



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Joseph D. Richards, Chair • Jeffrey A. Collier, Co-Editor • Anthony J. Cotter, Co-Editor

From the Chair

by Joe Richards, Pasco County Attorney's Office

Well, I put out a call for you to get involved and many have answered that call. Twenty-seven (27) members submitted presentation ideas for next year's Annual Update and I thank you. Your CLE committee is busy evaluating all the submittals and will soon be inviting speakers. We have also received articles for the *Bar Journal* and *Section Reporter*, but we have a continuing need for articles, so keep your ideas coming.

I encourage everyone to register for this year's ELULS Audio Webcast Series, which started in October with Pat Siemen and Robin Craig discussing "Ethics—A Scholastic Perspective for the Environmental and Land Use Practitioner." This first presentation was very informative. We have equally compelling topics coming in the next several months, including local government practice ethical considerations, mental health

and substance abuse, and the legislative session retrospective that's starting to become tradition. Please review the brochure on this website, if you have not already done so.

For anyone interested in joining the Executive Council, I encourage you to attend the next Council Meeting on January 27 in Orlando. Please check the website for more details as they become available. Thanks and Happy Holidays.

Amendment 4: It Ain't Over Yet

by Suzanne Van Wyk, Bryant Miller Olive

Introduction

On November 2, 2010, the electors of Florida resoundingly defeated Amendment 4, a measure which would have pointedly changed the practice of land use law throughout the State. Amendment 4 would have required voter referenda on all local government comprehensive plans and plan amendments. The provision would have taken effect immediately upon passage. The text would have read in pertinent part as follows:

Public participation in local government comprehensive land use planning benefits the conservation and protection of Florida's natural resources and scenic beauty, and the long-term quality of life of Flo-

ridians. Therefore, before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, such proposed plan or plan amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body as provided by general law, and notice thereof in a local newspaper of general circulation. Notice and referendum will be as provided by general law. This amendment shall become effective immediately upon approval by the electors of Florida.

Over 5 million votes were cast and the measure failed by a margin of

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Update on PACE: Challenges and Opportunities

by Erin L. Deady, Herb Thiele, Keri-Ann Baker & Ed Steinmeyer

I. HISTORY AND OVERVIEW OF PACE

It was ranked number five on Harvard Business Review's "Breakthrough Ideas for 2010." Property assessed clean energy ("PACE") programs began forming in multiple states across the U.S., and the Federal Housing and Finance Agency ("FHFA"), Fannie Mae and Freddie Mac cried foul. In a clear debate over conflict between federal and state law, the federal government is pitted against the "Breakthrough Idea" and the noble efforts of local governments, people and businesses to further a concept with significant public benefits.

In PACE programs, local government assessments are attached to an individual's property through a lien to fund energy efficiency or renewable energy improvements. These programs allow a state or local government to provide needed financing for energy efficiency or renewable energy projects to real property owners (residences or businesses) that are later collected as a non-ad valorem assessment. These programs go by several names in addition to PACE including Sustainable Energy Financing, Clean Energy Assessment Districts ("CEAD"), energy improvement districts, contractual assessments, and special tax districts.¹ The scope of the authorized energy (or

water conservation)-related improvements depends upon state law.

Fannie and Freddie own or guarantee \$5.5 trillion worth of residential mortgages and the federal government seized control of Fannie Mae and Freddie Mac in a \$200 billion bailout, the largest in the nation's history. Banks service loans for Fannie Mae and Freddie Mac and the FHFA regulates Fannie Mae and Freddie Mac. Amid the continued, and worsening, recent foreclosure crisis, Fannie Mae and Freddie Mac began questioning and challenging the seniority of routine local government levied assessments that are a cornerstone of PACE. Arguing that assessments for PACE programs are a "risk" to mortgage lenders, they have acted to prevent the seniority of these types of property-based assessments.

On the other side of the debate, in a time of increasing awareness of energy conservation and fiscal austerity, one reason PACE programs have flourished is because these programs all but eliminate the upfront cost of engaging in energy retrofits and energy efficiency projects.² The cost of the improvements is also affixed to the property, assuring lowered risk in collecting the assessments. These programs offer some unique additional public benefits, including: reducing a community's carbon footprint; better terms for incurring the

costs; transfers of the assessments with changeover in ownership; lowered utility bills; tax benefits; reduced transaction costs; job creation; and positive publicity.³ There are also many sources for state and local governments to obtain funding for these programs such as grants, bonds or private bank capital.

The American Recovery and Reinvestment Act ("ARRA") was signed into law on February 7, 2009. Among other things, ARRA allocated \$16,800,000,000 to the United States Department of Energy ("DOE") for Energy Efficiency and Conservation Block Grants, the Weatherization Assistance Program, and the State Energy Program. The DOE has encouraged the development and growth of PACE programs nationally and use of its grant programs to seek funding for doing so.⁴ State and local governments have pursued these funding mechanisms to achieve their energy efficiency goals, such as by the creation of PACE or PACE-like programs.

The unique aspect of PACE is that participation in a program, and therefore the assessment, is completely voluntary. The only parties that will be assessed for PACE improvements within an established district, or designated local government, are those parties that actively participate in energy-related improvements to their real property. Moreover, the assessments travel with the property and can be passed on to the next purchaser if a property is sold.

California leads the way in creating PACE programs and had the first such local government to do so (BerkleyFIRST launched in 2008).⁵ By June 2010, 22 states plus the District of Columbia had the ability to create PACE programs by adopting legislation or prior clear statutory authority for the formation of PACE programs.

While not every program across the U.S. is the same, most include certain criteria to ensure that the risk to the property owner and the property's existing mortgage holder

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is minimized while the goals of the program are accomplished. The DOE created its "Best Practice Guidelines" to assist state and local governments in the creation and maintenance of PACE programs.⁶ However, PACE programs have come under pressure from certain factions of the federal government (the FHFA and the Office of the Comptroller of the Currency), with multiple state and local governments, including Leon County, Florida, responding by filing lawsuits.

II. PACE IN FLORIDA

Florida has a long history in the creation of and governance through special districts. Irrespective of HB 7179, which passed in the 2010 legislative session and clarified authority for local governments to create the programs, PACE probably could have been implemented anyway. Under Florida law, the PACE concept can be equated to what is defined as a "qualifying improvement." Florida local government authority to levy special assessments is based primarily on county and municipal home rule powers granted in the Florida constitution.⁷ The Florida Supreme Court has expressly ruled that the authority to impose special assessments is embodied in home rule authority for both counties and cities. To make special assessments under Florida law, counties also have general statutory authority pursuant to Section 125.01(1)(r), (q), F.S., and Article VIII, §1(g) of the Florida constitution. Special districts in Florida derive their authority to levy special assessments through general law or special act.

Special districts have existed in Florida for almost two hundred years, with the first created in 1822. Today, over 1620 special districts exist in Florida. The public purposes of Florida special districts include: children services special districts; (Section 125.901, F.S.), county health and mental health care special districts (Section 154.331, F.S.); water supply authorities (Section 373.713, F.S.); community redevelopment districts (Chapter 190, F.S.), neighborhood improvement districts and water resource special districts (Ch. 163, F.S.); and soil and water conservation districts (Ch. 582, F.S.). Special districts have the authority to levy assessments to achieve a dedicated special purpose. Under state law, their as-

sessments take priority over all other obligations on a property, including purchase money mortgages, and subordinate and secondary mortgage obligations.⁸ General provisions for the use of special assessments are set forth in Section 197.3631, F.S., and they are defined in Section 197.3632, F.S., as "assessments which are not based upon millage and which can become a lien against a homestead permitted in Section 4, Article X of the State Constitution." Florida courts define special assessments as "charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money."⁹ The terms "special assessment," "non-ad valorem assessment," and "assessment" are synonymous in Florida law and are used interchangeably.

In HB 7179,¹⁰ the Florida Legislature clarified the process for the formation of PACE programs, finding that all "energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property resulting from fossil fuel production. Improved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption."¹¹ The Florida Legislature also found that "there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance."¹² Pursuant to HB 7179, a local government may incur debt for the purpose of providing financing for a qualifying improvements program, which is payable from revenue received from the improved property.¹³ Local governments are explicitly authorized to levy non-ad valorem assessments to fund these energy retrofit improvements.¹⁴ Finally, the bill outlines the process for formation of a PACE program.

III. RISE OF THE PACE LAWSUITS

The FHFA, together with Fannie Mae and Freddie Mac, have made determinations regarding the seniority of a PACE assessment and its position as a senior lien in relation to a mortgage. Fannie Mae and Freddie Mac are federally chartered, private corporations (known as government-sponsored enterprises or "GSEs"),

facilitating the secondary market in residential mortgages. The FHFA is the government regulator overseeing the GSEs. In addition to the senior lien issue is whether an assessment for energy retrofits is an "assessment" or a "loan." An assessment generally requires that the activity assessed be for a "public purpose." The FHFA, Fannie Mae and Freddie Mac argue that energy retrofits are an individual benefit rather than a public benefit. Several state and local governments and environmental groups disagree and have challenged the FHFA, Fannie Mae and Freddie Mac in federal court in the Northern District of California, the Southern District of New York and the Northern District of Florida.

Initially it did not appear that the FHFA, Fannie Mae or Freddie Mac took issue with the creation of PACE programs and treatment of the liens. On September 18, 2009 Fannie Mae released its Lender Letter essentially directing lenders to treat PACE assessments as any other tax assessments.¹⁵ However, a little less than a year later Fannie Mae officially reversed its earlier directions regarding PACE assessments.¹⁶ Of course at this point PACE programs were being formed at a rapid rate throughout the country across multiple states due to the popularity of the concept.

On May 5, 2010, Fannie Mae and Freddie Mac issued advice letters to lending institutions stating that PACE assessments acquiring a "priority lien" over existing mortgages pose risk to lenders, servicers, and mortgage securities investors and are key alterations to traditional mortgage lending practice.¹⁷ Additionally, they characterized the PACE assessments as "loans" rather than assessments.¹⁸ These determinations have been upheld by the FHFA, which oversees Fannie Mae and Freddie Mac as their conservator.¹⁹ This position is an abrupt departure from the entities' earlier guidance.²⁰ Throughout the summer and fall of 2010 the FHFA, Fannie Mae and Freddie continued to issue statements hostile to PACE program.²¹ As a practical matter, these pronouncements are a direct attempt to prohibit superior priority liens for energy assessment programs while at the same time continuing to recognize superior priority assessment liens for other public benefit improvements authorized pursuant to state laws.²²

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The impact is significant. These actions by Fannie Mae, Freddie Mac, and the FHFA essentially prohibit their mortgage holders from entering into PACE programs and, thus, effectively have stopped the development and implementation of numerous PACE programs across the nation. For example, while Fannie Mae and Freddie Mac on average hold fifty percent of residential mortgages, in Leon County this number is closer to seventy percent. Further, the aforementioned rules and determinations by Fannie Mae, Freddie Mac, and the FHFA now prevent state and local governments from using their explicitly authorized and constitutionally protected assessment power to achieve a compelling state interest, including advancing the energy reduction efforts of the state and providing economic benefits to participants, job creation, and greenhouse gas emission reduction. In more than one instance, these actions have jeopardized grant awards (California) and applications for hundreds of millions of dollars to form, and realize public benefits from, PACE programs nationally.

IV. THE FEDERAL PACE LAWSUITS

As a result of these actions, 8 complaints²³ involving 16 parties²⁴ have been filed in federal courts in California, Florida and New York. By statute, Fannie Mae has the power to sue and be sued in both state and federal court.²⁵

On July 14, 2010, the State of California filed its Complaint for Declaratory and Equitable Relief, Unfair Business Practices and Violation of the National Environmental Policy Act against the FHFA, Fannie Mae and Freddie Mac.²⁶ Many industry and environmental groups have supported the plaintiffs' actions in these lawsuits.²⁷ Almost simultaneously with the California Complaint, the Sierra Club also filed for declaratory and equitable relief, violations of the Administrative Procedure Act and violation of the National Environmental Policy Act.²⁸ Thereafter, the County of Sonoma, California filed a similar Complaint for declaratory

and equitable relief.²⁹ Placer County moved to intervene in the Sonoma County case on September 23, 2010. The City of Palm Desert, California also filed a Complaint on October 4th. The Natural Resource Defense Council, Inc. filed a Complaint (October 6, 2010) in the Southern District of New York against the same parties³⁰ but included John G. Walsh, as acting Comptroller of the Office of the Comptroller of the Currency, which has also weighed in on the issues.³¹ On October 8th, Leon County, Florida, filed a Complaint in the Northern District of Florida alleging violations of the Administrative Procedures Act, Tenth Amendment to the U.S. Constitution and the Florida Deceptive and Unfair Trade Practices Act (hereinafter "FDUTPA"), section 501.204, F.S.³² The Town of Babylon, New York filed its Complaint on October 26, 2010.

a. The Plaintiffs' Arguments: Local and State Governments/Environmental Organizations

The plaintiffs argue that state and local governments have legitimate interests in: (1) not being denied rightful status within the federal system by preserving home rule and assessment powers; (2) pursuing energy conservation and greenhouse gas emissions reductions strategies within their respective communities; (3) protecting the health and welfare of their citizens; (4) protecting the economic interests of their residents in financing energy conservation improvements; (5) protecting their citizens from unfair trade practices or an unfair competitive advantage by the GSEs in prohibiting senior liens for assessments; and (6) receiving federal monies earmarked for these purposes.

The Tenth Amendment to the United States Constitution expressly reserves to the states all powers except those limited powers granted to the federal government. The Tenth Amendment ensures the division of powers between the states and federal government that is necessary for the dual sovereignty of the federal system. Fundamentally, a lien is defined as a property interest protected by the due process clauses of the United States Constitution.³³ Under Florida law, local governments levy assessments based upon county and municipal home rule powers granted in the Florida constitution.³⁴ By statute, it appears that Fannie Mae and

Freddie Mac have consistently and without exception purchased and guaranteed mortgages subject to government assessment liens which generally enjoy a statutory priority over any underlying mortgage obligation. But, as the plaintiffs argue, there is no law, rule, procedure or other authority that allow the defendants to pick and choose which assessment liens have priority over mortgage obligations and which do not. Finally, the Leon County complaint argues that FHFA's rules are beyond its constitutionally delegated authority and do not flow from an express grant of power from Congress under Article 1 of the Constitution. Therefore, the FHFA's actions are a presumptive unconstitutional interference with the County's Tenth Amendment Rights.

It has been held that a state legislature may, by statute, alter prospectively the priority of liens arising under state law so as to give priority to a public charge.³⁵ Additionally, state statutes give certain assessment liens, including assessments to finance "qualifying improvements," a priority equal to that of liens for general taxes and superior to all other liens.³⁶ The designation of a PACE assessment as either a loan or an assessment, and its lien status, is critical to the outcome of the lawsuits filed by the plaintiffs because the terms of the Fannie Mae/Freddie Mac Uniform Security Instruments only prohibit loans, not liens, which have senior status to a mortgage.

While the individual claims may differ, generally, the plaintiffs also argue that the actions of the FHFA are arbitrary and capricious under the Florida Administrative Procedure Act ("APA") and are rules subject to the typical rulemaking and notice procedures for these types of agency statements. Leon County argues that Fannie Mae and Freddie Mac's determinations have unfairly attempted to secure an unlawful lien priority for their mortgages over non-ad valorem assessments through advertising, distributing, and providing Industry and Lender letters to their mortgage sellers and servicers. The unfair trade practices of Fannie Mae and Freddie Mac have resulted in an unfair competitive advantage for Fannie Mae and Freddie Mac in obtaining a senior lien status for mortgages and are in violation of FDUTPA.

Most plaintiffs are seeking de-

claratory relief along the lines of finding that the assessments are liens, not loans; the assessments do not pose risk and do not alter traditional lending practices; the assessments constitute a lien of equal dignity to county taxes and assessments; and the assessments do not contravene Fannie Mae or Freddie Mac's Uniform Security Instruments prohibiting loans that have senior lien status to a mortgage. The injunctive relief sought is to prevent Fannie Mae and Freddie Mac from taking any adverse action against any mortgagee who is participating or chilling participation in a program; preventing actions contravening levying assessments for these programs; and preventing the entities from unfairly attempting to secure an unlawful lien priority for their mortgages over non-ad valorem assessments.

b. The Defendants' Arguments: FHFA, Fannie Mae and Freddie Mac's Arguments

Generally, the defendants argue that they have identified a serious financial risk and they have acted responsibly, appropriately, and legally. They argue that they engaged with state and local authorities regarding their concerns, sought changes to the programs (including necessary consumer protections and energy retrofit standards) and ultimately directed the GSEs to take reasonable and prudent actions to protect their safe and sound operations in light of that risk. They argue that the GSEs, in conservatorship, did what their federal charters authorized and what safe and sound financial practice dictated — they took reasonable steps to protect their portfolios from the risks posed by PACE programs.

Legally, the FHFA argues that courts are without the power to even review its actions.³⁷ Additionally, the FHFA argues that the plaintiffs' state-law claims for purported unfair competition are pre-empted by federal law. The FHFA argues that under the conflict preemption doctrine, "[a] state law, whether arising from statute or common law, is preempted if it creates an 'obstacle to the accomplishment and execution of the full purposes of Congress.'"³⁸ The FHFA asserts that the claims for a declaratory judgment that PACE programs involve "assessments" and not "loans" is a non-justiciable because it would resolve a purely semantic dispute of

no legal consequence. It states that regardless of label, PACE obligations make the GSEs' mortgage-related assets riskier and less valuable. The FHFA argues that it has acted within the scope of its authority under the Housing and Economic Recovery Act of 2008 ("HERA").³⁹ Finally, the FHFA argues that the plaintiffs' claims that FHFA's actions contravene the APA fail because they are not in the zone of interests protected by the statute under which the FHFA acted, and because the FHFA has not issued any rule or regulation subject to notice and comment under the APA.

CONCLUSION

Motions to Dismiss and Consolidate are pending in the federal cases. As of the writing of this article, Sonoma County has a pending Motion for Preliminary Injunction. But all is not lost with the "Breakthrough Idea" of 2010. Other models for PACE-like programs are feasible. Local governments are working to develop and explore programs that are not based on a senior lien property assessed model, but these alternative programs will not provide as favorable administrative or financing costs. The attractiveness of the senior lien model is the reduced risk for debt or capital lenders for the program.

With the increased conflict of federal and state law, and as a result of the lawsuits, certain members of Congress have also sought to clarify the issue. On July 15, 2010, Congressman Mike Thompson submitted the "PACE Assessment Protection Act of 2010" in the United States' House of Representatives.⁴⁰ A few days later, Senator Barbara Boxer filed a similar bill in the United States' Senate.⁴¹ The PACE Assessment Protection Act is currently being reviewed in committee by both houses of Congress. The PACE Assessment Protection Act requires Fannie Mae and Freddie Mac to adopt underwriting standards consistent with the Guidelines issued by the DOE on May 7, 2010; declares that PACE liens comply with Fannie Mae and Freddie Mac's Uniform Instruments; and declares that PACE liens shall not constitute a mortgage default.⁴² Because of the conflict between federal and state law, it is clear that until Congress acts or a federal judge rules, the senior lien concept for residential PACE assessments is murky at best.

Endnotes:

¹ See MERRIAN C. FULLER, ET AL., GUIDE TO ENERGY EFFICIENCY & RENEWABLE ENERGY FINANCING DISTRICTS FOR LOCAL GOVERNMENTS 3 (2009), available at <http://www.ci.berkeley.ca.us/Content-Display.aspx?id=44262>.

² For example, the federal Government specifically found that barriers to the national retrofit market included: (1) the unavailability of access to reliable information; (2) access to upfront financing; and (3) access to skilled workers on October 18, 2009, The White House its own memorandum related to PACE financing programs. MIDDLE CLASS TASK FORCE, OFFICE OF THE PRESIDENT, RECOVERY THROUGH RETROFIT 1 (Comm. Print Oct. 2009), available at http://www.whitehouse.gov/assets/documents/Recovery_Through_Retrofit_Final_Report.pdf. Thirteen federal departments and/or agencies worked together to put together the *Recovery Through Retrofit Report*. The following departments and agencies contributed to the Recovery Through Retrofit Report: (1) Office of the Vice President; (2) Department of Agriculture; (3) Department of Commerce; (4) Department of Education; (5) Department of Energy; (6) Department of Housing and Urban Development; (7) Department of Labor; (8) Department of the Treasury; (9) Environmental Protection Agency; (10) Equal Employment Opportunity Commission; (11) General Services Administration; (12) Small Business Administration; (13) Executive Office of the President (includes the Council of Economic Advisors, the Domestic Policy Council, the National Economic Council, the Office of Management and Budget, the Office of Public Engagement and Intergovernmental Affairs, and the Office of Science and Technology Policy). *Id.* at 5.

³ *Id.* at 7–8.

⁴ "The Department of Energy (DOE) is announcing funding for model PACE projects, which will incorporate this Policy Framework's principles for PACE program design. Under the State Energy Program, DOE has received approximately \$80 million of applications for PACE-type programs to provide upfront capital. Additional PACE programs are encouraged through a Funding Opportunity Announcement, released today, for competitive grants under the Energy Efficiency Conservation Block Grant Program." http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf.

⁵ California enacted Assembly Bill 811 and Assembly Bill 474 providing financial resources for property owners who lack financing to implement measures to be more responsible water users. Assemb. B. 811, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009) (amending CAL. STS. AND HIGHWAY CODE §§ 5898.12, 20, .22, .30 (West 2007) and creating CAL. STS. AND HIGHWAY CODE §§ 5898.14, .21 (West 2009)); Assemb. B. 474, 2009–2010 Cal. Assemb., Reg. Sess. (Cal. 2009); see also CAL. STS. AND HIGHWAY CODE §§ 5898.12(b), .14(b), .20(a)(1), for supporting text in statutes. Colorado enacted House Bill 08-1350 modifying chapters 29, 30, 31, and 40 of the *Colorado Revised Statutes*, permitting assessments to real property to fund energy projects. H.B. 08-1350, 66th Gen. Assemb., 2d Reg. Sess. (Colo. 2008); see also Colo. Rev. Stat. §§ 30-20-601.5, 604 (2010), for language in statute permitting the assessments. Florida enacted House Bill 1719 creating section 163.08 of the *Florida Statutes*. H.B. 1719, 112th Leg., Reg. Sess. (Fla. 2010) (creating FLA. STAT. § 163.08 (2009)). Illinois enacted Senate Bill 583 allowing contractual assessments to finance energy projects. S.B. 583, 96th Gen. Assemb., Reg.

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

in statute indicating assessment is at consent of owner. Vermont enacted H.B. 446. H.B. 446, 2009–2010 Leg. Sess., Reg. Sess., (Vt. 2009) (amending VT. STAT. ANN. tit. 24, §§ 1751, 2291 (2009) and creating VT. STAT. ANN. §§ 3261–69 (2009)). Virginia enacted S.B. 1212 permitting property assessments to fund clean energy projects. S.B. 1212, Gen. Assemb., Reg. Sess. (Va. 2009) (creating VA. CODE ANN. § 15.2-958.3 (West 2009)); *see also* VA. CODE ANN. § 15.2-958.3(A)–(C) (West 2010), for language in the resulting statute. Wisconsin enacted Assemb. B. 255 giving authority to local governments to lend money for energy efficient improvements. Assemb. B. 255, 99th Leg., Reg. Sess. (Wis. 2009) (amending WIS. STAT. §§ 66.0627 (2009); *see also* WIS. STAT. § 66.0627(8) (2010), for language granting that authority.

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

⁷ FLA. CONST. art. VIII, §§ 1-2; art. X § 9.

⁸ *Id.* art. X, §§ 1-2

⁹ *City of Gainesville v. State*, 863 So.2d 138, (Fla. 2003); *Atlantic Coast Line R. Co. v. City of Gainesville*, 83 Fla. 275 (Fla. 1922).

¹⁰ H.B. 7179.

¹¹ *See* FLA. STAT. § 163.08(1)(b) (2010).

¹² H.B. 7179; *see also id.* § 163.08(1)(c) (stating “voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest”).

¹³ H.B. 7179; *see also* FLA. STAT. 163.08(7).

¹⁴ H.B. 7179; *see also* FLA. STAT. 163.08(3).

¹⁵ Marianne E. Sullivan, *Energy Loan Tax Assessment Program*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 07-2009 (Sept. 18, 2009), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/ll0709.pdf>.

¹⁶ Marianne E. Sullivan, *Property Assessed Clean Energy Loans*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, LENDER LETTER LL 2010-06 (May 5, 2010), <https://www.efanniemae.com/>

[sf/guides/ssg/annltrs/pdf/2010/ll1006.pdf](https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1006.pdf); *see also* John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/sel1012.pdf>.

¹⁷ Letter from Patricia J. McClung, Vice President, Offerings Mgmt., Freddie Mac, to Freddie Mac Seller/Services (May 5, 2010) (on file with Freddie Mac), <http://www.freddiemac.com/sell/guide/bulletins/pdf/iltr050510.pdf>; *see also*, Marianne E. Sullivan, *supra* note xv.

¹⁸ *Id.*; Sullivan, *supra* note xv.

¹⁹ Statement, Federal Housing Finance Agency, FHFA Statement on Certain Energy Retrofit Loan Programs (July 6, 2010) (on file with Federal Housing Finance Agency) <http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf>.

²⁰ Sullivan, *supra* note xv.

²¹ On July 6, 2010, the FHFA issued a “Statement on Certain Energy Retrofit Loan Programs,” saying that PACE loans are “unlike routine tax assessments and pose unusual and difficult risk management challenges” and that they “do not have the traditional community benefits associated with taxing initiatives.” FHFA Statement on Certain Energy Retrofit Loan Programs, *supra* note xviii. On August 31, 2010, Freddie Mac issued Bulletin Number 2010-20, which provides that financing energy efficient and renewable energy home improvements can be achieved without altering the lien priority status of first Mortgages or other underwriting requirements. *Mortgages Secured by Properties with an Outstanding Property Assessed Clean Energy (PACE) Obligation*, BULL. No. 2010-20 (Freddie Mac, McLean, VA, Aug. 31, 2010 [hereinafter *Freddie Mac Bulletin*]), <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1020.pdf>. On the same date, Fannie Mae issued a similar announcement in its *Options for Borrowers with a PACE Loan*. John S. Forlines, *Options for Borrowers with a PACE Loan*, in FANNIE MAE SINGLE FAMILY SELLING GUIDE, ANN. SEL 2010-12 (Aug. 31, 2010), <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/sel1012.pdf>. Freddie Mac “reminded Seller/Services that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac.” Freddie Mac Bulletin, *supra* note xxi.

²² *See Freddie Mac Bulletin*, *supra* note xxi; Forlines, *supra* note xxi. FHFA has not issued any statements regarding the priority status of other assessments routinely given priority lien status. *See generally Freddie Mac Bulletin*, *supra* note xxi.

²³ Plaintiffs include the Town of Babylon, Placer County, Sierra Club, the Natural Resource Defense Council, Sonoma County, the California Attorney General, City of Palm Desert and Leon County.

²⁴ The Defendants include: the FHFA, Fannie Mae, Freddie Mac, Ed Demarco, Charles Haldeman, Michael Williams, the Office of the Comptroller and John J. Walsh.

²⁵ 12 U.S.C. § 1723a(a).

²⁶ *See California v. Fed. Housing Fin. Agency*, No. C10-03084 (N.D. Cal. filed July 14, 2010).

²⁷ Mayor Patrick Hays (North Little Rock, AR), ICLEI USA President and Chair of Board of Directors, and Martin Chávez, ICLEI USA Executive Director, issued the following statement in support of Leon County's lawsuit against the FHFA, Fannie Mae and Freddie Mac: “We support and fully endorse the recent legal actions undertaken by Leon County to preserve one of their most important tools to

reduce their greenhouse gas emissions and gain energy independence. With a lackluster economy and a chronic 9.6 percent unemployment rate, cities and counties across Florida are losing hope on any foreseeable turnaround to the economy.” Press Release, ICLEI-Local Governments for Sustainability USA, Leon County Fights to Preserve its Valuable PACE Programs- ICLEI USA Supports Local Governments’ Legal Efforts to Restore PACE (October 12, 2010), *available at* <http://www.icleiusa.org/news-events/press-room/press-releases/leon-county-fights-to-preserve-its-valuable-pace-programs-2013-iclei-usa-supports-local-governments2019-legal-efforts-to-restore-pace>.

²⁸ *Sierra Club v. Fed. Housing Fin. Agency*, No. 10-3317 (N.D. Cal. filed July 29, 2010).

²⁹ *The County of Sonoma vs. Fed. Housing Fin. Agency*, No. 10-3270 (N.D. Cal. filed July 26, 2010).

³⁰ The Office of the Comptroller of the Currency is a component of the United States Treasury.

³¹ *Nat’l Res. Def. Council, Inc. v. Fed. Housing Fin. Agency*, No. 10 Civ. 7647 (S.D.N.Y. filed Oct. 5, 2010).

³² FDUPA prohibits “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

³³ See U.S. CONST. amend XIV, § 9.

³⁴ FLA. CONST. art. VIII, §§ 1-2; art. X § 9.

³⁵ See *Provident Inst. For Savings v. Mayor and Alderman of Jersey City*, 113 U.S. 506 (1885); *Glisson v. Hancock*, 181 So. 379 (Fla. 1938); 51 Am. Jur.2d Liens s. 57 (1970).

³⁶ See, Footnote VI.

³⁷ Defendants argue three specific statutory provisions — 12 U.S.C. § 4617(f), 12 U.S.C. § 4635(b), and 12 U.S.C. § 4623(d) — expressly preclude jurisdiction over Plaintiffs’ claims.

³⁸ *Chae v. SLM Corp.*, 593 F.3d 936, 943 (9th Cir. 2010) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

³⁹ As Conservator, FHFA is charged with taking any action “necessary to put the regulated entity into sound and solvent condition” and “appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.” 12 U.S.C. § 4617(b)(2)(D).

⁴⁰ Cosponsors include: Congressman THOMPSON of California (for himself), Congresswoman WOOLSEY, Congresswoman MATSUI, Congressman ISRAEL, Congresswoman LOFGREN, Congressman FARR, Congressman STARK, Congresswoman SANCHEZ, Congresswoman ESHOO, Congresswoman WATSON, Congressman SHERMAN, Con-

gressman BERMAN, Congresswoman SPEIER, Congresswoman DAVIS, Congressman MCNERNEY, Congresswoman SCHWARTZ, Congressman RANGEL, Congressman LEVIN, Congressman MCDERMOTT, Congresswoman BERKLEY, Congressman NEAL of Massachusetts, Congressman BLUMENAUER, Congressman YARMUTH, Congressman SCHIFF, Congressman TIERNEY, Congressman MILLER, Congressman GARAMENDI, Congressman WAXMAN, Congressman POLIS and Congressman SARBANES.

⁴¹ The PACE Assessment Protection Act of 2010, S. 3246, 111th Cong. (2010). Cosponsors included: Senator Begich, Senator Bennett, Senator Gillibrand, Senator Merkly and Senator Udall. *Id.*

⁴² The PACE Assessment Protection Act of 2010, H.R. 5766, 111th Cong. (2010); *see also id.*

Erin L. Deady, Keri-Ann Baker and Ed Steinmeyer, Lewis, Longman & Walker, Herb W. Thiele, County Attorney, Leon County. Lewis, Longman & Walker is representing the FHFA, Fannie Mae and Freddie Mac.

Florida Case Law Update

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

Definition of “dock” not ambiguous and petition for certiorari granted quashing decision of circuit court sitting in its appellate capacity reversing the County’s Special Magistrate’s finding that Respondents violated County ordinances by replacing pilings without a County permit. *Orange County v. Liggatt*, -- So. 3d --, 2010 WL 4136146 (Fla. 5th DCA Oct. 22, 2010).

The Fifth DCA granted a writ of certiorari for review of a circuit court decision that reversed the Orange County (“County”) Code Enforcement Special Magistrate’s finding that Respondents violated the County’s ordinances. The Respondents replaced pilings below a landing area of their dock, which was originally constructed in 1975. The County issued a notice of violation because the replacement occurred without a County permit and the notice stated that Respondents could appeal the violation to the County’s Environmental Protection Commission (“EPC”). Respondents appealed the violation, and the EPC recommended against the Respondents. The County then

referred the matter to a Special Magistrate. The Magistrate found the Respondents violated the ordinances by conducting unauthorized repair of a grandfathered dock, and the Respondents appealed the finding to the circuit court. The circuit court concluded that the finding was unsupported by competent and substantial evidence because there was no evidence that the structure was a “dock” as defined by the ordinances. The circuit court further independently construed the relevant portions of the County’s ordinances. The County petitioned the Fifth DCA for certiorari review of the circuit court’s decision contending the circuit court exceeded the scope of its authority to review the Magistrate’s decision and County ordinances. The Fifth DCA accepted the writ because the definition of “dock” was not at all ambiguous and that the record showed without dispute that the structure was within the definition. Further, the County could reasonably categorize the types of structures covered by the ordinance instead of attempting to catalogue all the various structures.

Trial court granting a temporary injunction for a party that failed to exhaust administrative remedies reversed by appellate court as an abuse of discretion. *Miami-Dade County v. Wilson*, -- So. 3d --, 2010 WL 3895467 (Fla. 3d DCA Oct. 6, 2010).

On motion for clarification, the Third DCA issued an opinion reversing a trial court’s order granting a temporary injunction as an abuse of discretion because the appellee Keith Wilson (“Wilson”) failed to exhaust administrative remedies. Wilson owned and operated a nightclub, which Miami-Dade County (“County”) found in violation of certain code provisions regarding electrical wiring. Wilson received a Notice of Violation that provided Wilson could pay the fine and correct the violations or request an administrative hearing. Wilson requested the hearing. Despite being aware of the hearing date, Wilson failed to appear and was found guilty of the violations, fined, and required to bring the building into compliance within thirty days. During a subsequent telephone

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CASE LAW UPDATE

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call, the County informed Wilson of the outcome of the hearing. Wilson did not appeal the outcome or bring his building into compliance with the ordinances. Because of the ongoing violations, the County sought to disconnect the power to protect the public from the wiring hazard. Upon receiving a written notice that the penalties were continuing to accrue because of the ongoing violations, Wilson requested a second hearing. At the second hearing, Wilson attempted to contest the initial finding that he was guilty. The hearing officer refused to hear these issues because the second hearing related only to the continuing assessment of penalties, but the officer granted a continuance for the second hearing. Wilson then filed suit in circuit court seeking a temporary injunction. The trial court determined that his due process rights were violated and therefore the court could intervene in the administrative proceeding. It then granted his order for temporary injunction, which required the County to reconnect power. The County appealed the temporary injunction because Wilson was not likely to succeed on the merits and he failed to exhaust administrative remedies. The Third DCA reversed the trial court because Wilson had actual knowledge of the initial hearing, and therefore his due process rights were not violated. Further, his

failure to appeal the initial finding of guilt and choosing to not exhaust administrative remedies warranted reversal of the temporary injunction order.

Zoning ordinance sections prohibiting parking “trucks” in unenclosed areas, on streets or in public areas of Coral Gables from 7 am to 7 pm is constitutionally permissible under the rational basis standard because it rationally related to the legitimate purposes of preserving residential character and enhancing aesthetic appeal of the community. *Kuvin v. City of Coral Gables*, -- So. 3d --, 2010 WL 3324938 (Fla. 3d DCA Aug. 25, 2010).

After en banc rehearing, Judge Rothenberg wrote the majority opinion reversing the prior panel opinion and finding two Coral Gables zoning ordinance sections constitutional. Judge Shepherd wrote a concurring opinion and Judge Cortiñas joined by Judge Salter dissented. Judge Cortiñas participated as a member of the majority opinion in the panel opinion finding the ordinance sections unconstitutional from which Judge Rothenberg dissented.

Appealing from an order in favor of the City of Coral Gables (“City”) on cross motions for summary judgment, Lowell Joseph Kuvin (“Kuvín”) sought to have City ordinance sections 8-11 and 8-12 declared unconstitutional for violating his right of freedom of association and for vagueness, arbitrariness, and selective enforcement. Sec-

tion 8-11 prohibits parking “trucks” in residential areas (unless enclosed), and Section 8-12 prohibits parking “trucks” upon the streets or other public places between the hours of 7:00 pm and 7:00 am. Section 2-128 defines “trucks” to include “any motor vehicle designed, used or maintained for transporting or delivering property or material used in trade or commerce in general. Trucks shall include any motor vehicle having space designed for and capable of carrying property, cargo, or bulk material and which space is not occupied by passenger seating.”

Finding that the ordinance sections did not violate Kuvín’s fundamental rights, the majority applied a “rational basis” standard of review. Accepting the City’s argument that the ordinance sections were valid exercises of power to preserve the integrity of the residential areas and the unique aesthetic qualities of the City, the court found the sections passed facial constitutional muster. Further, the court rejected the argument regarding Kuvín’s “use” of his truck as strictly personal, and not as a recreational or commercial vehicle, because the section was focused on the “design” of the vehicle for commercial purpose. Further, the court contended that focusing on the “use” would create “an irrational classification, lead to absurd results, and be impractical, if not impossible to enforce.” Thus, the ordinance sections were constitutional as applied to Kuvín. Lastly, the court rejected the vagueness challenge because the sections provided fair notice that “trucks” could not be parked on public streets between 7:00 pm and 7:00 am, and Kuvín received a written warning notifying him of the violation before being ticketed.

The concurring opinion of Judge Shepherd identified that the appropriate remedy in this situation was with the legislative body because “under our system of government, it is our expectation as citizens that improvident decisions of local government, as distinguished from unlawful decisions, ‘will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.’” Judge Shepherd further rejected the majority’s statement that “the ordinances ‘make perfect sense’” when considering the fact that they were enacted long before the widespread use of pickup trucks for normal transportation.

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On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of November 19, 2010. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Keesler et al v. Community Maritime Park Associates, Inc. Case No. SC10-910. Petition for review of decision by 1st DCA affirming trial court order determining that the Sunshine Law gives appellants the right to be present but not to speak at public meetings. 32 So.3rd 659 (Fla. 1st DCA 2010). Status: Denied October 25, 2010.

SFWMD v Miccosukee Tribe, Case No. SC09-1893. Petition to invoke all writs jurisdiction directing the Third District Court of Appeal to transfer to the Court the consolidated cases of *New Hope Sugar Company, et al. v. SFWMD*, Case No. 3D09-2357, and *Miccosukee Tribe v. SFWMD*, Case No. 3D09-1960, so the Court can protect and exercise its mandatory and exclusive jurisdiction over matters currently pending before the Court: *Miccosukee Tribe v. SFWMD*, Case No. SC09-1817 and *New Hope Sugar Company v. SFWMD*, Case No. SC09-1818 (the validation appeals). Status: Order granting writ entered February 8, 2010; dismissal affirmed November 18, 2010.

Miccosukee Tribe v. SFWMD, Case No. SC09-1817 and *New Hope Sugar Company v. SFWMD*, Case No. SC09-1818. Petition for review of the validation of a bond issue to restore part of the Everglades. Status: Affirmed in part and reversed in part on November 18, 2010.

SJRWMD v Koontz, Case SC09-713. Petition for review of 5th DCA decision in *SJRWMD v. Koontz*, affirming trial court order that the District had effected a taking of Koontz's property and awarding damages. 15 So.3d 581 (2009). Status: Oral argument held April 5, 2010.

FIRST DCA

Honorable Jeff Atwater, et al v. City of Weston, Florida et al. Case No. 1D10-5094. Petition for review of final summary judgment determining that one provision in SB 360 (Chapter 2009-

96), the 2009 growth management legislation, constitutes an unfunded mandate, and determining that SB 360 "is declared unconstitutional. . . and the Secretary of State is ordered to expunge said law from the official records of the state." Status: Notice of appeal filed September 24, 2010.

Jacqueline Lane vs. International Paper; etc. et al. Case No. 1D10-1893. Petition for review of DEP final order adopting the ALJ's ultimate conclusions that IP provided reasonable assurances that its effluent would not adversely affect the biological community; that granting the permit will be in the public interest; that the discharge would not be unreasonably destructive to the quality of the receiving waters; that the proposed project complies with the DEP's antidegradation policy; and that the consent order establishes reasonable terms and conditions to resolve the enforcement action for past violations and is the order that establishes a schedule for achieving compliance with all permit conditions. Status: Notice of appeal filed April 15, 2010.

Dawn K. Roberts v. Florida Prosecuting Attorneys, et al. Case No. 1D10-4532. Appeal from declaratory judgment declaring that a proviso in the 2010-11 General Appropriation Act providing that "no state agency may expend funds provided for Bar dues," is unconstitutional as violative of III, Section 12, of the Florida Constitution, and ordering the Secretary of State to expunge the challenged proviso from the official records of the state. Status: Notice of appeal filed August 24, 2010.

James Hasselback vs. FDEP, etc, et al, Case No. 1D10-1850. Petition for review of DEP final order determining that petition challenging intent to issue Coastal Construction Control Line Permit was untimely notwithstanding that the Petitioner did not receive actual notice of the agency action, because Petitioner received constructive notice through the law firm that represented him and because another Cape Haven Townhome owner had implied authority to serve as his agent for receipt of notice. Status: Oral argument set for November 30, 2010.

Izaak Walton Investors v. Town of Yankeetown and DCA, Case No. 1D10-1732. Petition for review of final order rejecting developer's challenge to determination that plan is in compliance. The developer contended that the Town had not allocated sufficient land for commercial uses to accommodate anticipated growth over the planning timeframe. Status: Petition filed April 5, 2010; oral argument denied September 30, 2010.

Jetty East Condominium Owners Ass'n v. DEP et al, Case No. 1D10-123. Petition for review of DEP final order dismissing petition for hearing as untimely. Status: Affirmed *per curiam* on September 24, 2010.

Martin County Conservation, et al v. Martin County, Case No. 1D09-4956. Petition for review of final order determining comprehensive plan amendments to be in compliance. Certain Appellee's moved to dismiss the appeal for lack of standing, and requested attorneys fees. Status: Appeal dismissed *per curiam* on June 21, 2010; on the same date, the court ordered appellants to show cause why sanctions should not be imposed upon them pursuant to s. 57.105(1), F.S., for filing an appeal for which standing clearly is not present.

Lowe's Home Centers, Inc. v. DCA, Case No. 1D09-4383. Petition for review of final order of Administration Commission finding that Lowe's amendment to Miami-Dade Comprehensive Plan is not in compliance. Status: Oral argument scheduled for January 12, 2011.

THIRD DCA

New Hope Sugar Company, et al. v. SFWMD, Case No. 3D09-2357, and *Miccosukee Tribe of Indians of Florida v. SFWMD*, Case No. 3D09-1960. Petition for review of SFWMD final order denying, for lack of standing, appellants' requests for administrative hearing on SFWMD's decision to enter into a contract for the purchase of U.S. Sugar property for purposes of Everglades restoration and preservation. Status: Oral argument held December 2, 2009; on February 8, 2010, the Florida Supreme Court granted a petition to invoke all writs

continued...

ON APPEAL

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jurisdiction and directed the district court of appeal to transfer the cases to the Court. See Case No. SC09-1893, above.

Lowell Joseph Kuvin v. City of Coral Gables, Case No. 3D05-2845. Appeal from trial court's order upholding sections of the City's zoning code that prohibit the parking of trucks in residential areas of the City unless parked in an enclosed garage. Status: Affirmed August 25, 2010; on *en banc* review, question certified: "May a city ordinance, which prohibits the parking of any truck in a private

driveway or in a public parking spot at night, as applied to a personal-use of a light duty truck, be upheld as constitutional?"

FOURTH DCA

Flagler Center Properties, LLP, et al v. FDEP, Case No. 4D10-4979. Petition for review of final order issuing an Environmental Resource Permit and Letter of Consent to Use Sovereignty Submerged Lands authorizing Palm Beach County to undertake a project in the Lake Worth Lagoon known as the South Cove Restoration Project. Status: Oral argument set for December 14, 2010.

Rosenblum v Zimmet, Case No. 4D10-3049. Petition for review of FDEP final order finding that Zim-

met was entitled to a single family dock exemption for his project and rejecting Rosenblum's claim that his navigation would be impeded to and from the south side of his dock. Status: Notice of appeal filed July 26, 2010.

FIFTH DCA

St. John's Riverkeeper, Inc. v. SJRWMD, Case No. 5D09-1644; *City of Jacksonville v. SJRWMD*, Case No. 5D09-1646. Petition for review of SJRWMD final order granting consumptive use permit to Seminole County for withdrawal of surface water from the St. John's River for public supply and reclaimed water augmentation. Status: Oral argument held July 6, 2010.

Department of Community Affairs Update

by Richard E. Shine, Assistant General Counsel

COMPREHENSIVE PLANNING

Department of Community Affairs vs. Polk County and Safari Wild, LLC, DOAH Case No. 10-0544DRI

The Department appealed a Polk County Development Order issued to Safari Wild for a project located in the Green Swamp Area of Critical State Concern. Safari Wild sought approval to operate a game farm with up to 750 Asian and African animals grazing in multi-species herds to be viewed by the public for an entrance fee. The Department's petition maintained that the Safari Wild project was not a recreational low intensity use, rather a commercial land use prohibited by the Polk County Comprehensive Plan and Land Development Regulations. The Administrative Law Judge's July 30, 2010, Recommended Order found that the Safari Wild Project and activities authorized by the Development Order constituted "development" as defined in Section 380.04, Florida Statutes; that the project is inconsistent with the Polk County Comprehensive Plan and Land Development Regulations; and recommends that the Florida Land

and Water Adjudicatory Commission quash the Polk County Development Order and deny permission to Safari Wild to develop the project. No party filed exceptions to the Administrative Law Judge's Recommended Order. The matter is scheduled before the Florida Land and Water Adjudicatory Commission on November 9, 2010.

Department of Community Affairs and Department of the Air Force vs. City of Tampa and Spray Miser International, Inc., DOAH Case No. 08-4820

The City of Tampa adopted two Future Land Use Map amendments changing the land use designation for two parcels adjacent MacDill Air Force Base from Light Industrial to Community Mixed Use-35 (which allowed 35 units/acre as well as certain non-residential uses). The Department objected to both on the basis that the new categories were not compatible with the Air Force Base. One of the amendments, which was located wholly within the footprint of the MacDill Air Force Base AICUZ (air installation compatible use zone) went to hearing. However, a

settlement was reached for the other amendment, which was only partially located within the footprint of the MacDill Air Force Base AICUZ. As a part of the settlement, the Department agreed to the FLUM change on the condition that no vertical development would take place on the portion of the parcel located within the MacDill AICUZ footprint, and that the developer agreed to comply with the noise attenuation standards found in the City's building code which match federal recommendations.

CNL Resort Hotel, L.P. vs. City of Doral and State of Florida, Department of Community Affairs, DOAH Case No. 062417

Subsequent to incorporation, the City of Doral adopted a Comprehensive Plan which the Department found "not in compliance." Thereafter, the Department entered into a stipulated settlement agreement and the City adopted a remedial amendment causing the Department to find the Doral Comprehensive Plan "in compliance" with the Local Government Comprehensive Planning and Land Development Regulation Act, Ch. 163, Part

II, Florida Statutes. Intervenor, CNL Resort Hotel, L.P., opposed the Plan as remediated and filed a Petition Challenging Compliance of Proposed Comprehensive Plan on March 27, 2007. On May 17, 2007, the Administrative Law Judge issued an Order on Motion to Dismiss, granting the City of Doral's Motion to Dismiss Count I and related portions of Count III of CNL Resort Hotel, L.P.'s Petition Challenging Compliance of Proposed Comprehensive Plan. On June 18, 2007, CNL Resort Hotel, L.P., filed a Petition to Review Non-Final Agency Order with the Third District Court of Appeal. On September 24, 2008, the Court granted the Petition, quashed the Order on Motion to Dismiss and remanded to the Administrative Law Judge for further proceedings. *CNL Resort Hotel L.P., v. City of Doral, Florida, et al.*, 991 So.2d 417 (Fla. 3d DCA 2008).

Upon remand, Petitioner, CNL Resort Hotel, L.P., the City and the Department entered into a Stipulated Settlement Agreement requiring the City to adopt additional remedial amendments identifying the development rights of the CNL properties currently operating as golf courses. The City adopted the remedial amendments by Ordinance Number 2010-14 on June 9, 2010, and the Department published its ("NOI") on August 16, 2010, to find the Plan as again remediated "in compliance" with the Act. No party challenged this Notice and the time for doing so has expired.

Department of Community Affairs and Florida Wildlife Federation and Collier County Audubon Society v. Collier County and Buckley Enterprises, Hideout Golf Club, LTD., John L. Cowan and Jane Ann Cowan, DOAH Case No. 07-2317GM

The Department of Community Affairs challenged as not in compliance the Collier County Comprehensive Plan Future Land Use Map series (FLUM) relating to Section 24 in North Belle Meade and the associated text amendments to the Future Land Use Element. The Department found the proposed changes to the North Belle Meade Overlay were internally inconsistent with the provisions pertaining to the Red Cockaded Woodpeckers (RCW) because the best available data indicated that Section 24 contains RCW habitat and therefore should be

designated as Sending Lands consistent with the County's comprehensive plan. The Department and Collier County, along with intervenors Florida Wildlife Federation, Collier County Audubon Society, and three landowners, have reached a settlement to protect the Red Cockaded Woodpeckers in the North Belle Meade area of Collier County. The settlement provides that Collier County will adopt a remedial amendment for a habitat management plan that will direct clustered residential development within the area known as Section 24. Eighty percent of development property will be set aside and managed for the benefit of RCWs. With management efforts, the number of RCWs has already increased on adjacent County-owned conservation property.

Martin County Conservation Alliance, Inc., Donna Melzer, Eliza Ackerly, Groves Holdings, LLC, Groves 12, LLC, and Groves 14 vs. Martin County and Department of Community Affairs, DOAH Case No. 10-0913GM

The Department issued an NOI finding all but one of the amendments in compliance and the Department filed a petition for formal administrative hearing with DOAH. Subsequently, several parties intervened in the proceeding and the County adopted an ordinance repealing the amendment which was the subject of the Department's not in compliance finding. Subsequent to the repeal of the amendment, the Department requested a voluntary dismissal and the intervenors were realigned as the Petitioners. The ALJ issued a Recommended Order finding two of the challenged policies in the Future Land Use Element ("FLUE") not in compliance. In his Conclusions of Law, the ALJ stated that "after a comprehensive plan is determined to be in compliance, any non-substantive amendments to the plan should also be determined to be in compliance." The ALJ found one of the FLUE's policies to be not in compliance as he found that it was not based on the best available data and analysis regarding the effect of provisions of the comprehensive plan to reduce a landowner's ability to attain the theoretical maximum density allowed by the land use designation. A Final Order has not yet been issued in this case.

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DEP Update

by West Gregory

62-346, F.A.C., NORTHWEST ERP:

Concluding over five years of rule-making, the DEP filed the certification package for Northwest Environmental Resource Permitting (ERP) Phase II in October 2010. As of November 1, 2010, a full ERP program is effective in the panhandle, covering both stormwater management and dredge and fill activities. Pursuant to the revised Operating Agreement between the Northwest Florida Water Management District ("NFWFMD") and DEP, the NFWFMD will now review and take agency action on certain ERP activities involving less than five acres of dredging or filling in wetlands and other surface waters.

MS4 UPDATE:

As part of DEP's administration of EPA's NPDES program, DEP regulates Municipal Separate Storm Sewer Systems ("MS4s"). MS4 permits regulate stormwater systems under

the ownership or control of certain municipalities. The MS4 permit requires permittees to reduce pollutants to the maximum extent practicable. In late 2009, EPA contacted States to inform them that it intended to strengthen the enforceability of MS4 permits and require the permits to more effectively address Total Maximum Daily Loads ("TMDLs"). As a result, EPA's mandated changes to DEP-issued MS4 permits will have many new requirements, including the following relating to TMDLs:

- Fecal TMDLs – Requires the creation and implementation a Bacterial Pollution Control Plan, which requires, as appropriate, the identification and tracking of sources of fecal bacteria, the implementation of educational programs, and the identification of structural Best Management Practices ("BMPs") needed to meet the required load reductions.

- TMDLs with an adopted Basin

Management Action Plan ("BMAP") – Requires implementation of the permittee's activities set forth in the BMAP.

- EPA or DEP TMDLs without a BMAP – Requires the submittal of a prioritization and assessment report, and a TMDL Monitoring and Assessment Plan ("Plan"). The Plan includes estimating the annual loadings currently discharged from outfalls into water bodies with an adopted TMDL; the trends (increasing or decreasing loads) that have occurred during the years that an MS4 permit was in effect; and a ranking and prioritization of outfalls based on annual loading. Following submittal of the Plan, the permittee must conduct storm event monitoring to validate the loading estimates and then create and implement a TMDL Implementation Plan to begin reducing loads to meet the required load reductions in the TMDL.

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

Environmental and Land Use Law Audio Webcast Series

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Dates: October 14, 2010; December 9, 2010, February 17, 2011;
April 14, 2011; May 26, 2011
12:00 noon – 1:00 p.m. EST

Course No. 1128R

The Florida Bar Environmental and Land Use Law Section is pleased to announce this 2010-2011 audio webcast series. Over the course of the next eight months, we will provide an easy and affordable manner to earn CLE credits (including ethics credit), listen to presentations on environmental and land use hot topics by some of the top lawyers in the state, all from the comfort of your home or office. There is a discount for ordering the entire series.

October 14, 2010

Ethics – A Scholastic Perspective for the Environmental and Land Use Practitioner

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

Sister Patricia A. Siemen, Center for Earth Jurisprudence
Professor Robin Kundis Craig, FSU College of Law

December 9, 2010

Ethical Considerations When Practicing Before Local Governments

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

Clifford A. Schulman, Weiss Serota Helfman & Pastoriza
P.L. et al
Robert C. Apgar, Law Office of Robert C. Apgar

February 17, 2011

Mental Health and Substance Abuse Ethical Issues for Environmental and Land Use Practitioners

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

Scott Rogers, Institute of Mindfulness Studies
Michael J. Cohen, Florida Lawyers Assistance

April 14, 2011

Ethical Considerations for the Environmental and Land Use Practitioner – An Interactive Experience

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

Pamella A. Seay, Florida Gulf Coast University

May 26, 2011

Annual Legislative Wrap-Up

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

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

All programs begin at 12:00 noon Eastern Time.

AUDIO WEBCAST

As an audio webcast attendee, you will listen to the program over the Internet. Registrants will receive audio webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact the Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

CLE CREDITS

CLER PROGRAM

(For the Series)

(Max. Credit: 6.0 hours)

General: 6.0 hours

Ethics: 3.5 hours (does not include 5/26/11 program)

Substance Abuse: .5 hours (does not include 5/26/11 program)

Mental Illness Awareness: .5 hours (does not include 5/26/11 program)

CERTIFICATION PROGRAM

(For the Series)

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City, County & Local Government: 6.0 hours

Real Estate Law: 6.0 hours

State & Federal Gov't & Administrative Practice: 6.0 hours

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

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Ethics – A Scholastic Perspective for the Environmental and Land Use Practitioner – October 14, 2010 (1129R)

- ☐ Member of Environmental & Land Use Law Section: \$40
☐ Non-section member: \$65

Ethical Considerations When Practicing Before Local Governments – December 9, 2010 (1130R)

- ☐ Member of Environmental & Land Use Law Section: \$40
☐ Non-section member: \$65

Mental Health and Substance Abuse Ethical Issues for Environmental and Land Use Practitioners – February 17, 2011 (1131R)

- ☐ Member of Environmental & Land Use Law Section: \$40
☐ Non-section member: \$65

Ethical Considerations for the Environmental and Land Use Practitioner – An Interactive Experience – April 14, 2011 (1132R)

- ☐ Member of Environmental & Land Use Law Section: \$40
☐ Non-section member: \$65

Legislative Update – May 26, 2011 (1133R)

- ☐ Member of Environmental & Land Use Law Section: \$40
☐ Non-section member: \$65

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- ☐ **AUDIO CD** (includes course material in electronic format)

\$150 plus tax (section member)

\$175 plus tax (non-section member)

COURSE NO. 1128R

TOTAL \$ _____



Florida Environmental Public Interest Fellowship

by Jessica L. Calley

As the recipient of the Florida Environmental Public Interest (FEPI) Fellowship for summer 2010, I was very fortunate to spend my summer working with WildLaw in St. Petersburg. My experience with WildLaw was an amazing opportunity first because it allowed me to gain knowledge of how environmental attorneys function on a day-to-day basis. Second, I was able to observe how attorneys deal with clients from an environmental justice perspective. Third, I had the opportunity to work with environmental issues at a depth I have not dealt with as a law student. As a result of my time as a fellow, I have confirmed what I already anticipated as my career path, practicing in public interest environmental law.

The opportunity to gain knowledge of how public interest environmental attorneys spend their time was a rewarding experience. My work this summer allowed me to work hands on with attorneys and other individuals who work tirelessly to ensure the protection of the environment. Time spent working on a variety of issues supplemented my law school education in a way that could never be replicated in the classroom. As a result of this unique opportunity, I was able to gain invaluable practical experience in legal research and writing and client interaction, and I gained a better understanding of the federal and state regulatory process. In addition, the FEPI fellowship provided an opportunity for me to attend the Annual Update of the Environmental and Land Use Law Section (ELULS) where I interacted with scholars and practitioners and was exposed to emerging issues in environmental law. It was a gratifying experience to hear discussion of many newly emerging environmental issues as a law student who will soon be joining the work force as a public interest environmental law attorney. I am grateful to the ELULS for giving me the opportunity to gain such valuable hands on experience.

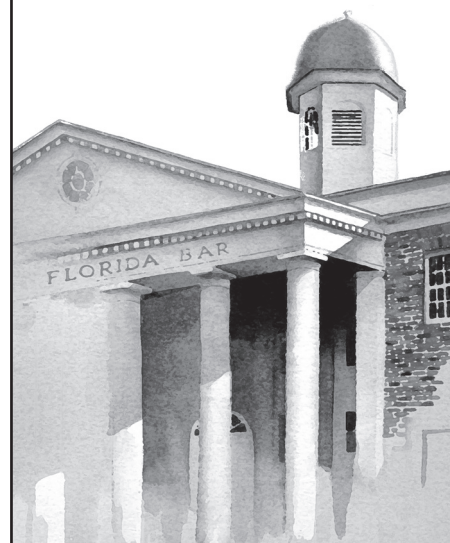
Also, as a result of my Fellowship experience, I was able to view the

interaction of attorneys and clients when dealing with environmental issues. While the chance to sit in on a meeting between an attorney and client is an invaluable experience for any law student, the opportunity to view the unique relationship between attorneys and clients when in an environmental justice context was extremely rewarding. I should start by commending everyone at WildLaw for their commitment to their clients and the area of environmental justice. The task of building a relationship with clients in an environmental justice context is not as simple as identifying a legal issue and helping the client to solve their problem. Instead, this area requires a comprehensive view of the attorney-client relationship. This means that not only do attorneys identify potential legal issues, but they also help organize communities and assist them in areas beyond the realm of the law. As a law student I believe there are many qualities of the environmental justice attorney-client relationship that I can successfully apply to my future practice. I believe that any opportunity for practitioners to integrate the comprehensive attorney-client relationship, a cornerstone of environmental justice, will benefit both the attorney and the client. The time I spent this summer learning some of the intricacies of such relationships was time well spent.

Finally, as the FEPI fellow, I was able to work in, and gain knowledge of, areas of environmental law I may not have had an opportunity to learn about in depth while in law school. Unfortunately, it is not practical for law students to spend three years of law school learning only about environmental law. For that reason, the opportunity to work with individuals who practice environmental law and, in my case, public interest environmental law, is an amazing one. While working for WildLaw, I was able to take what I have learned in law school and apply it to real life situations, then expand upon that knowledge with research and writ-

ing involving specific provisions of significant environmental laws. This experience was a meaningful one for me because I had the opportunity to analyze legal issues under the guidance and oversight of experienced environmental attorneys. Similarly, the opportunity to attend the ELULS Annual Update provided me with access to resources and information on emerging environmental law issues that may not have been covered in such depth in my law school courses. Since the Update, I have used what I have learned to participate in discussions in my law school courses and, hopefully, enrich the educational experiences of my classmates. Of all of the wonderful experiences I have had while a FEPI fellow, I am most grateful to have had the opportunity to augment my knowledge of environmental law under the guidance of experienced practitioners. Thank you to the ELULS, the ELULS Fellowship Committee, and WildLaw for giving me the opportunity to have such a wonderful learning opportunity.

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website at
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Law School Liaisons

Center for Earth Jurisprudence Update

by Jane Goddard

Center for Earth Jurisprudence to Host Water Justice Conference

The Center for Earth Jurisprudence will present the Second Annual Future Generations Conference on Friday, February 4, 2011, at the Barry University School of Law in Orlando. "Water Justice for All" will feature keynote speaker Maude Barlow, international environmental leader, author, and Senior Advisor on Water to the 63rd President of the United Nations General Assembly on Rights to Water. Ms. Barlow will be joined by Jennifer Greene of the Water Research Institute of Blue Hill, an organization that encourages "a new consciousness of water" based on the qualities of water itself. The program will also include attorneys and local experts discussing Central Florida water issues. For more information, contact Jane Goddard at jgoddard@mail.barry.edu or (321) 206-5788.

Center for Earth Jurisprudence Collaborates on Environmental Justice Summit

The Center for Earth Jurisprudence hosted a welcome reception on Oct. 7 at the Barry University School of Law in Orlando for the school's second Environmental Justice Summit, "Collaborating to Achieve Environmental Justice." The reception featured Attorney Brent Newell of the Center on Race, Poverty & the Environment, who represents the Native Village of Kivalina, Alaska.

Mr. Newell described the current status of the environmental justice lawsuit filed by the village. His talk was accompanied by photographs of the residents' plight due to climate change and soil erosion. "Climate change cuts across all sectors of the environmental and human commu-



Attorney Brent Newell discusses the environmental and legal challenges faced by the residents of Kivalina, Alaska.

nity," noted Sister Patricia Siemen, executive director of the Center for Earth Jurisprudence. "As the Kivalina case shows, those with fewer resources are the ones who suffer the most."

Two Lake Apopka Farmworker Memorial Quilts were displayed at the reception and summit. Each square of the quilts was created in memory of someone who worked in the fields and is now deceased. "We are delighted that the quilts were able to be displayed," said Jeannie Economos of the Farmworker Association of Florida. "The response was rewarding and empowering for the community members."

Nearly 100 lawyers, law students, academics, and local community residents attended the summit on Oct. 8. Keynote speaker Dr. Robert D. Bullard, director of the Environmental Justice Resource Center at Clark

Atlanta University, joined affected community members, attorneys, educators, and scientists in highlighting the causes and consequences of wrongful environmental practices. Panelists and participants engaged in a roundtable discussion aimed at identifying next steps to support affected communities and increasing available remedies.

"As the title of this year's summit suggests, we wanted to bring together the legal and local community to work towards finding solutions that support the health of all members of the Earth community," said Leticia M. Diaz, dean of the Barry University School of Law. "We were encouraged by the information shared at the summit and the progress that was made."

The summit was funded in part by the Environmental and Land Use Law Section (ELULS) of The Florida Bar.

Law School Liaisons continued....

Activities on Tap for the 2010 - 2011 Academic Year at The Florida State University College of Law

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

The Environmental Law program at The Florida State University College of Law has a full schedule of activities and initiatives on tap for the fall 2010 and spring 2011 semesters, including the following:

Fall 2010 Distinguished Lecturer: Prof. Kirsten Engel, University of Arizona James E. Rogers College of Law, gave this fall's *Distinguished Lecture*, entitled "Should Climate Change be the Subject of State Public Nuisance Liability Lawsuits?" on September 22, 2010. For the videocast of the lecture, please visit: <http://mediasite.apps.fsu.edu/Mediasite/Viewer/?peid=d5f679d4a3d14cda82714464e2024b841d>.

Fall 2010 Environmental Law Forum: The College of Law held its fall *Environmental Forum* on October 27, 2010. The *Forum* focused on "Energy Efficiency in Land Use Planning." The *Forum* explored the legal and practical implications of DCA's proposed regulation on this important topic and the challenge of crafting law for sustainable development. Featured speakers included: **Robert Pennock, AICP, Ph.D.**, Strategic Planning Coordinator, Florida Department of Community Affairs; **Vivien Monaco, Esq.**, Assistant Attorney, Orange County Attorney's Office, Chair of the City, County, and Local Government Section, The Florida Bar; **Janet Bowman, Esq.**, Director, Legislative Policy & Strategies, The Nature Conservancy-Florida; and **Nancy G. Linnan, Esq.**, Tallahassee Office Managing Shareholder, Carlton Fields. As always, we co-sponsored the *Forum* with the Section and had a terrific turnout. For the videocast, please visit the Law School's website, at: http://www.law.fsu.edu/academic_programs/environmental/video.html.

Spring 2011 Symposium: "Law and Sustainability: The Energy-

Land Use Nexus:" The goal of this one-day symposium, scheduled for February 25, is to bring legal scholars together to consider the nexus between energy and land use, looking both at energy consumption based on our land use patterns, and land consumption for energy generation. Presenters include **Prof. William Buzbee** of Emory University School of Law; **Prof. Robert Glicksman** of George Washington University Law School; **Prof. John Nolon** of Pace University Law School; **Prof. Jim Rossi** of The Florida State University College of Law; **Prof. Patricia Salkin** of Albany Law School; and **Prof. Joseph Tomain** of University of Cincinnati School of Law. The day will also include a presentation by **Dr. Robert McDonald**, a Vanguard Scientist with the Nature Conservancy whose work on "energy sprawl" has garnered national headlines, and will conclude with a practice roundtable, bringing the legal scholars into dialogue with practitioners on issues of implementation for sustainable land and energy development. As part of the Sustainable Energy Research Project, the event is a joint effort of the Law School's Environmental and Land Use Law Program and The Florida State University's Institute for Energy Systems, Economics, and Sustainability (IESES).

Spring 2011 Distinguished Lecturer: Our spring 2011 *Distinguished Lecture*, scheduled for Wednesday, March 16, at 3:15 p.m., will feature **Prof. Jody Freeman**, of Harvard Law School.

Additional Faculty Visitors. The College of Law hosted three distinguished Environmental Law professors during the fall semester for faculty workshops or as guest lecturers for our Environmental Certificate Seminar: **Prof. Hannah Wiseman**, University of Tulsa School of Law; **Prof. Blake Hudson**, Stetson Uni-

versity College of Law; and **Prof. Trish McCubbins**, Southern Illinois College of Law.

Our students have continued to excel in essay competitions. Three of our students swept the Frank Maloney Environmental Law Writing Competition this year. The contest is sponsored by The Florida Bar's Environmental and Land Use Law Section and is open to students in all the Florida law schools. **Kristy Sweat** took first place, **Melanie Leitman** took second place, and **Bonnie Malloy** earned third place. **Kristy Sweat** and **Bonnie Malloy** also took the two Honorable Mention awards in the 27th Annual (2010) Smith-Babcock-Williams Student Writing Competition.

Our students similarly continued to excel in having papers accepted for publication. **Tessa Davis's** paper, Keeping The Welcome Mat Rolled-Up: Social Justice Theorists' Failure To Embrace Adverse Possession as a Redistributive Tool, will be published in the *Journal of Transnational Law and Policy* (Ms. Davis also won the Attorney Title Insurance Fund competition for this paper). **Christian Cutillo's** paper on electronic waste, A Toxic Reciprocity: Examining the E-Waste Stream from the United States to China, has been accepted for publication in the on-line edition of the *Harvard Law & Policy Review*. **Melanie Leitman's** article, Water Rx: The Problem of Pharmaceuticals in our Nation's Waters, is forthcoming in the *UCLA Journal of Environmental Law and Policy*. **Gina Iacona's** paper, Going Green to Make Green: Necessary Changes to Promote and Implement Corporate Social Responsibility while Increasing the Bottom Line, will be published in the *Journal of Land Use and Environmental Law*.

This year's Environmental Moot Court Team, consisting of **Seth Welner**, **Justin Miller**, and **Jesse Unruh**, and coached by **Tony Cleveland**, **Segundo Fernandez**, and

Law School Liaisons continued....

LAW SCHOOL LIAISONS

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Preston McLane, is preparing for the National Environmental Law Moot Court Competition at Pace Law School in 2011.

Our Environmental Law Society has several events planned for the spring semester, including guest lectures by several speakers, and the annual career panel.

We hope you'll join us for one or more of our programs. For more information about our programs, please consult our web site at: www.law.fsu.edu, or please feel free to contact Prof.

David Markell, at dmarkell@law.fsu.edu. Our environmental brochure, available online at: http://www.law.fsu.edu/academic_programs/environmental/documents/environmental_brochure_08.pdf, also contains considerable information about the Environmental Law Program at the Florida State University College of Law.

St. Thomas University – LL.M. in Environmental Sustainability

St. Thomas University School of Law will launch its new LL.M. in Environmental Sustainability in Fall 2011, but students accepted to the program can begin refining their environmental expertise through two short courses offered this spring and summer.

To begin, John Dernbach, widely recognized as one of the foremost voices about issues of environmental sustainability, will come to St. Thomas University in Miami Gardens to teach an intensive course titled "Environmentally Sustainable Development: Law and Institutions," from March 7 - 11, 2011. His extensive experience helps him to view environmental issues from a variety of perspectives: Currently a law professor at Widener University, he is also an author and lecturer in the area of environmental law and cli-

mate change and leads a project titled Sustaining America that assesses sustainable development efforts in the United States and recommends action. He also has served in several roles, including Policy Director, at the Pennsylvania Department of Environmental Protection and has co-authored an *amicus* brief to the United States Supreme Court on behalf of climate scientists in the landmark climate change case *Massachusetts v. Environmental Protection Agency*.

The next short course opportunity, open also to law students at other universities for audit, is scheduled for the week of May 22 - 27, 2011: The Comparative Water Law Short Course/Tour in the Netherlands examines a nation below sea-level's approach to water management. The course includes visits to dykes, surge barriers and windmills and

explores the progressive nation's environmental innovations. The situation in the Netherlands will be compared and contrasted with Florida, particularly South Florida. Enrollment is limited to 35 students; interested law students should contact the LL.M. in Environmental Sustainability as soon as possible at environmentLLM@stu.edu. Members of the wider public can visit <http://floridaeearth.org> for similar programs developed for the Department of the Interior and the U.S. Army Corps of Engineers.

For more information regarding the LL.M. program in Environmental Sustainability at St. Thomas University School of Law, please visit www.stu.edu/law/environmentLLM or contact the program directly at environmentLLM@stu.edu or 305-623-2389.

University of Florida: The Upcoming Spring Semester

As the fall semester comes to an end, here is a preview of upcoming events for the spring semester at Levin College of Law. We anticipate a busy schedule, including various conferences and programs related to environmental and land use law. Please visit our website at www.law.ufl.edu/elulp or email elulp@law.ufl.edu for more information on these or other events.

UF will host its two annual environmental and land use law conferences this spring—the Richard E. Nelson Symposium and the Public Interest Environmental Conference—in

addition to hosting speakers for the Environmental Speaker Series. In addition, we're pleased to announce several new fellowships made possible by recent donations and grants to the ELULP. Details on the new scholarships, all three events, and other student activities follow.

ELULP Announces New Fellowships for J.D. and LL.M. Students

The ELULP is pleased to announce several new fellowships for J.D. and LL.M. students pursuing an education in environmental and land use law at UF. These include

a Florida Climate Institute Fellowship for an LL.M. student to work on climate-related projects, Conservation Law Fellowships for both J.D. and LL.M. students who participate in the Conservation Clinic, and an ELULP Minority Fellowship. More information is available on our webpage at www.law.ufl.edu/elulp under Fellowships.

Public Interest Environmental Conference

Date: February 24-26, 2011

Location: University of Florida Levin College of Law

Law School Liaisons continued....

Topic: *It's Not Easy Being Green: Our Energy Future*

Description: This year's conference will focus on the opportunities and challenges posed by our energy future. It will feature a plenary session on Friday morning, followed by nine panels, each addressing a different source of energy or an issue that interacts with energy. The panels will focus on Land Use, Wind, Nuclear, Energy Conservation, Solar, Fossil Fuels, Environmental Justice, Biofuels, and Transportation. The program on Saturday will feature the ever-popular workshop organized by the Public Interest Committee of the ELULS and a workshop on Green Jobs, as well as a closing plenary session. This year, UF is proud to host two keynote speakers, who will address the conference at the opening reception and at the Friday night banquet.

Kenneth Hood "Buddy" MacKay, former Governor of Florida, will give the opening remarks at the PIEC reception held on Thursday, February 24. Governor MacKay is a graduate of the University of Florida Levin College of Law, and has served in many public offices throughout his prominent career, including offices in the Florida House of Representatives, the Florida Senate, and the United States House of Representatives. As Lieutenant Governor under Lawton Chiles, MacKay was co-chair of the Florida Commission on Education, Reform, and Accountability. Since his retirement from active politics, he has worked on many significant social issues, including environmental policy, international trade, and human rights. Governor MacKay recently published "How Florida Happened: The Political Education of Buddy MacKay" a book he describes as "one participant's recollection of events in the final four decades of the twentieth century—the period in which Florida became an out-of-control growth engine."

On Friday evening, Professor Robert H. Socolow, Co-Director of the Carbon Mitigation Initiative at Princeton University, will deliver the keynote speech at the PIEC banquet. Professor Socolow is a Professor of Mechanical and Aerospace Engineering, whose current research focuses on global carbon management and fossil-carbon sequestration. His most well-known contribution is likely his characterization of "stabilization wedges" as a visual approach to solving the climate change problem. The

concept, developed in an article published in *Science* that Socolow co-authored with fellow Princeton Professor Stephen Pacala, caught national attention and helped to make the challenge of responding to climate change concrete. The Carbon Mitigation Project Professor Socolow co-directs seeks to combine research in environmental science, energy technology, geological engineering, and public policy, in order to address climate change problems facing the globe. In addition to his current endeavors, Professor Socolow has published significant academic articles addressing nuclear energy, carbon dioxide emission reductions, future trends in energy, and biofuels.

For more information, visit www.ufl.edu/piec. A complete agenda and registration information will be available online by early January. To request updates as more information is available, please contact elulp@law.ufl.edu. The Public Interest Environmental Conference is co-sponsored by the Public Interest Committee of the ELUL Section.

Richard E. Nelson Symposium

The Tenth Annual Richard E. Nelson Symposium is scheduled for Friday, February 11, 2011 at the Hilton University of Florida Conference Center in Gainesville. Outstanding speakers from within and outside the state will discuss legal developments that affect Florida's precious and fragile coast, such as global warming mitigation, oil spill response, and the Supreme Court's 2010 decision in *Stop the Beach Renourishment*. Scheduled speakers include Georgetown University law professor Peter Byrne, Stanford University law professor Barton H. "Buzz" Thompson, Jr., Florida Solicitor General Scott Makar, and UF law professor Michael Allan Wolf. CLE credit will be offered, and practitioners interested in cutting-edge developments in land use, environmental, and state and local law are encouraged to attend.

This annual symposium honors Richard E. Nelson, who served with distinction as Sarasota County attorney for 30 years, and Jane Nelson. Richard and Jane Nelson established the Richard E. Nelson Chair in Local Government Law, which sponsors this annual event.

All Sessions are on Thursday from 3-5pm	2011 Environment Speaker Series Speaker and Topic
February 10	Phyllis Harris , Vice President, Environmental, Health and Safety Compliance, Wal-Mart, <i>The Corporate Response to Climate Change</i>
March 3	John Copeland Nagle , John N. Matthews Professor of Law, University of Notre Dame Law School, <i>How to Think About Climate Change</i>
TBA	Victor Flatt , Tom & Elizabeth Taft Distinguished Professor of Environmental Law and Director, Center for Law, Environment, Adaption and Resources, University of North Carolina School of Law, <i>The Gulf Oil Spill and Regulatory Dysfunction</i>

The Speaker Series brings a selection of speakers to the UF Law campus each spring for a seminar with certificate and LL.M. students, faculty and interested members of the public. To reserve a seat at any of these events, please contact Lena Hinson at elulp@law.ufl.edu. Additional speakers and dates rounding out the Spring 2011 program will be announced on our website at www.law.ufl.edu/elulp in the coming weeks.

The Environmental Speaker Series is made possible through the support of our Gold Sponsor, Hopping Green & Sams, P.A.

GreenLaw

GreenLaw, the College of Law's student-run environmental law organization, (formerly the Environmental and Land Use Law Society) has several exciting events planned for the upcoming spring semester, in addition to helping run and organize the Public Interest Environmental Conference. GreenLaw is working with the UF Office of Sustainability to install additional recycling bins on the law school campus, engage students and faculty in a Spring Law School Woods Clean Up event, and will screen the *Tar Creek* documentary as part of its Green Screen series. If you have any questions about these upcoming events, please contact GreenLaw President Jennilyn Thibault at jennilynft@aol.com.

Environmental & Land Use Law Section CLE Audio-CD Programs Available

The first link is to the CLE by Sponsor, Environmental & Land Use Law Section of the Florida Bar website where you can purchase the programs on-line. <https://www.floridabar.org/FBWEB/CLEReg.nsf/By%20Sponsor?Openview&Start=10&Expand=10#10>

The second link is a PDF of the audio/video list and order form that you can print and return with your payment. [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/33D29E3754E2FC1A85256B96006BFDBE/\\$FILE/AVTapesList.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/33D29E3754E2FC1A85256B96006BFDBE/$FILE/AVTapesList.pdf?OpenElement)

You may also visit the LegalSpan site to purchase additional CLE courses or CLEtoGo. <http://www.legalspan.com/TFB/catalog.asp?CategoryID=20060801-441572-825390&UGUID=T2008070783521934192526>

AMENDMENT 4

from page 1

67% to 33%.¹ On election night, Leslie Blackner, President of Hometown Democracy (the proponents of the measure) announced “we respect the voters’ judgment at the ballot box” but claimed that “voters were subjected to the full financial power of those special interests that are committed to maintaining a death grip on their ability to control the status quo of sprawl and overbuilding in our state.”² Ms. Blackner acknowledged that the vote marked “the end of the Hometown Democracy movement.”³

While Ms. Blackner’s grassroots statewide organization may have conceded defeat, it does not follow that all like-minded individuals agree. While the statewide movement was under development, a number of related local initiatives more quickly won approval. In 2007, Sarasota County voters approved an initiative to require a supermajority vote of County Commissioners to approve comprehensive plan amendments. Recently, a group of residents in Surfside filed an initiative petition calling for a referendum to

repeal the zoning code.⁴ And, most famously, in 2005, residents in the City of St. Pete Beach successfully pushed a charter amendment to require referendum approval of all comprehensive plan amendments.

There is no reason to assume that just because the official statewide movement is quieting that the issue is over. Many cities and charter counties reserve to the people the power to propose amendments to the governing charter. The aim may shift from the Florida Constitution to individual local government charters, but the goal of “direct democracy” in land use planning may still be achieved by initiative in many jurisdictions in Florida.

Experience of St. Pete Beach

In 2005, the City of St. Pete Beach adopted the following amendment to its City Charter.

Sec. 3.15: Voter approval required for approval of comprehensive land use plan or comprehensive land use plan amendment.

A comprehensive plan (“Plan”) or comprehensive plan amendment (“Plan Amendment”)(both as de-

fined in Florida Statutes Chapter 163) shall not be adopted by the City Commission until such proposed Plan or Plan Amendment is approved by the electors in a referendum as provided by Florida Statute Section 166.031 or by the City Charter or as otherwise provided by law. Elector approval shall not be required for any Plan or Plan Amendment that affects five or fewer parcels of land or as otherwise prohibited by Florida Statutes including but not limited to Florida Statutes Section 163.3167.

Thus, the City became the first Florida local government to require referendum approval of all comprehensive plan amendments. The wording of the measure is very similar to the wording of Amendment 4 as proposed. Also, similar to Amendment 4, the City charter amendment was proposed by citizen initiative. Citizens for Responsible Growth (“CRG”) formed to oppose a plan amendment adopted by the City in 2005 for redevelopment of major tourist lodging areas. In addition to repealing the adopted plan amendment, CRG was successful in proposing and gaining approval of the charter amendment by a majority of

City voters. What has followed is a seemingly endless stream of litigation. The City has been embroiled in a legal quagmire since 2005 that has cost hundreds of thousands of dollars in legal fees alone, not to mention administrative and political costs.

In 2007, another political action committee, Save Our Little Village (SOLV), filed an initiative petition with the City to place a comprehensive plan amendment (very similar to the one repealed in 2005) before the voters for approval. The City opposed the petition maintaining that a plan amendment adopted by initiative petition would violate the Growth Management Act (the Act). SOLV filed a mandamus action against the City to place the plan amendment on the ballot under the City's initiative petition provisions.⁵ The City settled with SOLV agreeing to place the amendment on the ballot and initiate the procedures of the Act, approving a written settlement agreement that set out the procedures to be followed. The SOLV settlement agreement is, to say the least, complicated. The Agreement was a valiant effort of attorneys for the City and SOLV to merge the City's initiative petition provisions, the charter requirement for voter approval of comprehensive plan amendments and the growth management act. The City placed the plan amendment on the ballot June 3, 2008, when it was approved by over 60 percent of the electorate. Despite the City's efforts to merge all the applicable requirements, a disaffected minority has instituted a tremendous amount of litigation.

For the purpose of this article, it is important to note both the number and types of challenges filed against the City. A small group (three named individuals) filed five separate challenges to the comprehensive plan amendment and related land development regulations approved by referendum on July 3, 2008. The first is a typical not "in compliance" challenge filed under the Growth Management Act.⁶ However, the plaintiffs in these cases also filed a challenge to the referenda alleging violations of section 101.161, and a nine-count declaratory judgment action challenging the City's actions on a variety of grounds. But for the City Charter provision requiring referendum approval of comprehensive plan amendments, the plaintiffs' remedies would have been limited to the administrative challenge and

some portions of the circuit court declaratory judgment action.

The St. Pete Beach case challenging the ballot title and summary for the referendum on the City's comprehensive plan amendment was a case of first impression. The circuit court was faced with determining whether a 75-word ballot summary for a 115-page comprehensive plan met the requirements of section 101.161 to clearly convey the chief purpose of the measure and not mislead the voters.⁷ The plaintiff raised a number of issues with the ballot summary, including that it "hid the ball" with respect to height increases in the City, misled the voters on issues of impact fees, green building standards and beach access requirements, and failed to inform of the legal affect referendum approval would have on the hearing and adoption procedures. The bench trial highlighted the complex nature of comprehensive planning and the difficulty of summarizing a plan amendment on a referendum ballot. In addition to arguing that specific provisions were included that were misleading, the plaintiff argued that the ballot misled the voters by omitting items in the plan amendment. For example, the plaintiff argued that the ballot was misleading because it didn't state that the Housing Element was being amended. Yet, the minor amendments to the housing element were only conforming to the impact fee and density bonus provisions established in the more detailed future land use element. Several times during discovery leading up to trial, the plaintiff was asked, but declined, to draft a ballot summary which would meet all the statutory requirements as he alleged.

At press time, the final trial in this matter was concluded, but no judgment had been rendered. If the court strikes down the ballot language, the City will have to either abandon its comprehensive plan amendment or conduct another election. To conduct another election, the City must craft a new amendment summary. And, given the political climate and the apparent well-funded opposition, there will likely be a challenge to that ballot summary. The City may be caught in a downward spiral where the only way out is to abandon the plan amendment.

In addition to the administrative challenge and ballot challenges, the City also faced a declaratory judgment action on several grounds.⁸ Two of

the grounds that are most important for local practitioners are (1) that the amendment was adopted by an initiative petition process that is invalid because it's preempted by the Growth Management Act or was applied in a manner that conflicts with the Act; and (2) the City is required to conduct a second election because the City amended the comprehensive plan amendment following the referendum in order to address Department of Community Affairs' ("DCA") comments. On the first issue, the circuit court issued summary judgment in favor of the City as to the adoption of comprehensive plan amendments through initiative petitions.⁹ This is significant because it gives us a preview of one of the unintended consequences of adoption of local referenda measures.

If developers have to go to the voters for approval of comprehensive plan amendments, what is to keep them from going directly to the voters, bypassing the elected officials? This is essentially what happened in St. Pete Beach. The property owners most interested in the City's redevelopment plans, brought an amendment forward by citizen initiative. The idea is not novel or unique. Almost every city in Florida has an initiative provision in its charter, and at least 16 charter counties contain such a provision. While many charter initiative provisions contain exceptions (such as no ordinances to adjust salary of commissioners or to propose rezonings), few if any prohibit a plan amendment by initiative. Now with the ruling in the St. Pete Beach case, there is at least some precedent that comprehensive plans proposed through initiative petition are not preempted by the Growth Management Act and do not conflict with the Act, at least in the approach reasoned by the City.

The second issue highlights the difficulty and cost of fitting the referendum requirement into the comprehensive plan amendment process. As discussed below, probably the best timing is to conduct the referendum after receipt of state agency comments. However, for an amendment proposed by initiative petition, other charter requirements must be considered. In the case of St. Pete Beach, the City Charter required an initiative petition be put before the voters within 90 days after certification of the petition if not separately adopted by the City Commission.¹⁰ The City resolved the

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myriad of procedural requirements by conducting a referendum, then holding the transmittal hearing on the proposed plan amendments and moving forward through the Growth Management Act procedures. Following receipt of the Department of Community Affairs' comment letter,¹¹ the City chose to strike two provisions from the plan amendment which had received negative comments from the DCA. The City maintained that the stricken provisions (a one-sentence footnote and a two-sentence workforce housing exemption) did not obviate the will of the voters in approving the plan amendment. However, the circuit court ruled that the plan amendment was not properly adopted pursuant to its Charter since it was changed following referendum approval.¹²

In short, the experience of St. Pete Beach with its own charter requirement for referendum approval of comprehensive plan amendments is instructive for land use law practitioners and others faced with a local referendum requirement. The key issues are the types of amendments requiring referendum approval, the timing of the referendum within the existing growth management process, and the impact of existing charter requirements.

Timing of the Referendum

Under Amendment 4, a referendum would have been required before a plan amendment was adopted, but after preparation by the local planning agency and consideration by the local governing body. Where exactly that would fit into the existing statutory adoption process was open to speculation.

Existing Process

Plan amendments are prepared, considered, reviewed and adopted pursuant to a series of steps that are set forth in Section 163.3184, F.S. The local government's designated "local planning agency" prepares the plan amendment, holds at least one public hearing, and recommends action to the governing body. §163.3174, F.S. A minimum of two public hearings are required of the local governing body, and are commonly referred to as the "transmittal hearing" and the "adoption hearing."

See §163.3184(15)(b), F.S. Small scale amendments and certain amendments applicable to urban infill and redevelopment areas require only a single hearing. §163.3187(c)(3), F.S. (specifying procedures for small scale amendments); §163.3184(18), F.S. (specifying procedure for certain urban infill and redevelopment area amendments).

At the transmittal hearing the governing body considers whether to transmit the proposed amendment to the DCA for review. If the governing body transmits the amendment, the DCA and other state agencies have a specified period of time in which to review the amendment and issue comments to the local government. In most cases the statute gives the local government 60 days after receiving the DCA's report containing its Objections, Recommendations and Comments ("ORC Report") to adopt the amendment, adopt the amendment with changes, or decide to not adopt the amendment. The local government then submits the adopted amendment to DCA, and DCA has a specified period of time to issue and publish a notice of intent to determine whether the amendment is "in compliance" with state law.

Third parties have a window of time to challenge the state's compliance decision. §163.3184(9), F.S. If the DCA finds the amendment not in compliance or if the amendment is challenged by a third party, an administrative proceeding is conducted which culminates in a final administrative order by either the DCA or the state Administrative Commission. See §§163.3184(10) & (11), F.S. The Administration Commission may specify remedial actions that will bring the amendment into compliance, or impose monetary sanctions upon the local government. §163.3184(11)(a), F.S. As noted previously, in most cases these DCA or third party challenges are resolved through negotiations that result in a compliance agreement. The plan amendment becomes effective upon issuance of a final order finding the plan amendment in compliance. §163.3189(2)(a), F.S.

How the Referendum Requirement May Fit Into the Plan Amendment Process

Where the referendum fits into the existing statutory framework impacts the expense for both the applicant and the local government. In St. Pete Beach, the charter provides simply that no plan amendment may be ad-

opted until it has been approved by the voters in a referendum. It provides no guidance as to when in the process it should occur. In the case of St. Pete Beach, the referendum was conducted prior to the first public hearing on the amendment, but after the local planning agency hearing. The decision to handle the referendum in that manner was subject to criticism that it violated the Growth Management Act. The court did not agree.¹³ The decision to conduct the referendum first does lead to difficulty for a body of elected officials. Once the constituents have voted, what latitude does an elected official have? Depending on the wording of the referendum requirement, holding the election first may lead to multiple follow-up elections if the amendment is changed as it progresses through the plan amendment process. Local government could get bogged down in a spiral of referenda.

There are of course other options to fit a referendum into the existing statutory structure:

1. **Prior to Transmittal:** The referendum could conceivably be held before the transmittal hearing if the governing body has at least one public meeting prior to that point at which it "considers" the proposed amendment. It could then transmit only those amendments approved by voters. This option would allow local governments and the state to avoid the expense of further review and preparation of an amendment only to have it subsequently rejected by voters. Unfortunately, this option would introduce constraints and uncertainties on the back end of the process. Local governments may be unable to modify the amendment in response to additional public comment or state review without having to hold another referendum.¹⁴ It's worth noting that plan amendments "approved" by voters are not protected or immune from state challenge or third party challenges under existing law. While it would be logical for local governments to hold referenda after the potential for any state and third party administrative challenges have passed, this is not permitted under the existing statutory and constitutional language. Currently, the 21-day window for administrative challenge is triggered only by the publication of the state's notice of intent regarding the amendment's compliance with state law, which under the current statutory

scheme occurs only after the local government has adopted the amendment and the DCA has had a period of time to review the adopted amendment. *See* §§163.3184(7) & (8), F.S.

2. After Transmittal and prior to receiving ORC Report: The transmittal hearing could qualify as “consideration by the governing body.” A local government may choose to schedule a referendum for some point following the transmittal hearing, with the intention of working closely with DCA in the time leading up to the referendum to ascertain whether the amendment contains any issues likely to generate objections from the state. This would allow the local government to pull the plug on the referendum as well as further state review if the agency raised any preliminary red flags. A process like this would be very ad hoc, however. Landowners and others who desire certainty and predictability in governmental processes would likely be uncomfortable with it, as would elections officers, who would likely require more predictability for purposes of printing ballots and readying polling locations.

3. After the ORC Report: If a local government waits to hold the referendum after receipt of the state’s ORC report, it will reduce the potential for multiple referenda on the same amendment. The local government could make changes to the amendment to satisfy any state agency concerns, schedule a public hearing to “consider” the revised amendment, and then hold the referendum. Assuming the local government makes any changes to the amendment necessary to keep the state from initiating a compliance proceeding, the only uncertainties remaining are whether the voters will approve the amendment and whether a third party will challenge the amendment after its adoption. It is unlikely the government will be able to hold the referendum and the adoption hearing within the existing statutory 60-day window for adopting the plan amendment following the ORC report. Although DCA has not enforced this 60-day deadline in the past, local governments should weigh the risk of potentially missing this deadline against the efficiencies and certainties of this alternative.

There are also special circumstances which arise when considering plan amendments that only require one public hearing, such as small scale amendments and those to design-

nate urban infill and redevelopment areas. If a local charter requires referendum approval, it cannot be applied to violate the single public hearing requirement.

Any community faced with an initiative to require referendum approval of comprehensive plan amendments will want to fully vet the options and consequences of the timing. An open discussion of the realistic potential ramifications will result in a well-informed electorate.

What Amendments are Subject to Referendum Approval

As presented to the voters, Amendment 4 contained no exemptions or exceptions. The plain language required a referendum on any and all comprehensive plan or amendment thereto: “before a local government may adopt a new comprehensive land use plan, or amendment to a comprehensive land use plan[.]” The breadth of the Amendment, intentional or otherwise, would have significantly effected comprehensive planning at the local level.

As originally adopted,¹⁵ the St. Pete Beach charter requirement also contained no exemptions or exceptions. It applied across the board to all plan amendments, required or optional.

The Act requires updates to the local comprehensive plan approximately every seven years following a substantial review known as the Evaluation and Appraisal Review, or EAR. The EAR is required periodically for local governments to determine how well the plan has accomplished the stated goals of its plan. The EAR is subject to review by the Department of Community Affairs and, once approved, the local government must adopt its EAR amendments to implement the report. These amendments are comprehensive in nature, usually touching on every element of the plan. If a local government fails to timely adopt its EAR amendments, it is prohibited from adopting future plan amendments and may be subject to sanctions affecting revenues. *See* §§163.3191(10) & (11) and 163.3184(11), F.S.

The Act requires local governments to amend the Capital Improvement Element of their plans each year to adopt or update a five-year schedule of capital improvements for water, sewer, roads and other infrastructure. As of December, 2011, all local governments must adopt a “financially feasible” schedule of capital improve-

ments. Failure to do so may subject the local government to sanctions. *See* §§163.3177(3)(b) & (c), F.S.

The Act further requires local governments to implement school concurrency by amending their plans to annually incorporate the school district’s five-year work program.

In 2009, the Legislature adopted Senate Bill 360¹⁶ automatically designating many urban areas as Dense Urban Land Areas, qualifying them as Transportation Concurrency Exception Areas (TCEAs) or allowing them to adopt a TCEA in an expedited manner. Significantly, the bill requires affected local governments to amend their comprehensive plans within two years to replace transportation concurrency with transportation mobility requirements.

Requiring local referendum approval for these required amendments could stonewall local infrastructure planning, thwart school planning and subject local governments to sanctions, including loss of state-shared revenues, not based on a vote of the elected officials, but on the outcome of a referendum of the people.

Requiring referendum approval of other amendments also creates problems. Under the Act, “small scale amendments” (defined in the Act) are exempt from Department review (under most circumstances) and are subject to a streamlined adoption process. A small scale amendment may involve property owned by a single property owner and may be less than five acres in size. Any referendum requirement for approval of plan amendments involving five or fewer acres is prohibited by state law. *See* §163.3167(12), F.S.

Finally, the Act contains specific provisions for “remedial amendments,” or amendments adopted to implement a settlement agreement with the Department. Under the current structure, when the Department finds an adopted amendment not “in compliance” as defined in the Act, the finding is automatically forwarded to the Division of Administrative Hearings for an administrative hearing. The majority of the cases settle with the local government agreeing to adopt specific amendments to their plan to remedy the compliance decision. If “remedial” amendments are subject to local referendum requirement, the status of settlement negotiations will be thrown into doubt. Litigating a “not in compliance” challenge to a plan

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amendment already approved by the residents may become more attractive than negotiating a settlement with the state or third parties, only to risk rejection of the settlement in a referendum.

Legal Requirements for Referenda

Finally, what are the requirements for a referendum on local comprehensive plan amendments? The requirements of general law must be met. The general law requirements for referenda are found in Section 101.161(1), Florida Statutes, as follows:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot....The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

In short, Section 101.161(1) “requires that the ballot summary for a public measure ‘state in clear and unambiguous language the chief purpose of the measure.’” *Smith v. American Airlines Inc.*, 606 So.2d 618, 620 (Fla. 1992) (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla.1982)). The following synthesis of the caselaw interpreting Section 101.161 will be helpful to all land use practitioners and local attorneys.

In the event of a challenge to a ballot summary, the Florida Supreme Court has stated that, fundamentally, the statute requires that the court consider “(1) whether the ballot title and summary, in clear and unambiguous language, fairly

inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public.” *Advisory Op. to Attorney Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1236 (Fla. 2006). The chief purpose is the legal effect of the measure ascertained from its text. *Armstrong v. Harris*, 773 So.2d 7, 18 (Fla. 2000).

The 75-word limit under general law will prove a difficult challenge for most local government comprehensive plan amendments. However, the Court has recognized the ballot summary need not contain every detail of a measure, and that the voter has the responsibility to inform him or herself with the measure prior to voting. *Advisory Op. to the Attorney Gen. Re Standards for Establishing Legislative Boundaries*, 2 So.2d 175, 185 (Fla. 2009). The Court has also reasoned that a summary which uses different but synonymous terms than the lengthier ordinance does not invalidate the measure. *Id.* at 185. And that using generally understood terms in the summary instead of technical or less common terminology used in the ordinance does not invalidate the ballot. *Id.* at 187.

In summary, almost any Florida jurisdiction may be faced with a local version of “Hometown Democracy” through initiative petition. The debate over such an initiative should address the timing of the referendum, the amendments subject to referendum, as well as a review of the local government charter requirements for proposing ordinances by initiative. Based upon the experience of St. Pete Beach, any jurisdiction requiring voter approval of comprehensive plan amendments should strictly limit local initiatives to propose such amendments.

Endnotes:

¹ Florida Department of State, Division of Elections

² Statement of Lesley Blacker, News 4, November 2, 2010.

³ *Id.*

⁴ “Surfside Officials Say Petition Could Throw Town into Chaos,” *Miami Herald*, Community News Network, September 17, 2010.

⁵ §§7.02 and 7.04, St. Pete Beach City Charter.

⁶ *Pyle v. St. Pete Beach and SOLV*, Div. Admin. Hrgs. Case No. 08-4772GM, in which the City prevailed. The Department of Community Affairs’ final order was appealed to the First District Court of Appeal by the Petitioner below, where the Order was approved, *per curiam*. See *Pyle v. Dept. Comm. Affs. et. al*, 31 So.3d 180 (Fla. 1st DCA, 2010).

⁷ *Pyle v. City of St. Pete Beach, et al.*, Sixth Judicial Circuit in and for Pinellas County, Florida, Case Nos. 08-8129 and 08-8642.

⁸ *Kadoura v. St. Pete Beach, et al*, Sixth Judicial Circuit in and for Pinellas County, Case No. 08-12498-CI-19.

⁹ Order on Motion for Summary Judgment; *Kadoura v. St. Pete Beach, et al*, Sixth Judicial Circuit in and for Pinellas County, Case No. 08-12498-CI-19 (April 21, 2010).

¹⁰ §7.04(e), St. Pete Beach City Charter (2008).

¹¹ The City is under the pilot program plan amendment process pursuant to Section 163.32465, Fla. Stat., and the DCA does not issue an ORC report on the City’s amendments, but rather a comment and recommendations letter.

¹² §3.15, St. Pete Beach City Charter (2008).

¹³ See Order on Motion for Summary Judgment; *Kadoura v. St. Pete Beach, et al*, Sixth Judicial Circuit in and for Pinellas County, Case No. 08-12498-CI-19 (April 21, 2010).

¹⁴ The issue of whether a local government may make changes to an amendment following a referendum was raised in the case of *Kadoura v. St. Pete Beach, et al.*, discussed *infra*.

¹⁵ The charter was amended in 2009 to narrow application of the referendum requirement to amendments “changing density or intensity of uses or height of structures, or which add or change a land use category.” §3.18, City of St. Pete Beach Charter (2009).

¹⁶ The bill was challenged in circuit court and found to violate the “unfunded mandate” provision of the Florida Constitution, Article VII, Section 18(a). See Final Summary Judgment, *City of Weston, et.al, v. Charlie Crist, et.al*, Case No. 2009-CA-2639, 2nd Judicial Circuit in and for Leon County (August 26, 2010); *reh’ng den.*, September 24, 2010. The circuit court ruling has been appealed.