for resilience means adjusting for future changes, but in the disaster context, planning for resilience means recovering from misfortune. Both parts of the definition are relevant to local governments (and even businesses) in Florida in light of observed impacts of climate change and recovery from recent hurricane disasters.

This article will focus on the implementation aspects of local government responses to climate change and SLR. It is important to focus on both aspects since SLR is a consequence of climate change. It is also important to note that climate change is not just a coastal issue. The inland impacts include increased heat days, public health challenges, and flooding of urban stormwater systems that are not designed to handle the volume of precipitation from rain events. This article will largely focus on resiliency implementation strategies, as well as relevant case studies to identify some of the legal aspects of implementation that continue to arise as Florida adapts to climate change and SLR.

## The Comprehensive Plan to Guide Policy.

Section 163.3178, Florida Statutes requires local governments that must develop a coastal management element of their Comprehensive Plan to include a “(a) redevelopment component that outlines the principles that must be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise”<sup>2</sup> known also as “Peril of Flood” amendments. While the redevelopment component itself is not new, the following must be addressed:

1. Development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas that result from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of SLR;
2. Encouraging the use of best practices development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency (FEMA);
3. Identifying site development techniques and best practices that may reduce losses due to flooding and claims made under flood insurance policies issued in Florida;
4. Being consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and applicable flood plain management regulations set forth in 44 C.F.R. part 60;
5. Requiring construction activities seaward of the coastal construction control lines established pursuant to Section 161.053, F.S. be consistent with Chapter 161, F.S.; and
6. Encourage local governments to participate in the National Flood Insurance Program (NFIP) Community Rating System (CRS) administered by FEMA to achieve flood insurance premium discounts for their residents.

Two key issues are important about the Section 163.3178 requirement. First, it only applies to those local governments that must have a coastal management element. According to Barbara Lenczewski, Ph.D., AICP at the Department of Economic Opportunity, to date approximately 88 governments have adopted Peril of Flood

compliant amendments. Second, it can be considered a floor and not a ceiling in terms of a local government tool to address climate change and SLR. While several local governments have come into compliance with this requirement through various updates to their Comprehensive Plans, others have taken a broad approach incorporating these issues into multiple elements of their Comprehensive Plans. This could include incorporating climate or SLR issues into Infrastructure<sup>3</sup>, Public Facilities<sup>4</sup>, Future Land Use<sup>5</sup> or Conservation Elements.<sup>6</sup> Some local governments have even developed standalone optional elements dedicated to climate<sup>7</sup> and/or adaptation policies.<sup>8</sup>

Additionally, addressing the key goals for the individual local government in terms of the incorporation of mitigation strategies related to energy (such as Alachua County’s Energy Element<sup>9</sup>) or greenhouse gas emissions, as a component of Climate Change (such as Broward or Monroe Counties) is also one approach. “Expansion” of broader environmental initiatives to include climate change, adaptation and/or greenhouse gas (GHG) management is also a strategy.<sup>10</sup> One example of an approach is the City of Sarasota’s Comprehensive Plan which details a wide range of climate change and SLR planning strategies in the Environmental Protection and Coastal Island Element. This section promotes the reduction of GHG emissions community wide and in city operations and requires SLR and storm surge data to be considered in the planning for future infrastructure. If proposed development is within a vulnerable area, resiliency strategies must be incorporated into the design.<sup>11</sup> Whatever approach a local government takes, it is clear that at least for coastal communities, addressing only SLR in the Comprehensive Plan is no longer the predominant model. The co-benefit of compelling coastal local governments

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to address these issues in Comprehensive Plans is that the action of doing so, in many instances, has opened up a broader conversation about how the local government will approach climate issues overall.

### Using Adaptation Action Areas as a Tool.

“Adaptation Action Areas”<sup>12</sup> are an option for local governments to address coastal risk as part of the Coastal Management Element of a Comprehensive Plan. Adaptation Action Areas can be areas for which (a) the land elevations are below, at, or near mean higher high water, (b) areas with a hydrologic connection to coastal waters, (c) areas that are designated as evacuation zones for storm surge, and (c) other areas impacted by stormwater and flood control issues.<sup>13</sup> Local governments essentially have the authority to utilize the designation to prioritize the types of areas and projects important to them for development of policies specific to those areas.

Several local governments have already identified specific Adaptation Action Areas ranging from specific stormwater projects,<sup>14</sup> to inlet management,<sup>15</sup> or natural resource protections.<sup>16</sup> Policies for planning within the Adaptation Action Areas can include: utilization of best available data and resources; regional collaboration; vulnerability assessments to identify at-risk geographic areas;<sup>17</sup> public infrastructure and investments; and assets that could be impacted by rising sea levels.

### Zoning, Land Development Regulations and Design Criteria as Tools.

While “green building” continues to gain traction in reducing the environmental footprint of residential and commercial buildings, there is a developing trend in focusing on the resiliency aspects of land development. Multiple green building standards and certifications are now common. Their focus on flood mitigation, resiliency or floodproofing of electrical and mechanical systems, and other related issues such as wind mitigation are gaining momentum in construction practices. Some local governments have begun incentivizing or

mandating green construction standards, so the movement toward more resilient land development regulations is not an illogical leap.

In *Voluntary Resilience Standards: An Assessment of the Emerging Market for Resilience in the Built Environment*, an overview is provided regarding certifications, benchmarking programs, planning frameworks and design principles, termed “resilience standards”.<sup>18</sup> The idea is that a shift towards building resiliency will occur much in the same way sustainable construction standards gained momentum with the growth of Leadership in Energy and Environmental Design (LEED). Some standards address new construction while others address existing facilities. Another key element is that some standards address resiliency at the “facility” or building level while others address resiliency at the neighborhood and community scales. Some key take-aways of this guidance include:

- Revising building codes and policies can facilitate the uptake of more resiliency elements in construction;
- Beyond-code policies can act as carrots or sticks to help drive outcomes;
- Zoning and permitting policies can be a strong tool for implementation; and
- Resiliency can be a fundamental goal of financing and incentive programs such as tax benefits, grants, reduced development fees or bonuses.

Currently, the National Institute for Building Sciences, and those that promote RELi and FORTIFIED building standards, and other entities are leading efforts to quantify the costs and benefits of resiliency construction standards. This mirrors many efforts of the green building industry to do the same thing in the early days of developing green construction practices. Another strategy could be to incentivize adaptation strategy at the property owner level by offering insurance mitigation discounts for certain types of resiliency improvements. The FORTIFIED Home standard is designed to make new and existing homes more resilient to hurricanes, high winds, and hail. Since 2009, five states have adopted various regulatory incentive insurance

mitigation programs encouraging the adoption of the FORTIFIED Home standard. In Alabama and Mississippi, FORTIFIED Home properties are specifically eligible for insurance discounts within certain coastal areas. The Strengthen Alabama Homes program also provides grant funding for retrofits of existing homes. In Mississippi, Georgia, and South Carolina, FORTIFIED Home properties receive wind mitigation credits through the state’s wind pool.<sup>19</sup>

One particular aspect of resiliency code or floodplain regulations is “freeboard.” According to FEMA:

Freeboard is a term used by FEMA’s National Flood Insurance Program (NFIP) to describe a factor of safety usually expressed in feet above the 1-percent-annual-chance flood level. The NFIP requires the lowest floor of structures built in Special Flood Hazard Areas (SFHAs) to be at or above the BFE, so a structure built with freeboard would have its lowest floor 1 foot or more above the BFE. Adding freeboard will reduce NFIP insurance premiums.<sup>20</sup>

Several local governments in Florida and nationally have adopted higher freeboard standards for multiple reasons, primarily because it is a public health safety and welfare protection. Also key is the last sentence in FEMA’s own definition: “Adding freeboard will reduce NFIP insurance premiums.” As discussed in more detail later in this article, FEMA’s Community Rating System awards points for increasing freeboard requirements which can lead to reduced NFIP insurance rates.

A challenge of increased freeboard are height limits that may prevent such increases, as observed with the City of Key West. On November 4, 2014, voters in Key West approved a building height referendum to directly respond to the need for increasing building height limits while allowing people to implement freeboard projects on properties. Section 122-1149 of the City’s Code was amended to provide for a Flood Protection Building Height Exception<sup>21</sup> in cases where a building is raised above ground to meet or exceed FEMA established base flood elevation levels. Conditions

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of the exception include:

- Only the equivalent measure of distance from the existing ground level, prior to infill, to the required base flood elevation of the building, and up to a maximum of four (4) feet above the base flood elevation, may exceed the building height regulations; and
- No exception shall result in a building height that would exceed 40 feet.

Buildings located within historic districts, and “Historically Contributing Structures” located elsewhere in the City, remain under the jurisdiction of the City’s Historic Architectural Review Commission (HARC). HARC must approve elevation applications. No variance from the 40’ limitation is permissible, absent a special referendum approved by the voters.

There are several examples of seawall heights becoming a resiliency tool. On November 13, 2018, for example, the Broward County Commission approved the initiation of a land use plan amendment to establish a seawall and top-of-bank elevation for tidally-influenced waterways, in accordance with SLR predicted through 2070. The proposed regional resiliency standard includes requiring a minimum elevation of 4 feet NAVD88 by 2035 and 5 feet NAVD88 by 2050 for seawalls and shorelines.<sup>22</sup> On August 22, 2019, following a public hearing, the Broward County Planning Council recommended approval of a text amendment to the Broward County Land Use Plan Policies. Policy 2.21.7<sup>23</sup> will be considered by the Broward County Board of County Commissioners in September, 2019. The proposal - through a reference to Broward County’s Code of Ordinances - sets a minimum seawall height standard of 4’ NAVD 88 by 2035 and 5’ NAVD 88 by 2050. The regional standard is a planning foundation for municipal adoption. The corresponding amendment to Chapter 39 of the Broward County Code of Ordinances is on a parallel track for adoption by the Board of County Commissioners.

The City of Ft. Lauderdale has also modified its Unified Land Development Regulations (ULDR) (City of Fort Lauderdale Section 47-19.3 Boat

Slips, Docks, Boat Davits, Hoists, and Similar Mooring Structures) with a minimum of 3.9’ NAVD and a maximum seawall elevation based on the elevation of the property in the context of the property’s Base Flood Elevation (BFE). These maximum elevations were used to ensure that new seawalls are lower than the finished flood elevation and will not result in flooding into the home. The standards are:

1. Property in a floodplain where BFE is greater than 5’ NAVD, the maximum seawall or dock elevation is the BFE of the property;
2. Property in a floodplain where the BFE is equal to 4’ NAVD, the maximum seawall or dock elevation is 5’ NAVD; and
3. In an X zone, not in a floodplain, the maximum seawall or dock elevation must meet the definition of grade.

The City of Miami Beach recently amended its Public Works Manual to require the raising of seawall heights in certain situations. The manual now requires that new private and public seawalls be constructed to a minimum elevation of 5.7 feet NAVD (from 3.2 feet previously). Existing seawalls that are not being repaired or replaced are permitted to remain so long as they meet the minimum 4.0 feet NAVD with the structural design to accommodate extension to 5.7 feet NAVD in the future. This new height is informed by SLR projections, design storm events, and coincides with the typical lifespan of a seawall.

Finally, resiliency-based zoning strategies are becoming more prevalent, and include many different aspects. Some communities have adopted “project specific” zoning elements such as the Gentilly Resilience District in New Orleans, Louisiana or the Meadowlands Resilient District in New Jersey. Some communities have gone a step further or are in the process of establishing zoning regulations for resiliency such as Boston<sup>24</sup> and New York City<sup>25</sup>. Finally, others have taken more formal steps to adopt overlays or more formalized zoning requirements to address resiliency such as Norfolk, VA (combining overlays and a point-based resiliency quotient) or South Kingstown, RI (overlays and design criteria). This

concept more narrowly focuses on enhancing resiliency through zoning-based outcomes, much like green building codes previously did.

### Infrastructure Adaptation.

Much of the work to date on resiliency and adaptation planning has been just that: planning. In the last few years, however, actual project implementation is starting to occur for many reasons. First, the planning efforts have given local governments a more accurate understanding of the types of spending that is needed in the short term and/or long term to make communities more resilient overall. Second, the notion of “an ounce of prevention is worth a pound of cure” is beginning to support “no regrets” project implementation.

The National Institute of Building Sciences (NIBS) conducted a study published in 2018<sup>26</sup> that found the following key financial results from adaptation strategies:

- Adopting Model Codes Saves \$11 per \$1 Spent;
- Federal Mitigation Grants Save \$6 per \$1 Spent;
- Exceeding Codes Saves \$4 per \$1 Spent; and
- Mitigating Infrastructure Saves \$4 per \$1 Spent.

To conduct the study, the NIBS used 12 U.S. Economic Development Administration grants and additional mitigation measures as case studies to show the degree to which mitigation of utilities and transportation lifelines can be cost effective. The study analyzed benefit cost ratios for several categories of infrastructure: water, wastewater, electricity, telecommunications, roads, and railroads. The measures studied that are relevant to Florida include:

- Elevating roads and railroads;
- Elevating water treatment plant electrical equipment;
- Relocating to higher ground electrical substations, telephone substations, water treatment plants, and wastewater treatment plants to better resist flood;
- Protecting water and wastewater treatment plants with berms; and
- Moving electrical transmission lines underground to better resist wind loads.

This information is valuable

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because local governments and agencies may not always have the opportunity to quantify project benefits in these terms. The prevailing bottom line is that mitigation pays and the sooner it is planned, the better.

Pinellas County, Florida has recognized, “[a]s new infrastructure projects are planned, or existing assets are modified or improved, flooding and other impacts exacerbated by sea level rise must be considered in the decision-making process”. In 2017, the County produced a document entitled “Guidance for Incorporating Sea Level into Capital Planning” identifying four key steps in the planning process:<sup>27</sup>

1. Climate Science: What is the current science and what are the local projections for SLR?
2. Vulnerability Assessment: Which assets are vulnerable to SLR?
3. Risk Assessment: Which assets are at greatest risk to SLR?
4. Adaptation Measures: What can we do to improve the asset’s resiliency to impacts from SLR?

One of the key aspects of an approach like this is that it can uniformly provide Division Directors, project managers, and technical staff with a step-by-step process for considering SLR vulnerability, risk, and adaptation planning within their Division capital plans and projects. Factors considered in the project evaluation process include: Functional Lifespan (how long will the project be in use at this location (Including O&M); Location (is the project located in a vulnerability zone during its lifespan?); and Planning Horizon (the date construction is complete + the functional lifespan). The County also has conducted County-Wide Vulnerability Assessment of Critical Infrastructure for two hazards scenarios including Tidal (non-storm) flooding and Storm surge for current (storm surge only) in years 2040, 2070 and 2100. Another effort is to develop a decision-support tool for capital planning, budgeting and implementation.

Monroe County, Florida continues to prioritize vulnerability planning and decision-making and is making great strides in cross-departmental

and division collaboration. Several partnerships and efforts are underway including Disaster Recovery from Hurricane Irma. A primary effort of the County has been to prioritize roads and stormwater vulnerability analysis to begin incorporating projects into capital planning and disaster recovery funding sources. The County completed a Pilot Study in January 2017 which analyzed the impacts of tidal flooding in two (2) neighborhoods severely impacted by King Tides in October 2015 and October 2016.<sup>28</sup> At the conclusion of the effort, the County adopted a Resolution including a design standard accounting for SLR and a threshold not to exceed seven (7) days of tidal flooding annually for the useful life of the project.<sup>29</sup> The final report also included a draft Ordinance building upon the St. John’s County environmentally-challenging locations concept adding a design standard and local conditions analysis for feasibility. In the spring of 2019, the County also launched a countywide roads and stormwater analysis to address all county owned and maintained roads and potential adaptation measures that will include stormwater. This will be where the “rubber meets the road” in terms of answering questions such as: What roads get elevated and to what extent? How will the projects be paid for (such as special assessments or general revenue)? And, what level of service will be achieved in terms of tidal or other types of flooding?

### **Adaptation and Development in the Public Interest.**

The biggest challenge in implementing these types of infrastructure efforts becomes balancing the public interest, which is an evolving thought process. A hypothetical case study in point: City x is considering whether it makes sense from a policy and funding perspective to elevate a road. The project may make sense if (a) the road can be elevated without causing adjacent flooding; (b) the road serves a number of property owners and businesses; (c) the project can be permitted; (d) the project does not cause adverse environmental impacts; (e) the project does not create new onerous maintenance obligations; and (f) the project does not create a cascading effect of requiring elevation of adjacent properties or drainage impacts in another flood basin. Conversely,

the project may not make fiscal or policy sense if (a) the project only serves a limited number of properties; (b) the project would flood adjacent properties; (c) the project requires other costly stormwater projects to prevent flooding; (d) the project creates adverse impacts to habitat; (e) the project is not likely to be permitted; and (f) the project creates other unintended consequences. The key is transparency and managing expectations in the decision-making process so that (a) the local government has the clear authority to consider these factors in the face of climate change, (b) property owners gain an understanding of the levels of service they can expect in the future and, (c) the expectations of the regulated community can be managed.

One path would be to borrow a page from Chapter 373, Florida Statutes, which governs environmental resource permit issuance and which incorporates a “public interest test” with several key factors such as whether an activity will adversely affect:

- (a) public health, safety, welfare;
- (b) property of others;
- (c) fish and wildlife or listed species;
- (d) navigation or flow of water or cause harmful erosion or shoaling, temporary or permanent nature; and
- (e) historical value and current condition and value of resources affected (wetlands).<sup>30</sup>

Similarly, consumptive use permit issuance incorporates a reasonable beneficial use evaluation including: (a) economic and efficient use of water; (b) not causing harm to existing off-site land uses resulting from hydrologic alterations; (c) not harming water resources; and (d) not causing water quality violations.<sup>31</sup> These established principles can formulate the basis for similar economic, environmental and policy evaluations to determine whether infrastructure adaptation projects have undergone evaluation to determine whether or not they have been adequately considered in the face of SLR. These types of concepts could be applied to both public sector infrastructure (think roads and stormwater) or private development projects (should that development project be approved in this vulnerable location as designed?). Longstanding legal principles in Chapter 373, Florida

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## RESILIENCY PLANNING

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Statutes interpreting factors may be instructive in application to “balancing” these types of infrastructure projects. The benefits of a resiliency-based “balancing test” would include:

- Clarifying factors for policy infrastructure decision-making;
- The test is both prescriptive and flexible;
- Contains economic and practical elements; and
- Could cover new upgrades to public infrastructure decisions and those regulatory approvals for new or modified private development.

For this type of policy development, this is not necessarily “new territory.” Creating a resiliency-based “balancing test” is simply new application of policy evaluations to a new subset of conditions based upon a future impacted by climate change and SLR.

### Harmonizing Disaster Recovery and Resilience.

The topic of harmonizing disaster recovery and resilient rebuilding of homes and infrastructure could be an entire article in and of itself. Focusing more specifically on currently available funds, \$633,485,000 is available for communities statewide impacted by Hurricanes Hermine, Matthew and Irma through Community Development Block Grants- Disaster Recovery<sup>32</sup> funding. This funding addresses housing, infrastructure, economic development, and mitigation programs, including:

1. Housing Programs
  - \* Housing Repair and Replacement Program (\$346,186,147)
  - \* Single Family Owner-Occupied (\$314,044,300)
  - \* Small Rental: 1-4 units (\$16,547,447)
  - \* Multi-Family Rental: 5+ units (\$15,594,400)
  - \* Affordable Workforce Housing Construction Program (\$140,000,000)
  - \* Voluntary Home Buyout Program (\$75,000,000)
2. Economic Development Programs
  - \* Workforce Recovery Training (\$20,000,000)
  - \* Business Recovery Grant

Program (\$60,000,000)

- \* Business Assistance to New Floridians from Puerto Rico (\$6,000,000)
3. Infrastructure Programs
    - \* Infrastructure Repair Program (\$85,819,653)

The largest amount of funding (in the Housing Repair and Replacement program) includes repairs to, reconstruction or replacement of homes, including bringing the home into code compliance and providing resiliency for future storms. In compliance with HUD goals, as expressed in Federal Register Notice Vol. 83, No., 28, February 9, 2018,<sup>33</sup> the program has established a “Resilient Home Construction Standard” to enhance property resistance to future wind-borne disaster. This standard includes resiliency and mitigation measures that are intended to provide enhanced construction materials for specific housing components including roofing, windows and doors. The Resilient Home Construction Standard will be applied to all homes that have verified Hurricane Irma repairs that remain an unmet need and which will be repaired by the program.

Specific funding is related to costs such as green building and mitigation requirements, elevation, insurance, accessibility modifications for the disabled, repair or replacement of water, sewer and utility connection needs. Cost effective energy measures and improvements that meet local zoning, required Housing Quality Standards (HQS), especially those improvements which add enhanced resilience, such as elevation of major electrical components, roof strapping and other items, are also eligible. Elevations will also be included for substantially damaged properties and evaluated on a case-by-case basis. Elevations will be guided by the following (from the *State of Florida Action Plan for Disaster Recovery*)<sup>34</sup>, stating:

DEO will develop and implement resilient home construction standards, including design standards for all structures designed principally for residential use and located in the 100-year (or 1 percent annual chance) floodplain that receive assistance for new construction, repair of substantial damage

or substantial improvement, as defined at 24 CFR 55.2(b) (10). DEO will require elevation of these structures such that the lowest floor, including the basement, is at least two feet above the base flood elevation which is the minimum height requirements set forth in the February 9, 2018, Federal Register Notice.

These types of programs also can be resource for adding design features or criteria to local code to require or incentivize resilient standards. Similar requirements exist for rebuilding infrastructure with disaster recovery funds. On Oct. 5, 2018, President Trump signed the Disaster Recovery Reform Act of 2018 into law as part of the Federal Aviation Administration Reauthorization Act of 2018.<sup>35</sup> It addressed a couple of key provisions that still require FEMA implementation including:

- National Public Infrastructure Pre-Disaster Hazard Mitigation (Section 1234): Authorizes the National Public Infrastructure Pre-Disaster Mitigation fund, which will be funded through the Disaster Relief Fund as a six percent set aside from estimated disaster grant expenditures. This allows for a greater investment in mitigation before a disaster. This new program is named Building Resilient Infrastructure and Communities (BRIC).
- Hazard Mitigation Grant Program for Resilience (Section 1235a): Ensures Hazard Mitigation Grant Program funding increases resilience to future damage, hardship, loss or suffering.

The reality is that using disaster recovery money for resiliency purposes is now becoming commonplace. Local governments can benefit from exploring these types of initiatives for incorporation into existing Codes and policies.

### Floodplain Management Linkages.

FEMA’s Community Rating System (CRS) is a program that provides lowered NFIP premiums for meeting certain floodplain management activities. There are 19 creditable activities, organized under four categories including (1) public information, (2) mapping and regulations,

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## RESILIENCY PLANNING

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(3) flood damage reduction, and (4) warning and response. SLR analysis is incorporated into several activities in the *NFIP Community Rating System Coordinator's Manual*, including:

- Section 322.c for communities that provide information about areas (not mapped on the FIRM) that are predicted to be susceptible to flooding in the future because of climate change or sea level rise;
- To become a Class 4 or better community, a community must (among other criteria) demonstrate that it has programs that minimize increases in future flooding;
- To achieve CRS Class 1, a community must receive credit for using regulatory flood elevations in the V and coastal A Zones that reflect future conditions, including sea level rise;
- Section 342.d when prospective buyers of a property are advised of the potential for flooding due to climate changes and/or sea level rise;
- Section 412.d when the community's regulatory map is based on future-conditions hydrology, including sea level rise;
- Section 432.k when a community accounts for sea level rise in managing its coastal A Zones;
- Section 452.a if a community's stormwater program regulates runoff from future development;
- Credit is provided in Section 452.b for a community whose watershed master plan manages future peak flows so that they do not exceed present values;
- Section 452.b for a coastal community whose watershed master plan addresses the impact of sea level rise; and
- Section 512.a, Steps 4 and 5, for flood hazard assessment and problem analysis that address areas likely to flood and flood problems that are likely to get worse in the future, including (1) changes in floodplain development and demographics, (2) development in the watershed, and (3) climate change or sea level rise.

A local community can be strategic in its climate planning efforts and

potentially develop a data, evaluation and policy approach that not only informs future decision-making, but also potentially results in reduced premium rates. While many Florida communities participate in CRS, very few at all have combined these efforts in a way to effectively achieve enhanced Class rating utilizing SLR planning strategies. In Florida, this is a very overlooked benefit of vulnerability planning. In particular, if a local community is pursuing some type of SLR vulnerability analysis and improvement in CRS, Section 452.b regarding watershed master plans addressing the impact of SLR provides a good opportunity to harmonize those efforts.

### **Adaptation and Resiliency Funding Strategies for Local Governments.**

Funding for resiliency is likely to be based on a "layered" approach of traditional and new sources of revenue. Pre- and post-disaster recovery sources that harmonize the concepts of resiliency and planning for future conditions including climate adaptation are available and too numerous to summarize here. Communities are also employing general obligation or revenue bonding, user fees, non-disaster related grants, State Revolving Loan Funds and incentive-based funding strategies to achieve resilience outcomes.

Pay as you go financing is one approach, for example, where a vulnerability assessment is completed and a prioritized list of capital adaptation projects is developed to be integrated into a local government's traditional capital planning process. Projects are then funded just as any other capital improvements are funded. Revenue sources to support such funding could include grants, disaster recovery money, and general revenue. Debt-financed approaches could include bonds, traditional government borrowing or low-interest loan programs.

Assessments are being increasingly investigated as a financing tool, because in some instances, they allow a proportionate rate to be charged for the benefit accrued. This flexibility can address issues such as localized differences in levels of flood service or differing elevations of roads for adaptation to achieve certain future flood conditions. Assessments can already be used for neighborhood

improvements and business improvement districts. They can fund improvements over a larger geographical area such as stormwater or roads pursuant to Sections 163.501-526, Florida Statutes. The tool can be used to "improve" a specifically defined geographic area within a community. It remains a challenge, however, to determine if and how assessments should be used.<sup>36</sup>

Tax increment financing can be another tool especially in the redevelopment context. Tax-increment financing allows collection of property tax revenue based on increases in property values that result from a particular enhancement or improvement. Resilience projects that will increase a property's value are a good opportunity for tax-increment financing. Tax increment financing is valuable for a local government because the model allows development or infrastructure project to be financed without large independent capital outlay. Essentially, the projects can be "self-financed"—the increase in assessed property value caused by the development is used to repay the cost.

Impact fees are widely used by local governments as a tool to help reduce the economic burden of the infrastructure costs that new developments incur due to the expansion of the public service network. Generally, impact fees are assessed to generate revenue to meet local infrastructure and public facility demands arising as the result of new development. Examples of impacts fees that have been utilized in the past include water and sewer facilities, roads, parks, schools and other public services, as well as municipal facilities such as fire, police, and libraries. But, impact fees in some instances, can also be used to incorporate resiliency-related attributes into such projects. Examples include stormwater system upgrades, flood control improvements, road elevation, green infrastructure, or open space features that have resiliency co-benefits.

Finally, individual property owners can also utilize financing strategies to incorporate resilient elements into their homes or businesses. One tool are mortgage-related products such as Fannie Mae's HomeStyle Energy Mortgage which also funds flood, fire and seismic improvements.<sup>37</sup> Property Assessed Clean Energy (PACE)

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can currently fund energy efficiency, renewable energy and wind resistance improvements and can be used as a financing tool for both residential and commercial property owners to fund these types of qualifying improvements.<sup>38</sup> PACE typically allows financing for such improvements to be repaid on the property owner's tax bill. But other states have added resilient features allowing PACE to be utilized to achieve broader resiliency goals such as water conservation, flood mitigation or tornado resiliency in Alabama.<sup>39</sup> Particularly relevant in Florida, the flood mitigation improvements include, but are not limited to:

1. The raising of a structure above the base flood elevation to eliminate flood damage;
2. Installation of a flood diversion apparatus;
3. Electrical, mechanical, plumbing, or other system improvements that reduce flood damage;
4. Improvements to mitigate or eliminate the potential for microbial growth, or reduce flood insurance premiums; and
5. Any other improvement that reduces repetitive loss that is recognized by the NFIP, CRS, or FEMA.

The link between PACE financing and resilient construction or redevelopment is only growing as PACE provides a critical source of capital for individual property owners to undertake these improvements, even in many instances for new construction, which is gaining much momentum on the commercial side.

### Conclusion.

Much work with resiliency planning is being done in Florida, and no one strategy is the silver bullet. Local governments are already advancing the response to climate change and SLR because they control land use, and they are responsible for the lion's share of infrastructure planning and financing. Regional collaboration is also a significant source of data gathering and information exchange enabling local governments to learn from each other to implement their individual goals. These regional collaborations are important, particularly

with regard to vetting the science to determine "unified" or consistent SLR projections for local planning targets.

Resiliency planning only makes good economic sense within our land use and environmental decision-making construct. Funding partnerships can help in the implementation phase such as Federal grants available through the National Oceanic and Atmospheric Administration, partnerships with Florida SeaGrant and others. The State of Florida, through its Resiliency Planning Grants, has also served as a catalyst for local government planning assisting in policy development, vulnerability planning and project implementation. But the time is now to start rethinking how we use traditional planning approaches and financing tools to achieve more proactive and resilient outcomes. Examples include zoning policy, impact fees and construction standards.

Whatever the buzz word--adaptation planning, vulnerability planning or resiliency planning-- the reality is that planning for future conditions is moving from planning into action through many approaches. The good news is there are ample case studies to review that will fit specific priorities at the local government level. Increased partnerships between local governments, the State of Florida and the Federal government will be critical. "No Regrets" strategies are based on concepts and measures that can be implemented now without being certain about all aspects of future climate change. This paradigm shift is upon us and many municipalities and counties are having that conversation. The challenge has been, and continues to be, moving beyond the conceptual to action.

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# Florida State University College of Law August 2019 Update

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students and alumni. It also features several of the terrific programs the College of Law will be hosting during the upcoming year. We hope Section members will share their accomplishments with us and join us for one or more of our future programs.

### Recent Alumni Accomplishments

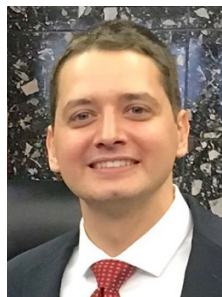
- **Erika Barger** was recently named the Florida State Elks Association's "Elk of the Year" at the Florida State Elks Association's State Convention held in Orlando. She received this award based on her efforts as State Chairman of the Florida State Elks Association's Elks National Foundation Certificates Committee.
- **Chief Judge Robert S. Cohen** was awarded the 2019 Claude Pepper Outstanding Government Lawyer Award by the Government Lawyer Section of the Florida Bar. This award is presented each year to an individual who has exemplified the highest ideals of dedication, professionalism, and ethics in service to the public. Chief Judge Cohen was also the recipient of the 2019 S. Curtis Kiser Administrative



Barger



Chief Judge Cohen



Cunningham



Price



Sjuggerud



Volpe

Lawyer of the Year Award for his significant contributions to the field of administrative law in Florida.

- **Stephen Cunningham** recently accepted a position as an associate at Gunster's West Palm Beach office.
- **Terry Lewis**, of Lewis, Longman & Walker, P.A., was included in the *2019 Florida Super Lawyers* in the area of Environmental Law.
- **Jon Harris Maurer**, of Panza Maurer P.A. in Tallahassee, was recently elected Chair of the Florida Bar's Environmental and Land Use Law Section.
- **Tara Price** is currently practicing administrative law and appellate litigation at Holland & Knight LLP. She also serves on the Executive Council of the Administrative Law Section of the Florida Bar.
- **Michael Sjuggerud**, who is Board Certified in Real Estate Law, recently joined the Orlando office of Shutts & Bowen LLP as a partner in the firm's Real Estate Practice Group. He also received his LL.M. in Environmental Law and Policy from Florida State University College of Law.

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## FSU UPDATE

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- **Robert Volpe**, of Hopping Green and Sams, was presented with the Stephens/Register Memorial Award from the Environmental and Land Use Law Section at the 2019 Florida Bar Conference for his work with the ELULS executive council and as chair of the continuing education committee.
- **Travis Voyles** was recently appointed Deputy Associate Administrator of the Office of Congressional and Intergovernmental Affairs at the U.S. Environmental Protection Agency. In this new position he manages the Agency's response to Congressional, state, and local governmental interactions and oversight investigations, including coordination with Agency personnel and Congressional Committee staff in preparation for hearings, briefings, and the production of documents and information relevant to oversight investigations.

### Recent Student Achievements and Activities

- Congratulations to our graduates who completed the Environmental Certificate Program during the Spring 2019 term: **Jill Bowen, Lindsay Card, Darrell Garvey, Amber Jackson, Annalise Kapusta, Caleb Keller, Jennifer Mosquera, Matthew Pritchett, and Laurel Tallent.**
- Congratulations also to the 2019-20 Executive Board of the Florida State University College of Law's Environmental Law Society:
  - \* President – **Kelly Ann Kennedy**
  - \* Vice President – **Amelia Ulmer**
  - \* Treasurer – **Steven Kahn**
  - \* Secretary – **Payton Williams**
  - \* Mentor Chair – **Anastacia Pirrello**
- In addition, the following students will be leading the Journal of Land Use and Environmental Law:
  - \* **Gabriel Lopez** – Editor-in-Chief
  - \* **Erica Gloyd** and **Allison Bar-kett** – Executive Editor
  - \* **Young Kang** – Senior Articles Editor
  - \* **Jordan Botsch** – Associate Editor
  - \* **Ryan Soccia** – Administrative Editor

- The Sustainable Law Society provides resources and educational opportunities to make FSU Law a leader in sustainability, including providing reusable coffee mugs in the student lounge, organizing an annual student clothing swap, and hosting regular trash cleanups near campus. Congratulations to the 2019-20 Executive Board:
  - \* **Holly Parker Curry** – President
  - \* **Corie Posey** – Vice President
  - \* **Abby Boyd** – Secretary
  - \* **Brooke Boinis** – Treasurer
  - \* **Mikayla Melnik** – Activities Coordinator
- The following students will be participating in environmental externships this fall:
  - \* **Eric Saccomanno** – City of Tallahassee Attorney's Office, Land Use
  - \* **Erin Carroll** – Division of Administrative Hearings, Environmental
  - \* **Sordum Ndam** – NextEra Energy
  - \* **Young Kang** – U.S. Department of Justice, Environment and Natural Resources Division

### 2019- 2020 Events

The College of Law will host a full slate of impressive environmental law events and activities this upcoming year. Below is a sampling of the events that we have planned with more to be announced.

### Environmental Law Enrichment Lectures

**Silvia Alderman**, Chair, Water Task Force, Akerman LLP, presented a guest lecture on Tuesday, September 17<sup>th</sup>.

**William Butler**, Associate Professor and Masters Program Director, Department of Urban and Regional Planning Florida State University, presented a guest lecture on Wednesday, October 2<sup>nd</sup>.



Silvia Alderman



Professor William Butler

### Fall 2019 Environmental Distinguished Lecture

**David Spence**, Baker Botts Chair in Law, The University of Texas at Austin School of Law, will present the College of Law's Fall 2019 Environmental Distinguished Lecture on Wednesday, October 30 at 3:30 p.m. in Room 310. A reception will follow in the Rotunda.



Professor David Spence

### Spring 2020 Environmental Distinguished Lecture

**Cary Coglianese**, Edward B. Shils Professor and Professor of Political Science, University of Pennsylvania Law School, will present the College of Law's Spring 2020 Environmental Distinguished Lecture on Wednesday, March 11 at 3:30 p.m. in Room 310. A reception will follow in the Rotunda.



Professor Cary Coglianese

Information on upcoming events is available at <http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events>. We hope Section members will join us for one or more of these events.



## CULTIVATING HEMP

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imports of abaca and jute to satisfy rope and cordage needs.<sup>19</sup> After World War II hemp cultivation steadily declined and became negligible as a commercial crop.<sup>20</sup> Policymakers continued the effort to eliminate the use of psychoactive *Cannabis sativa* leading to greater restrictions on hemp cultivation.

While the strength and durability of hemp fibers have been used for cordage and coarse textiles for centuries, the plant also provides raw materials for pulp and paper manufacture, composite wood products, and industrial products, e.g. geotextiles and nonwoven industrial fabrics. The plant also historically provided foodstuffs, seed/grain, and oil.<sup>21</sup> However, due to the labor-intensive production techniques, other natural and synthetic materials displaced hemp demand.<sup>22</sup>

In 1970, the U.S. government enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 thereby criminalizing the possession of “Marihuana”, which included all varieties of *Cannabis sativa*,<sup>23</sup> making the possession of both hemp and marijuana illegal in the United States. *Cannabis* cultivation was also prohibited in many other countries during this same time. However, much of Asia, South America, Eastern Europe, and a few countries in Western Europe did not enact similar prohibitions.<sup>24</sup> Hemp as a significant commercial crop diminished worldwide. In 1998, hemp made up “less than one percent of total world production of vegetable fibers.”<sup>25</sup> However, that same year Canada began licensing the cultivation of hemp, using the general legal standard of less than 0.3 percent THC content.<sup>26</sup>

The Canadian regulatory framework requires hemp farmers undergo police background checks and farmers must report and register the areas currently being cultivated with hemp, as well as those that have been cultivated with hemp during the previous two years.<sup>27</sup> The crop also undergoes laboratory testing to determine THC levels.<sup>28</sup> The Canadian regulatory scheme is similar to that used by some nations in Western Europe.<sup>29</sup>

In January 2000 the USDA described the hemp market as “thin” with weak demand and susceptibility to oversupply.<sup>30</sup> The USDA cited findings from *The Impact of Industrial Hemp in Kentucky*

regarding the potential of hemp fiber to replace molded automobile parts or fiberglass replacement.<sup>31</sup> However, a relatively recent product of hemp cultivation is cannabidiol (CBD). CBD is an extract of the hemp plant that has shown itself to be useful in treating a number of ailments including epilepsy, pain, and anxiety.<sup>32</sup> It is very likely that the initial economic viability of commercial hemp production will rely primarily on the CBD market until other uses become economically viable on a commercial scale.

### Federal Law

Twenty years after Canada commenced regulating the legal cultivation of hemp, the U.S. relaxed the Federal prohibitions on hemp cultivation. The Agriculture Improvement Act of 2018 (2018 Farm Bill), enacted by Congress and signed by President Trump, became effective on December 20, 2018. It amended the Agricultural Marketing Act of 1946 by creating Subtitle G – Hemp Production 7 USCA §§1639o – 1639s.<sup>33</sup> The legislation also included amendments to the Controlled Substances Act providing a legal pathway for hemp cultivation.<sup>34</sup> The 2018 Farm Bill excludes hemp from the definition of “marihuana”<sup>35</sup> in what amounts to a major shift in U.S. policy regarding low THC *Cannabis sativa*.

The change in federal policy created a mechanism whereby States and Indian tribes may assert primary regulatory authority over hemp production within their relevant jurisdiction.<sup>36</sup> While the shift in policy allows a pathway forward for hemp production, significant hurdles remain. It should be no surprise that the general requirements described below resemble the Canadian regulatory scheme. Assertion of hemp regulatory authority requires Indian Tribes or States to devise and submit a plan for hemp cultivation and production.<sup>37</sup> The State/Tribal Hemp Plan must then be submitted to the Secretary of the United States Department of Agriculture (USDA).<sup>38</sup> State or Tribal plans are required to include maintenance of information for three years regarding lands upon which hemp is grown.<sup>39</sup> The legal description of the land must also be included and maintained.<sup>40</sup> Specific procedures for laboratory testing of a crop’s THC concentration must be developed along with a protocol for effective disposal of “hot”<sup>41</sup> plants and products.<sup>42</sup> The Federal law also requires specific enforcement

provisions, minimum/random annual inspections of cultivation sites, a certification that the State or Tribe has adequate resources to implement the program, and reporting requirements from the State or Tribe to the USDA.<sup>43</sup> Notably, the Federal law specifically does not preempt or limit States or Tribes from enacting more stringent hemp laws and regulations.<sup>44</sup>

### Florida’s Quick Response

It is very likely that considerable pent up demand for hemp cultivation existed in Florida prior to the passage of the 2018 Farm Bill. Notably, during the 2018 election, Florida Commissioner of Agriculture Nikki Fried effectively campaigned on this issue. Commissioner Fried touted hemp cultivation as a beneficial crop to the environment and farmer.<sup>45</sup> Whether Commissioner Fried is an oracle of Congressional action or simply recognized the growing hemp demand, Congress passed the 2018 Farm bill within two months of the election and the Florida Legislature extended this policy shift to our State during the 2019 session. The Florida Legislature nearly unanimously passed SB 1020 and Governor DeSantis approved that action on June 25, 2019.<sup>46</sup> Hence, Section 581.217, *Florida Statutes*, and the State Hemp Program (Hemp Program) within the Florida Department of Agriculture and Consumer Services (FDACS) was created.

Unsurprisingly, the new law closely tracks the Federal requirements for the creation of the Hemp Program. Tracking the Federal law hemp is specifically defined as *Cannabis sativa* with a total THC concentration that does not exceed 0.3 percent on a dry weight basis.<sup>47</sup> The definition includes all derivative extracts, isomers, salts, acids, and salts of isomers and generally adopts the Federal definition and apparently the generally accepted international standard.<sup>48</sup> At that same time, Florida also amended Section 893.02(3), *Florida Statutes*, to exclude hemp<sup>49</sup> and industrial hemp<sup>50</sup> from the definition of “Cannabis.” This change essentially excludes hemp and industrial hemp from the Florida Drug Abuse Prevention and Control Act.<sup>51</sup> Notably, Florida law now finds that cannabidiol (CBD) is neither a controlled substance nor an adulterant.<sup>52</sup> This legislative finding removes significant State law impediments to the marketing and sale of CBD oil, although, Federal limitations remain

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and will be discussed later.<sup>53</sup>

FDACS is required to initiate rule-making to administer the state hemp plan<sup>54</sup>. This process is ongoing and will be discussed further in the next section. FDACS is thereafter required to seek USDA approval of the State Hemp Plan within 30 days after FDACS rule adoption.<sup>55</sup> The USDA must then act decisively and approve or disapprove the State Hemp Plan for conformance with the requirements of the 2018 Farm Bill within 60 days after receipt.<sup>56</sup> The USDA is currently writing procedures for this review and approval process. If the State Hemp Plan is disapproved by the USDA, the Governor and Cabinet, sitting as the Administration Commission, must then develop recommendations to amend the state plan and submit those recommendations to the legislature.<sup>57</sup> While the involvement of the Administration Commission seems odd at first glance it is driven by the Farm Bill requirement that FDACS consult with the Governor and chief law enforcement officer of the state prior to submitting an amended plan to the USDA.<sup>58</sup> The Governor and Cabinet sitting as the Administration Commission includes the Governor, Attorney

General (the State's chief law enforcement officer), the Chief Financial Officer, and the Commissioner of Agriculture.<sup>59</sup> Seemingly, the Administration Commission is bound to submit a recommendation to the legislature, even if the recommendation does not require a legislative change, but only an amendment to the required FDACS rules.<sup>60</sup>

Lawful hemp cultivation requires a license from FDACS.<sup>61</sup> A licensee will be required to submit a full set of fingerprints to allow FDACS to ensure—as is federally required<sup>62</sup>--no person convicted of a controlled substance felony will be licensed to cultivate hemp for 10 years following the conviction.<sup>63</sup> The FDACS' rules must also require the Global Positioning System coordinates and legal description of the hemp cultivation areas.<sup>64</sup> FDACS must maintain a land registry of these locations which will be submitted monthly to the USDA.<sup>65</sup> FDACS was granted the authority to enter premises and conduct random inspections to enforce the requirements of the State Hemp Plan.<sup>66</sup> The new Florida law also places very strict control over the source of hemp seeds and cultivars, requiring only certified low THC varieties be used for cultivation. Only certified hemp seeds and cultivars from a "certifying agency" or from a university conducting industrial hemp pilot (research) projects may be

used by licensed cultivators.<sup>67</sup> Finally, State and Federal law also require close scrutiny of the distribution and sale of hemp extract, including CBD's intended for ingestion. The forthcoming rule for hemp extract products will need to require testing for THC content, precise tracking, expiration dates, the amount of extract in a product (in milligrams), and a statement that the product has low THC content.<sup>68</sup>

Once a licensee successfully obtains permission to begin cultivation, State and Federal laws extend protections for licensees. The Federal law clearly shields a negligent violation of a hemp program from criminal enforcement by Federal, State, Tribal, or local governments.<sup>69</sup> Generally, negligent violations of the licensed activity will only result in reasonable corrective action plans and not criminal enforcement.<sup>70</sup> Violations involving a culpable mental state greater than negligence require FDACS to report to the US Attorney General and the Florida Attorney General.<sup>71</sup>

An Industrial Hemp Advisory Council (Council), adjunct to FDACS, was created to provide advice and expertise to FDACS regarding the State Hemp Program.<sup>72</sup> The 15 member advisory council will be appointed by the Governor, President of the Senate, Speaker of the House, and the Commissioner of

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## 2019 AGRICULTURAL LAW UPDATE CLE IN GAINESVILLE

The Environmental and Land Use Law Section and Solo & Small Firm Section have co-sponsored an Agricultural Law Update for decades. This year, the Agricultural Law Update took place on October 4, at the Florida Farm Bureau in Gainesville. Co-chairs were Dr. Mike Olexa and Sid Ansbacher. ELULS members benefitted from the Water Management District Update by Irene Kennedy Quincey; Marijuana Agricultural Update: Ethics and Law by Tara Tedrow; and Agricultural Policy Legislative Update by Adam Basford and John-Walt Boatright of the Florida Farm Bureau Federation. This half-day CLE provided 5.5 General, 5.5 State or Federal Government & Administrative Practice, and 1.0 Ethics Credits. We appreciate everyone that participated and attended.

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Agriculture along with representatives from law enforcement, the agricultural industry, and academia.<sup>73</sup> While the advisory council is required to meet at least once annually, no date was required for the appointments.<sup>74</sup> The Council was established to provide advice and expertise to FDACS on the plans, policies, and procedures for the administration of the State Hemp Plan. The Council is expected to meet for the first time in September 2019. However, on July 25, 2019, Commissioner Fried announced<sup>75</sup> the appointment of the FDACS Hemp Advisory Committee (Committee)<sup>76</sup> to “provide advice and recommendations on a broad range of industry issues dealing with the growing, processing, manufacturing, testing, education, and retail sales of Hemp” and will provide advice and expertise to FDACS on matters such as banking and finance; retail operations; consumer safety; and hemp research that are beyond the scope of the State Hemp Plan.<sup>77</sup> While, the Council and Committee will presumably focus on different aspects of the State Hemp Program, both evince a strong commitment to public input.

### FDACS Rulemaking

FDACS enthusiastically commenced the rulemaking process even before SB 1020 became effective and held rulemaking workshops on June 20, 21, and 24, 2019.<sup>78</sup> The Legislature required FDACS to initiate rulemaking by August 1, 2019, to adopt rules to administer the state hemp plan (Section 581.217, *Florida Statutes*) which must also include testing procedures for determining the delta-9 THC concentrations in cultivated hemp and a disposal procedure for hemp plants cultivated in violation of the statute or FDACS rules.<sup>79</sup> Additionally, the Legislature required FDACS to consult with the Florida Department of Health and the Florida Department of Business Regulation regarding its proposed rules.<sup>80</sup> In advance of the June 2019 workshops, FDACS published the Draft State Hemp Program Rule (Draft Rule).<sup>81</sup> The Draft Rule effectuates the State and Federal law authorizing FDACS to regulate the cultivation of hemp as an agricultural commodity.<sup>82</sup> Notably, FDACS also specifically recognizes that hemp “is a potentially invasive plant species and is a threat

to the plant life of this state if not properly controlled.”<sup>83</sup> The Institute of Food and Agricultural Sciences, IFAS, at the University of Florida determined that hemp is a “High Invasion Risk.”<sup>84</sup> The Draft Rule requires an annual license issued by FDACS to cultivate hemp and requires that hemp plants or parts be introduced into or moved within the state in compliance with the rule.<sup>85</sup> The Draft Rule reiterates the license application criteria outlined in the Federal and State law, i.e. location of cultivated area, criminal background check, and each license application must include an environmental containment plan.<sup>86</sup> The containment plan must include a description of strategies to prevent the spread of hemp during cultivation, harvesting, and transport.<sup>87</sup> The application must also include a waste disposal plan and identify the methods to destroy “hot” plants (THC greater than 0.3% dry weight).<sup>88</sup> An “Agricultural Bond” is required for each growing location over five contiguous acres to cover destruction costs if the licensee fails to do so.<sup>89</sup>

Lawful cultivation will require a licensee to comply with the containment and disposal plans previously mentioned.<sup>90</sup> In addition, records must be maintained describing the varieties of hemp cultivated for at least the previous three years.<sup>91</sup> The grower may only use certified hemp seed<sup>92</sup> or nursery stock from an FDACS registered nursery.<sup>93</sup> The certification, label, and receipt for hemp seeds must be kept for at least three years.<sup>94</sup> Every entry point to a hemp cultivation site must be posted with the license number and a statement that hemp is being grown at that location.<sup>95</sup>

Regulatory concerns can be separated into two general areas: the danger posed by a potentially invasive species; and the cultivation of plants with a delta-9THC above the legal definition for hemp. The Draft Rule specifically references statutory requirements regarding invasive plants as does FDACS Rule 5B-57.013, Florida Administrative Code, for the industrial hemp pilot projects.<sup>96</sup> The bonding requirement of the Draft Rule is clearly aimed at preventing or controlling the spread of hemp from an abandoned location. Tight controls are also planned when hemp is harvested. Prior to harvest the licensee must notify FDACS and confirm that the hemp has a THC concentration within the legal definition of hemp.<sup>97</sup> Should the required lab tests

confirm the presence of “hot” plants, the licensee must assure the destruction of the plants, although limited harvesting of the seeds and stalks may occur under certain conditions.<sup>98</sup> Specific intrastate transportation requirements also apply to the harvested crop and enclosed vehicles/containers must be used when transporting any real distance.<sup>99</sup> Additionally, significant information about the crop must also be in the hauler’s possession such as bill of lading, inspection certificate, and the ownership information of origination and destination of the crop.<sup>100</sup> Interstate movement of hemp plants or hemp products capable of hosting pests or disease must comply with rigorous regulatory criteria designed to prevent the spread of pests or disease that may affect hemp cultivation in Florida.<sup>101</sup>

While the Hemp Program is governed primarily by the Draft Rule, several other rules require modification in order to fully effectuate the requirements of SB 1020. These rules will cover requirements for hemp seeds, hemp extract for ingestion in animal feed, and the permitting and regulation of hemp extract processing and human food manufacturing.

### FDA Issues

The United States Food and Drug Administration (FDA) continues to evaluate questions surrounding cannabidiol (CBD).<sup>102</sup> Dr. Amy Abernathy, M.D., Ph.D., Principal Deputy Commissioner, and Lowell Schiller, J.D., Principal Associate Commissioner for Policy explained that the FDA is applying a “rigorous, science-based” approach to the evaluation of cannabis related products including CBD.<sup>103</sup> The FDA’s task is to protect consumers regarding the quality and safety of products used for therapeutic and medical purposes.<sup>104</sup> The FDA recognizes that the 2018 Farm Bill and many States have eliminated prohibitions on cannabis related products.<sup>105</sup> However, the FDA quickly points out that other laws remain effective to regulate cannabis products, including CBD.<sup>106</sup> The FDA indicated that if products are marketed as having therapeutic effects or for the treatment of disease then that product is regulated as a drug and requires FDA approval.<sup>107</sup> Food supplements, including dietary, are also regulated and it is currently illegal to place into interstate commerce products containing CBD.<sup>108</sup>

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The FDA recognizes the potential benefits of CBD but indicates that questions remain regarding the substance's safety.<sup>109</sup> At a public hearing the FDA heard from a myriad of stakeholders requesting a pathway to allow lawful marketing of products containing CBD.<sup>110</sup> The perplexing questions around the issue include the amount of CBD that can safely be consumed, and whether that amount varies based on the form of CBD.<sup>111</sup> The FDA is also concerned about drug interactions, special populations: children, pregnant women, and the elderly; as well as risks from long term exposure.<sup>112</sup>

The Acting Commissioner of Food and Drugs for the FDA, Dr. Norman E. "Ned" Sharpless remarked at the May 21, 2019 public hearing that although hemp is no longer a Federally controlled substance, the FDA retains regulatory authority over cannabis containing products such as CBD.<sup>113</sup> Dr. Sharpless indicated that the FDA has approved EPIDIOLEX, MARINOL, and SYNDROL drug products for various medical treatments.<sup>114</sup> EPIDIOLEX contains CBD while MARINOL and SYNDROL contain a synthetic form of THC.<sup>115</sup> Interestingly, the FDA apparently has no objection to a several hemp seed products, currently proposed to be marketed in human food as "generally accepted as safe," so long as those products comply with all other FDA requirements.<sup>116</sup> However, because both CBD and THC have been evaluated as drugs it is currently illegal for these substance to be added to food or used as a dietary supplement.<sup>117</sup> In an effort to inform the general and regulated public, the FDA published "Questions and Answers" regarding the regulation of cannabis and cannabis-derived products.<sup>118</sup> The only FDA-approved drug containing CBD is Epidiolex and the agency expresses concern over the proliferation of products containing CBD and marketed for therapeutic or medical uses.<sup>119</sup>

In Florida, Section 581.217(3)(e), Florida Statutes, defines "hemp extract" as a substance or compound intended for ingestion that is derived from or contains hemp and that does not contain other controlled substances. That definition clearly lands these products within the definition of "food" in Section 500.03, Florida Statutes. Therefore,

FDACS proposed rules would require entities intending to manufacture or sell hemp extracts intended for ingestion to meet all requirements of food establishments as provided in Chapter 500, Florida Statutes, and the rules adopted pursuant thereto. In addition, Section 581.217(7), Florida Statutes, requires that all hemp extract distributed and sold in the state to have a certificate of analysis prepared by an independent laboratory. The analysis must be accessible via a barcode or QR code on the packaging and state that the hemp extract batch was tested and found to have less than the legal delta-9 THC limit and found to be free of contaminants unsafe for human consumption. The packaging must also provide the hemp extract batch number, an internet address for information about the batch, an expiration date, the number of milligrams of hemp extract, and a statement that the total delta-9 THC does not exceed 0.3 percent on a dry-weight basis. All of these requirements are intended to ensure consumer protection and transparency.

### UF and FAMU Pilot Projects

In 2017, the Florida Legislature recognized the increased interest in hemp cultivation, as well as the lack of real-world knowledge regarding cultivation in Florida, required action. In response, the Legislature created a legal mechanism allowing educational institutions to establish pilot projects to research the "cultivation, harvesting, processing, market research, and sales of approved industrial hemp agricultural, industrial, and commercial products."<sup>120</sup> The University of Florida (UF) quickly followed by Florida Agricultural and Mechanical University (FAMU) are currently operating pilot projects permitted by the Florida Department of Agriculture and Consumer Services.<sup>121</sup> The 2019 hemp bill expanded the eligibility for research projects to any Florida College System institution or state university that has an established agriculture, engineering, or pharmacy program.<sup>122</sup>

The UF project focuses on identifying hemp varieties suitable for cultivation across Florida while developing "hemp management practices and cropping systems" that are economically viable.<sup>123</sup> FAMU's project has similar goals, but also includes processing for beneficial oils and fibers.<sup>124</sup> The UF and FAMU pilot projects also focus on developing methods to control the

plant, recognizing the threats of a potentially invasive species.<sup>125</sup> In short, these universities will figure out what can grow, how to foster that growth, how to contain the crop in the proper location, and whether the crop can be profitable.

### Conclusion

The economic success of hemp will require the development of markets for the crop. While CBD oil is likely to provide healthy demand, markets for other plant components, i.e. seeds and fibers, seem less than certain. Nonetheless, the crop continues to stir great excitement as a potential new revenue stream for Florida's farmers. FDACS is working diligently to adopt rules to implement the State Hemp Plan in a manner that meets the requirements of the 2018 Farm Bill while balancing the need to provide consumer protection with the goal of business flexibility for Florida's emerging hemp industry of cultivators and processors.

### Editor's Note:

Subsequent to the drafting of this article, the Florida Department of Agricultural and Consumer Services published a revised draft of Rule 5B-57.014. Readers may review the current draft of Rule 5B-57.014 by using the following link: <https://www.fdacs.gov/content/download/88756/file/State-Hemp-Program-Revised-Draft-Rules-09-18-2019.pdf>. The authors have graciously committed to provide an article in a future issue of The Reporter to update the readers on the State Hemp Plan.

### Endnotes

1 Steven grew up on his family's farm outside of Malone, Florida. He attended the University of Florida (Go Gators!) where he received a Bachelor's Degree in Food and Resources Economic with a minor in Agricultural Law. Steven continued his education at Samford University on Birmingham, Alabama, receiving a Master's Degree in Environmental Management and a Juris Doctorate from Cumberland School of Law in 2006. After graduation, Steven joined the Florida Office of General Counsel at the Department of Agriculture and Consumer Services where he has served in various capacities and currently serves as the Department's General Counsel. Steven is married to Dr. Tiffany Hall, D.V.M., and is the proud father to two children. He is a sixth-generation Florida farmer and continues an active role in his family's farming operation.

2 Mr. Williams is Of Counsel with Lewis, Longman & Walker, P.A. in its Tallahassee office. His practice is focused on agricultural, land use and environmental permitting, zoning, state and local permitting, administrative matters and business and real estate transactions. Mr. Williams is the former General

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3 FLA. CONST. ART. 10, § 29

4 Hemp can be divided into two sub-categories: “hemp,” FLA. STAT. § 581.217 (2019), and “industrial hemp,” FLA. STAT. §1004.4473 (2019). Referenced by Fla. Stat. §893.02(3). The only discernable difference is that “industrial hemp” was sanctioned as part of a pilot project to allow universities to conduct research for commercial hemp production.

5 FLA. STAT. § 581.217(3)(D)(2019); Act effective July 1, 2019, ch. 19-132, 2019 Fla. Laws.

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35 7 USCA § 1639o. (1)

36 7 U.S.C.A. § 1639p. (a)(1)

37 *Id.*

38 *Id.*

39 7 U.S.C.A. § 1639p. (a)(2)(A)(i)

40 *Id.*

41 Total delta-9 [THC] concentration exceeding 0.3 percent on a dry-weight basis.

42 7 U.S.C.A. § 1639p. (a)(2)(A)(ii), (iii)

43 7 U.S.C.A. § 1639p. (a)(2)(A)(iv), (v), (vi), (vii)

44 7 U.S.C.A. § 1639p. (a)(3)

45 Nikki Fried, *Priorities: Industrial Hemp*, <https://nikkifried.com/priorities/> last visited July 30, 2019.

46 *Supra* note 5.

47 FLA. STAT. § 581.217(3)(D) (2019).

48 *Supra* at note 26.

49 As defined in FLA. STAT. §581.217 (2019).

50 As defined in FLA. STAT. § 1004.4473 (2018.)

51 Chapter 893, Florida Statutes

52 FLA. STAT. § 581.217(2)(B) (2019).

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54 FLA. STAT. § 581.217(12) (2019)

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56 7 U.S.C.A. § 1639p. (3)(b).

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62 7 U.S.C.A. § 1639p. (e)(3)(B)(i)

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66 FLA. STAT. § 581.217 (11) (2019).

67 FLA. STAT. § 581.217 (6) (2019)

68 FLA. STAT. § 581.217 (7) (2019)

69 7 U.S.C.A. § 1639p. (e)(2)(C).

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91 Draft Rule 5B-57.014 (5)(c)

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