



Special Assessments for Flood Elevation (SAFE): Using the PACE Financing Mechanism as a Model for Funding Structure Elevation to Avoid Flood Risk

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ABSTRACT

Elevating structures has been identified as one strategy to reduce the risk of floods posed to Florida communities. Elevating structures also offers the opportunity to reduce flood insurance premiums under the National Flood Insurance Program. This article identifies the financing vehicle created by the Florida

Property Assessed Clean Energy (PACE) program as a possible means to fund improvements to structures that could be adapted to fund building elevation. Such a financing model, coined Special Assessments for Flood Elevation (SAFE) would make capital available to mitigate flood risk through structure elevation. This article's analysis discusses many

aspects of the potential SAFE model including whether Florida local governments have the authority to implement such programs and some of the issues that PACE programs have raised.

I. INTRODUCTION

Because of high risk and the unpredictable nature of flooding, private

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From the Chair

by Kelly Samek

We are midway through the first year of ELULS's journey to revamp its CLE calendar. At the end of January, the CLE offering "What You Need to Know About Current Environmental and Land Use Law Issues" signaled our transition into this brave new world. In the future, this winter event will be where ELULS provides its main substantive environmental and land use law programming in a live format. It will be complemented by a second program featuring more procedural content—our very popular General Counsel's Roundtable, Administrative Update, and Legislative Update—during the early summer. We've just begun planning the first

iteration of this program, and I hope you will take note and join us this June in Boca Raton at The Florida Bar Annual Convention for its launch. Full details on the date and time will be posted at eluls.org and on our email distribution lists as soon as they become available this spring.

From initial appearances, it looks as though we can call "What You Need to Know About Current Environmental and Land Use Law Issues" a success. The venue was well-suited to the size of our group, offered convenient access, and proved to be an affordable option for a live program. Cost control is one of the challenges our program schedule revamp is intended to address, so this

is very good news. If you weren't able to attend, the recorded program is available for purchase on The Florida Bar [website](http://www.floridabar.org). Aftermarket sales of our

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CHAIR'S MESSAGE

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CLE courses are an essential component for ensuring Section financial health as well as our continued ability to offer such programs.

If this latest program doesn't suit your needs, there is likely an offering in our catalog that does. Right now, in addition to the most recent programs co-sponsored with other sections (such as the Agriculture Law Update and Emerging Trends on the Development Front for Environmental, Land Use and Real Estate Practitioners), you can still access the 2013 and 2014 editions of the ELULS Annual Update and Ethical Challenges for the Environmental Lawyer and

Consultant. There are also shorter excerpts of the Annual Updates focusing on particular themes, including Large Scale Restoration.

In other news, I participated in the most recent Council of Sections meeting in January. Each of the Section representatives in attendance were asked to report on two things their Section does well and two areas that could use improvement. On behalf of ELULS, I reported that our challenges include two issues I've alluded to in the last few editions of this column—profitability of our CLEs and member retention. But I was proud to be able to talk about our successes.

From the pool of available options, I first chose to talk about the diversity of practice areas represented by our membership and reflected in our Section services. Whether you are a

private practitioner or a government attorney, whether you fill your days with zoning hearings or rule writing, whether you are in-house with a development corporation or consult for land trusts, ELULS offers a place for you. Following onto this, I spoke about the variety of services ELULS provides its members. For your once-a-year dues, you have full access to our multi-volume treatise, can join several email distribution lists, and can claim CLE credit for attending our free webinars. Those dues also support ELULS's ability to provide this quarterly newsletter, our for-fee CLEs, our website, and numerous other opportunities. Listening to other Section leaders share their reports, I realized just how enviable ELULS's points of excellence are. I hope you feel the same way.



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

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January 2015 Florida Case Law Update

by Gary K. Hunter, Jr., Hopping Green & Sams

Harris Act claim was not subject to dismissal where such claim was timely and properly filed and was a valid “as applied” challenge; claims for inverse condemnation are not afforded the same tolling period privilege as Harris Act claims. *Hussey v. Collier Cnty.* 2014 WL 5900018 (Fla. 2d DCA November 14, 2014).

This case stems from years of litigation regarding an amendment to the Collier County Growth Management Plan, referred to as the “Rural Fringe Amendment,” which resulted in the Property Owner’s land being designated as “Sending Lands.” The Property Owners challenged the Sending Lands designation in a petition for formal administrative hearing with the Department of Community Affairs. The administrative law judge issued a recommended order declaring the County’s actions as being in compliance with state and local law, which was then approved both by the Department of Community Affairs and the First District Court of Appeal. The Property Owners filed an amended notice giving the County notice that they would seek compensation under the Harris Act on July 24, 2004, and then filed suit for both the Harris Act claim and the Inverse Condemnation claim on September 11, 2008. The Circuit court dismissed both causes of action, triggering this appeal to the Second DCA.

On review, the Second DCA confined its opinion to whether the causes of action alleged were timely, complying with the statute of limitations and pre-suit notices, and if the complaint stated causes of actions under which the plaintiffs could obtain relief. The Second DCA determined that the Harris Act claim was timely filed as being within the statute of limitations of F.S. § 95.11(3)(f) and within the tolling period afforded to Harris Act claims. Section 70.001(11), *Florida Statutes*, allows for a tolling period for Harris Act claims if an owner seeks relief from governmental action through administrative or judicial proceedings, tolling the statute of limitations until the conclusion of

such proceedings. The Property Owner’s statute of limitations commenced on September 15, 2004, the date the First DCA affirmed the DOAH determination that the County Amendment was proper. Thus, the Property Owner’s September 11, 2008 lawsuit was timely filed within the statute of limitations and the tolling period for Harris Act Claims. The Court further held that the Property Owners honored the statutory mandate that no suit can be filed until 180 days after the government entity is given notice of the Harris Act Claim, which the Property Owners complied with by serving notice on July 21, 2004, and did not file their lawsuit until September 11, 2008.

The Court then addressed the First DCA’s holding that the Harris Act authorized only “as-applied” challenges to government actions. The Court held that the Rural Fringe Amendment’s land use plan was applied to the Property Owner’s land by its very terms, or “as-applied,” and thus was a proper Harris Act Claim. Regarding the Inverse Condemnation Claim, the Second DCA held the First DCA’s decision to dismiss the inverse condemnation claim on the basis that it was not an “as-applied” designation was incorrect. Claims for inverse condemnation receive the same statute of limitations period of four years as do Harris Act Claims; however, the tolling period for Harris Act Claims does not apply to claims for inverse condemnation. Rather, the statute of limitations for inverse condemnation claims begins when the governmental entity has made a final decision about the permissible use of the property, which was on July 22, 2003 when DOAH entered its final order on the matter. Thus, when the Property Owners filed their action for inverse condemnation on September 15, 2006, such an action was barred by the statute of limitations.

DEP’s statutory interpretation of F.S. 161.053 (11)(a)-(b) was proper as to allow for the subsections to be read in harmony, unexclusive

of one another, to allow for an exception to the permit requirement for activities deemed “not to cause a measurable interference.” *Pope v. Grace*, 151 So.3d 523 (Fla. 1st DCA 2014).

The Property Owners of a waterfront property appealed the Florida Department of Environmental Protection’s final order determining that repairs to the foundation of a dune walkover structure did not require a permit. The dune walkover structure at issue, “Milliken’s Replat,” was built between the Property Owners’ beachfront lots. The dune walkover was subject to a Road Maintenance Agreement, which required the Property Owners to maintain the Plat “in a condition so as to make it free and passable in perpetuity.” On recommendation by the DEP that a major portion of the walkover needed to be repaired due to the age of its wood and hardware, the Property Owners applied for a permit to repair the walkover. Again, based on DEP’s recommendation that the dune walkover might qualify for an exemption, the Property Owners made a request for an exemption determination, which was granted by DEP. In its amended exemption notice, DEP found that the proposed work satisfies the exemption requirements of Section 161.053(11)(b), *Florida Statutes*.

Repairs on the dune walkway commenced prior to the Property Owner’s administrative hearing on the matter. The ALJ concluded that subsection 11(a) was the relevant exemption and thereby exclusive, but further determined section 11(a) to be in inapplicable because the language excludes repairs to an existing foundation of an “existing structure,” and conclusively found that the Property Owners were not entitled to an exemption. The DEP rejected the ALJ’s recommended order, finding that the exemption in subsection 11(b) is the alternative to 11(a), and could apply to any activity that does not “cause a measurable interference with the natural functioning of the coastal system.”

The First DCA analyzed the statutory framework of F.S. 161.053(11)

continued...

CASE LAW UPDATE

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(a) and (b) to determine if subsection 11(a) sets forth an exclusive exemption, or if the neighboring exemption in 11(b) is also available. The First DCA concluded that the two exemptions can coexist and can be read harmoniously together to allow for repairs to existing structures as generally permissible without a permit, but that a permit is required for repairs to an existing structure unless “no measurable interference with the natural functioning of the coastal system” would result. The Court further found DEP’s interpretation of section 161.053(11) as reasonable, finding that alterations or construction activities that do not cause measurable environmental harm falls under the exemption to the permit requirement under 11(b). In affirming DEP’s interpretation, the Court emphasized the high level of deference given to DEP’s finding because it is the agency charged with enforcing the statute.

Amendment to City of St. Pete Beach’s Comprehensive Plan, Ordinance 2011-19, was void due to failure to publish notice pursuant to the notice provisions of F.S. 166.041(3)(c) and the city’s subsequent violation of the Sunshine Law. *Anderson v. City of St. Pete Beach*, 2014 WL 5151321 (Fla. 2d DCA October 15, 2014).

The City of St. Pete Beach enacted an amendment to its comprehensive plan, Ordinance 2011-19, on June 28, 2011. This dispute arises from Anderson’s challenge to the amendment as void due to failure to publish notice, and subsequently that the City violated the Sunshine Law. The trial court rejected the challenge to the amendment, and granted summary judgment to the City on Anderson’s Sunshine Law claim. On appeal, Anderson argued that the trial court erred in failing to find section 163.32466 to be a special law enacted without the proper notice required by Article III

of the Florida Constitution. Anderson also alleged that the trial court erred in rejecting his challenge to the amendment because of the City’s failure to publish notice, and further erred when the trial court entered summary judgment for the City on Anderson’s Sunshine Law claim.

The Second DCA found Ordinance 2011-19 to be void because the City did not comply with the notice requirements of section 166.041, *Florida Statutes*, when the Ordinance was adopted. Section 166.041 requires the governing body to give proper public notice and provide for two advertised public hearings for ordinances that change the actual list of prohibited uses within a zoning category or map. The Second DCA acknowledged that courts have consistently held that zoning ordinances which are not strictly enacted pursuant to the notice provisions outlined above are null and void. Accordingly, the Second DCA concluded that the Ordinance was null and void due to the City’s failure to comply with the notice requirements.

Regarding Anderson’s Sunshine Law claim, Anderson specifically challenged the City’s use of seven “shade meetings” which were conducted to devise a plan that included the modification or repeal of certain provisions of the City’s comprehensive plan. Section 268.011(8) allows for an exemption to the Sunshine Law for meetings between a public body and its attorney, “to discuss pending litigation to which the entity is presently a party before a court or administrative agency,” provided that certain conditions are met. The Second DCA concluded that the City’s meetings contained discussions to the “comp plan strategy,” finding that while although some discussions at the meetings did in fact involve costs associated with the pending litigation, the meetings’ main goal was to readopt the comprehensive plan amendment. The Court held that because the City’s discussions exceeded the scope of the exemption for “shade meetings,” the trial court erred in entering summary judgment for the City on Anderson’s Sunshine Law claim.



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The online form can be found on the web site under “Member Profile.”



On Appeal

by Larry Sellers, Holland & Knight

Note: Status of cases is as of February 18, 2015. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Wakulla Fishman Ass'n, Inc., et al. v. Florida Fish and Wildlife Conservation Commission, Case No. SC 14-1550. Petition for review of 1st DCA decision reversing trial court's final judgment enjoining any and all further enforcement of the net ban amendment as set forth in Article X, §16, the Commission's authority to adopt rules to regulate marine life with respect to the use of a "gill net" or an "entangling net" pursuant to Article IV §9, and Rules 68B-4.002, 68B-4.0081 and 68B-39.0048. 39 Fla. L. Weekly B1407a. Status: Petition for review denied February 12, 2015.

DOT v. Clipper Bay Investments, LLC, Case No. SC 13-775. Petition for review of 1st DCA decision determining that the Marketable Record Title Act's exception for easements in right-of-ways is applicable to land held as a fee estate for the purpose of a right-of-way, so long as competent substantial evidence establishes the land is held for such a purpose. The court reversed the trial court's award of a portion of the land north of the I-10 fence line and remanded with instruction to quiet title to all of the land north of the I-10 fence line in Clipper Bay, except for the portion used by Santa Rosa County. 38 Fla. L. Weekly D271a (Fla. 1st DCA 2013). Status: Oral argument held on April 8, 2014. Supplemental briefs requested and filed.

FIRST DCA

Save the Homosassa River, et al. vs. DEP, Case No. 1D14-5872. Appeal from final order of the Department of Environmental Protection rendered pursuant to Section 373.114(2)(a), Florida Statutes, concluding that Florida Administrative Code Rules 40D-8.041(16) and 40D-8.041(17), which establish minimum flows for the Chassahowitzka and Homosassa River Systems, are consistent with the Florida Water Resource Implementation Rule (Fla. Admin. Code Ch. 62-40). DEP Case No. 13-0914 (final order entered November 25, 2014). Status: Notice of appeal filed December 24, 2014.

Capital City Bank v. DEP, Case No. 1D14-4652. Appeal from final order of the Department of Environmental Protection approving the county's application for after-the-fact CCCL permit, authorizing the county to construct a rock revetment on Alligator Drive in Franklin County. DEP Case No. 13-1210, DOAH Case No. 14-0517 (final order entered September 8, 2014). Status: Notice of appeal filed October 8, 2014.

Guerrero, et al. v. Spinrad, et al., Case No. 1D14-4496. Appeal from a final order of the Department of Environmental Protection denying the Guerreros' request for attorney fees, costs and sanctions under Sections 120.569(2)(e) and 120.595, Florida Statutes. DEP Case No. 13-0858, DOAH Case No. 13-2254 (final order entered September 8, 2014). Status: Notice of appeal filed September 29, 2014.

Guerrero, et al. v. Spinrad, et al., Case No. 1D14-5465. Appeal from final order by Administrative Law Judge denying request for attorney fees under Sections 120.595(1), 120.569(2)(e), and 57.105(5), Florida Statutes. DOAH Case No. 14-4860F (final order entered October 31, 2014). Status: Notice of appeal filed December 1, 2014.

Ahler, et al. v. Scott, et al., Case No. 1D14-3243. Appeal from final judgment denying petition for writ of mandamus seeking to compel defendants to require Georgia-Pacific to obtain authorization for the use of mixing zones associated with its discharge to the lower St. John's River. Status: Notice of appeal Filed July 18, 2014; request for oral argument denied on February 10, 2015.

SECOND DCA

Florida Audubon Society v. United States Sugar Corporation, Sugar Farms Co-Op and SFWMD, Case No. 2D14-2328. Appeal from final order renewing Everglades works of the district permits for the United States Sugar Corporation, Sugar Farms Co-Op and Sugar Cane Growers Cooperative of Florida. Status: Notice of appeal filed May 15, 2014; oral argument set for March 10, 2015.

THIRD DCA

Miami-Dade County, et al. v. Florida Power & Light Co., et al., Case No.:

3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Notice of Appeal filed June 16, 2014.

FOURTH DCA

Kijewski v. Northern Palm Beach County Improvement District, et al., Case No. 4D14-3402. Appeal from a Final Order of the South Florida Water Management District dismissing "Petitioners' Response to District's Order Dismissing Amended Petition for Administrative Hearing" and Denying Motion to Transfer Case to Administrative Law Judge" The petitioners requested a hearing to challenge the modification of a previously issued conceptual permit and construction authorization for a stormwater management system for part of the project. The petition for administrative hearing was dismissed twice, with leave to amend, for failure to satisfy the requirements of the Administrative Procedure Act. The petitioners responded with a "Response to District's Order Dismissing Amended Petition for Administrative Hearing" and Request to Transfer Case to the Division of Administrative Hearings. The District's final order dismisses this document with prejudice because it failed to meet the requirements of the Florida Administrative Code; the document was not filed with the clerk and was not timely; and the petitioners failed to allege how their substantial interests will be affected by a modification to the permit. SFWMD Case No. 2014-072-DAO-ERP (final order entered August 11, 2014). Status: Notice of appeal filed on September 10, 2014; all briefs have been filed.

Haskett v. Rosati and DEP, Case No. 4D13-4094. Appeal from final order of the Department of Environmental Protection determining that the Respondent Rosati qualifies for the Noticed General Permit, and granting the Letter of Consent to use sovereignty submerged lands, notwithstanding a contrary recommendation by the ALJ. DEP Case No. 13-0040. DOAH 13-0465 (final order entered October 29, 2013). Status: Affirmed *per curiam* on February 12, 2015.

Law School Liaisons

Spring 2015 Update from the Florida State University College of Law

by David Markell, Associate Dean for Environmental Programs and Steven M. Goldstein Professor

This column highlights several of the environmental, energy, and land use programs the College of Law is hosting this spring. We hope Section members will join us for one or more of them. The column also features updates on student and alumni accomplishments.

Spring 2015 Events

Enrichment Lunch with Kelly Samek

Kelly Samek (Environmental LL.M. 2012), Gulf Restoration Coordinator of the Florida Fish and Wildlife Conservation Commission, updated the College of Law's Environmental Certificate students on ongoing efforts to restore the Gulf of Mexico and assist communities affected by the 2010 BP oil spill.



Spring 2015 Distinguished Lecture

Katrina Wyman, Sarah Herring Sorin Professor of Law, New York University School of Law, will deliver the College of Law's Spring 2015 *Distinguished Lecture* on February 25 from 3:30 p.m.-5:00 p.m., followed by a reception in the Rotunda. Professor Wyman will be presenting her paper entitled "Environmental Tragedies Are Not Inevitable: The Recovery in U.S. Fisheries." CLE credit approval is pending. For more information, visit: http://www.law.fsu.edu/academic_programs/environmental/events.html.

Spring 2015 Environmental Forum

The Spring 2015 *Environmental Forum*, entitled "What Would Milton Friedman Do About Climate Change?," will provide different perspectives on reducing emissions of greenhouse gases. The *Forum* is scheduled for Wednesday, March 25 from 3:15 p.m.-5:00 p.m. and will be followed by a reception in the Rotunda. The *Forum* will include former Congressman **Bob Inglis** of Energy & Enterprise Initiative (E&EI), Professor **Nathan Richardson**, University of South Carolina School of Law, and Dr. **Jeff Chanton**, Professor of Oceanography at Florida State University. Professor **Shi-Ling Hsu** will moderate the *Forum*. CLE credit approval is pending. For more information visit: http://www.law.fsu.edu/academic_programs/environmental/events.html.

Environmental Certificate and Environmental LL.M. Enrichment Series features

The Environmental Certificate and Environmental LL.M. Enrichments Series welcomes four additional distinguished speakers this spring: **Dave Owen**, Associate Dean for Research and Professor of Law, University of Maine School of Law (February 11); **Katie Miller**, Research Librarian, Florida State University College of Law (March 5); **Jeff Wood**, Partner, Balch and Bingham (April 2); and **Katrina Kuh**, Associate Professor of Law and Associate Dean for Intellectual Life, Hofstra University, Maurice A. Deane School of Law (April 8).



Wyman



Owen



Kuh



Wood

Recent Student Achievements

Chris Hastings' student note, entitled *Implementing a Carbon Tax in Florida Under the Clean Power Plan: Policy Considerations*, was recently selected for publication in volume 42 of Florida State University Law Review. Another student note that Chris Hastings wrote, entitled *TSCA Reform and the Need to Preserve State Chemical Safety Laws*, was recently selected for publication in volume 27 of Villanova Environmental Law Journal.

Valerie Little earned 1st place in the AWMA (Air & Waste Management Association) Student Challenge. Several College of Law students have Spring 2015 Externships involving Environmental Law, including: **David Rehr**, State of Florida Division of Administrative Hearings; **Valerie Little**, State of Florida Division of Administrative Hearings; **Chase Den Beste**, Department of Transportation; **Kelly Baker**, NextEra Energy; **Kelsey Watry**, Public Service Commission; **Megan Zbikowski**, Office of the Attorney General-Administrative Law; **Joshua Pratt**, Office of the Attorney General-State Programs.

Law School Liaisons, continued...

LAW SCHOOL LIAISONS

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Recent Alumni Accomplishments

- **Jacob T. Cremer** of Smolker, Bartlett, Schlosser, Loeb & Hinds, P.A., in Tampa was recognized by The Florida State University Alumni Association as one of its “Thirty Under 30,” as well as by the Tampa Bay Business Journal as an “Up and Comer.”

- **Ahjond Garmestani’s** book, *Social-Ecological Resilience and Law*, was published by Columbia University Press.

- **Steven Geller** has been selected for the 2014 *Super Lawyers Business Edition*. The edition can be viewed at <http://digital.superlawyers/superlawyers/usbe14#pg1>.

- **Lonnie Groot** participated in the Seminole County School District’s “Teach In.” Professionals attended schools throughout the County to share their insights about careers and educational objectives. Groot serves as City Attorney for the City of Daytona Beach Shores and Assistant City Attorney for the City of Sanford and the City of Oviedo.

- **Anne Longman** has been appointed to the Board of Governors of the Leon County Research and

Development Authority, which oversees Innovation Park in partnership with FSU, FAMU, and TCC as a hub for economic development, scientific research and commercial development in Leon County. More information can be found at <http://lcrda.org/>.

- **Cari Roth** has joined Dean Mead as Of Counsel in the Government Relations, Lobbying, and Administrative Law practice group.

- **Jonathan Steverson** has been appointed Secretary of the Florida Department of Environmental Protection.

- **Craig Varn** was appointed to serve as DEP General Counsel and Special Counsel on Water Policy and Legal Affairs.

- **Jeff Wood** was recently admitted to the Bar of the District of Columbia. He was quoted in *Bloomberg News* and the *Atlanta Business Chronicle* about the impact of the recent federal elections on U.S. energy and environmental policy. Jeff is currently a partner in the Washington DC office of Balch & Bingham LLP and can be reached at jhwood@balch.com.



Roth



Varn



Longman



Groot



Wood

UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program, University of Florida Levin College of Law

February Offers Diverse Environmental Activities

UF law offered a wide range of activities during February, highlighted by the 21st annual Public Interest Environmental Conference, held Feb. 12-14.

The PIEC focused on “Powering the Planet: Energy for Today and Tomorrow,” looking at how energy is made and used and how that production and use affects humans and the environment. In just a decade, America has reduced its dependence on foreign oil and increased its production



of alternative energy sources. Today, America produces as much solar power every three weeks as the country did in 2008.

The Public Interest Environmental Conference provides a forum for an exchange of ideas among private, government, and public interest lawyers; students and academics; environmental professionals, advocates and activists, and the interested public. Keynote speakers for this year’s conference included Janice Schneider, assistant secretary for land and minerals management at the U.S. Department of Interior, and Jenna Nicholas, co-founder and CEO of Phoenix Global Impact, a consulting firm that specializes in impact

Law School Liaisons, continued...

investing, social enterprise, and strategic philanthropy that promotes a more sustainable and just society.

The conference included multiple panel discussions, a workshop sponsored by The Florida Bar, and training opportunities for both attorneys and those outside the legal field. Panel discussions concerned topics including new developments in federal and Florida energy law and policy, offshore hydrokinetic energy, fracking, green building, the Environmental Protection Agency's proposed greenhouse gas regulations, and Florida's solar energy policy.

UF Law student and PIEC co-chair Adrian Mahoney said the PIEC is one of the largest student-run conferences in the nation. "The conference is an amazing opportunity for UF students to interact with leaders in the legal and policy fields relating to the important topic of energy," he said.

Wolf Family Lecture Examines Open Space

"Open Space in Urban Areas: Might There Be Too Much of a Good Thing?" was the topic of the annual Wolf Family Lecture, also held in February. The guest speaker was Robert C. Ellickson, the Walter E. Meyer Professor of Property and Urban Law at Yale Law School.

The Wolf Family Lecture Series was endowed by a gift from UF Law Professor Michael Allan Wolf, who holds the Richard E. Nelson Chair in Local Government Law, and his wife, Betty.

Past scholars who have delivered the Wolf Family Lecture in the American Law of Real Property include Thomas W. Merrill, Charles Evans Hughes Professor of Law at Columbia Law School; Gregory S. Alexander, A. Robert Noll Professor of Law at Cornell Law School; Lee Fennell, Max Pam Professor of Law at the University of Chicago; Joseph William Singer, Bussey Professor of Law at the Harvard Law School; Vicki L. Been, Boxer Family Professor of Law at New York University School of

Law; Carol M. Rose, Gordon Bradford Tweedy Professor Emeritus of Law at Yale Law School, and Lohse Chair in Water and Natural Resources at the James E. Rogers College of Law, University of Arizona; and Daniel A. Farber, Sho Sato Professor of Law at the University of California at Berkeley Law School.

Eminent Domain Topic of Nelson Symposium

The topic of the 14th annual Richard E. Nelson Symposium was the first decade of eminent domain reform after the U.S. Supreme Court's controversial decision in *Kelo v. City of New London* (2005), a controversial 5-4 ruling that considered economic redevelopment a valid "public use" under the Fifth Amendment.

The stridently negative reaction to *Kelo* in the media, in statehouses, and in the courts was certainly unanticipated after the near silence that followed earlier high court public use rulings in 1954 (*Berman v. Parker*, concerning urban renewal and 1984 (*Hawaii Housing Authority v. Midkiff*, concerning a land redistribution scheme). What exactly has happened since the smoke cleared on June 23, 2005, is a matter of interest and serious concern not only to those who practice state and local government, eminent domain, real property, land use, economic development, and constitutional law, but also to elected and appointed officials and the public at large.

An outstanding group of national and state experts considered the changing landscape of public and eminent domain ten years after the jurisprudential tremors first registered by the *Kelo* court. Florida is the perfect setting for this program, as the changes to statutory and constitutional law in the wake of *Kelo* have perhaps been the most extensive among the more than 40 states to modify their laws since 2005.

Presenters included Scott G. Bullcock, senior attorney, Institute for Justice; Marc Edelman, associate professor of law, Zicklin School of Business, Baruch College; Robert C. Hockett, Edward Cornell Professor of Law, Cornell University Law School; Alexandra B. Klass, professor of law, University of Minnesota Law School; Roy K. Payne, Assistant City Attorney, city of Orlando; Ilya Somin,

professor of law, George Mason University School of Law; Amanda L. Hudson and Bradley S. Tennant, J.D. candidates, University of Florida Levin College of Law; and Michael Allan Wolf, Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law.

Symposium topics include the legal responses to *Kelo*, the perspective from Susette Kelo's counsel, and the use of eminent domain to take sports stadiums and arenas, underwater mortgages, and energy transmission lines.

This is the 14th symposium honoring Richard E. Nelson (who served with distinction as Sarasota County attorney for 30 years) and Jane Nelson, two loyal UF alumni who gave more than \$1 million to establish the Richard E. Nelson Chair in Local Government Law, which sponsors the annual event.

ELULS Eco Run Held Jan. 31

The Environmental & Land Use Law Society (ELULS) held its annual Eco Run on Jan. 31. The Eco Run is the law school's annual 5K, sponsored by ELULS as a fundraiser for the student-run Public Interest Environmental Conference.

Study Law in Costa Rica this summer

The UF Law Costa Rica summer program will be held May 31 – June 30, 2015. The program features practicums and a field-based approach. It's experiential learning at its best, in Costa Rica.

The UF Law Costa Rica Program partners with the Organization for Tropical Studies (OTS) and the UF Center for Latin American Studies Tropical Conservation and Development Program, building interdisciplinary bridges between law, policy and the social and natural science of conservation and sustainable development. Students develop their knowledge and skills through an integrated suite of courses that coalesce around efforts to find practical, policy-relevant solutions to issues of immediate importance to the conservation and sustainable development community. Each week the program will embark on extended visits to OTS field stations and their Neotropical context – rivers, wetlands, forests (wet, dry and cloud), beaches and mountains.

Law School Liaisons continued....

LAW SCHOOL LIAISONS

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Students will also visit indigenous communities, meet with farmers and land owners, and encounter unique sustainable development projects – all grist for collaborative problem-solving approaches. Interested students can contact Clinic Director Tom Ankersen at Ankersen@law.ufl.edu.

Spring Break field course focuses on South Florida and Bahamas

UF Law will offer a Sustainable Development Field Course during spring break, focusing on South Florida and the Bahamas Ecoregion.

Sustainable Development Field

Course: Law, Policy and Practice (2 credits) will focus on efforts on both sides of the Gulf Stream to grapple with development pressures and climate impacts to fisheries and coral reef management, among other issues. After a Saturday evening on Miami Beach, the course will begin on Sunday, March 1, with attorney-guided issue-based trips of Biscayne Bay and the Miami River, and a series of lectures at the University of Miami Rosensteel School of Marine and Atmospheric Sciences. On the evening of March 2 the course will move to Nassau, Bahamas, for lectures and meetings with Bahamian environmental professionals and College of the Bahamas faculty. On March 4, the course will travel to Andros Island to the field station of Bahamas National Trust to experience first-hand the marine and coastal issues facing the Bahamas.

Andros Island is the largest of the Bahamian Islands and boasts its largest reef. It is the largest collection of blue holes in the world. The course will conclude with travel back to Miami on March 7.

In addition to U.S. and Bahamian domestic law and international development policy, students will be exposed to the unique legal framework of the commonwealth Caribbean and role of small island developing nations in international treaty negotiations.

UF Law's Conservation Clinic has been working closely with the Bahamas National Trust, which manages the national parks and marine protected areas of the Bahamas, and the Biscayne Baykeeper, which works to protect Biscayne Bay. Additional information is available from Clinic Director Tom Ankersen at Ankersen@law.ufl.edu.



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insurers have historically not offered flood insurance.¹ In 1968, the federal government responded to this void in the market by implementing the National Flood Insurance Program (NFIP).² The NFIP allowed property owners to purchase flood insurance from the Federal government if their local government had minimum standards for new construction and adopted certain floodplain management ordinances.³ Many property owners receive subsidized insurance rates which allow them to participate in the program but which have made the NFIP actuarially unsound. A House fiscal report for the fiscal year of 2014 reported that the NFIP debt has reached \$23 billion.⁴ According to the Government Accountability Office, NFIP losses “have created substantial financial exposure for the federal government.”⁵

A. National Flood Insurance Program reform

Largely in response to the overwhelming debt of the NFIP, Congress passed the Biggert-Waters Act in 2010. This Act included significant insurance reforms, mapping reforms, management reforms, and grant reforms.⁶ The main goal of the Biggert-Waters Act is to replace the subsidy financing structure with one that charges homeowners an insurance rate based on their “full risk rate.”⁷ Thus, the 20 percent of NFIP participants (approximately 1,120,000 individuals) who previously received subsidies must begin paying an unsubsidized rate that is truly predictive of their properties’ flood risk. Depending on a variety of factors—such as size, location, and classification—insurance rates can skyrocket from the subsidized rate to the full risk rate virtually overnight.⁸

Biggert-Waters impacted Florida more than any other state. Largely due to its 1,197 miles of coastline and 663 miles of beaches,⁹ Florida currently has approximately 2,037,242 NFIP policies in place.¹⁰ A study by Florida TaxWatch found that of these policies, 268,648 (13 percent) are subsidized, meaning that they will be

subject to the increased rates.¹¹ Nearly 48 percent of the total populations in Pinellas, Miami-Dade, and Lee counties have subsidized policies.¹² In Pinellas County, this amounts to nearly 51,000 affected properties.¹³ Interestingly, the study found that the NFIP paid substantial claims in Florida as a result of only two storms: Tropical Storm Isaac (\$407 million in paid claims in 2012) and Hurricane Wilma (\$365 million in paid claims in 2005). The study found that the majority of NFIP’s current debt is from Hurricanes Sandy and Katrina, both of which had a minimal impact on Florida.¹⁴

Without a Federal flood insurance program, it would be nearly impossible to insure structures which are threatened by floods. Rising rates, however, are substantial enough to threaten property ownership. For example, a homeowner in Miami, Florida previously paid an annual premium of approximately \$3,000. This escalated to \$24,300 in the aftermath of Biggert-Waters.¹⁵

Somewhat unsurprisingly, the Biggert-Waters Act received significant backlash. In response, Congress passed the Homeowner Flood Insurance Affordability Act (HFIAA) in March of 2014.¹⁶ That legislation lowers the recent rate increases on some policies, prevents future rate increases for some policyholders, and—in rare circumstances—will issue refunds to affected policyholders. While HFIAA was passed in order to relieve the sting of Biggert-Waters, the majority of the Biggert-Waters Act remains intact. With hundreds of thousands of Floridians impacted by the current federal flood insurance paradigm, the state continues to have a need to address flood risk in a way that balances risk mitigation and affordability.¹⁷

B. Reducing insurance cost and flood risk through structure elevation

According to FEMA, “of the many factors that determine the full risk rate of a structure, the single most important is the elevation of the structure in relation to the Base Flood Elevation (BFE).”¹⁸ The Base Flood Elevation is the elevation to which water is expected to rise during a 100-year storm event.¹⁹ Generally, the higher a property is elevated above

BFE, the lower the flood insurance premiums will be for that property.²⁰ According to FEMA, a homeowner could potentially save \$90,000 over 10 years under the Biggert-Waters Act by elevating his or her home three feet above BFE.²¹

While elevating structures is one strategy to reduce flood risk and insurance premiums, doing so is costly. If elevation information for a specific structure does not exist, an owner may need to hire a state-licensed surveyor to complete an elevation certificate.²² According to FEMA, in the case of a residential dwelling, this action alone can cost between \$500 and \$2,000, depending on the structure’s size, weight, and foundation.²³ If elevation is warranted to reduce flood risk, a property owner must decide which technique best suits his or her needs. According to the New York Times, government officials and industry professionals estimate the cost range of elevation projects as \$10,000 to \$100,000.²⁴ State officials from New Jersey—a state also significantly affected by Biggert-Waters—estimate home elevation as costing between \$30,000 and \$100,000.²⁵ In Florida, a couple recently reported spending \$40,000 to elevate their home.²⁶

C. The high costs and large potential benefits of structure elevation call for new and creative financing options

Financing building modifications that address flood risk would reduce insurance costs, reduce threats to the long-term viability of the NFIP and lower the actual risk of floods to individual structures and to communities. While local governments have a variety of financing tools to carry out their governmental powers and goals—including taxes, fees and special assessments—funding new programs is a perennial challenge for communities.

While local governments may only levy those taxes explicitly authorized by the state Constitution or by general law,²⁷ this limitation does not restrict local governments’ ability to levy special assessments.²⁸ Special assessments are government imposed costs on property owners used to fund special benefits to the assessed properties and not to the community as a whole.²⁹ Property Assessed Clean

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Energy (PACE) programs are a modern application of the old special assessment idea that has increased interest in this funding tool. This article provides background on the Florida law framework for levying special assessments, an overview of PACE programs and presents Special Assessments for Flood Elevation (SAFE) as a hypothetical method for financing structure elevation to avoid flood risk and to reduce insurance premiums.

II. ASSESSEMENTS UNDER FLORIDA LAW

The use of special assessments by local governments has a long history in the United States.³⁰ Levying special assessments is within the home rule authority of local governments³¹ and the Florida Constitution grants home rule authority to municipalities³² and to charter counties.³³ Additionally, Florida statutes explicitly note that local governments have the authority to levy special assessments.³⁴ Florida courts have validated special assessments to fund fire and rescue services,³⁵ waste and recycling services,³⁶ solid waste disposal,³⁷ storm water services,³⁸ and fire protection services.³⁹

In *City of Boca Raton v. State*, the Florida Supreme Court outlined the test used to analyze the validity of special assessments. The court held that in order for a special assessment to be valid, the property assessed must (1) derive a special benefit from the service provided by the special assessment; and (2) be properly apportioned to among the properties receiving the special benefit.⁴⁰ In addition to the general test in *Boca*, Florida case law indicates that the following characteristics are inherent to special assessments: special assessments are issued to property owners that specially benefit from a public improvement;⁴¹ the benefitted property owner cannot choose to opt out of the project requiring the special assessment; the special assessment is against the land and not the improvements;⁴² and the special assessment will be upheld if reasonable.

A. Special Benefit

A government project provides a “special benefit” to a property “when the affected property receives a direct advantage from the improvement funded by the special assessment.”⁴³ Although special assessments must benefit the assessed properties, the benefit of the special assessment may also accrue to the community as a whole.⁴⁴ In a case recognizing that local governments may use special assessments to fund fire services, the Florida Supreme Court clarified that the “special benefit” to property may also be understood as the presence of a “logical relationship” between the local government service and the benefit to the property:

In evaluating whether a special benefit is conferred to property by the services for which the assessment is imposed, the test is not whether the services confer a “unique” benefit or are different in type or degree from the benefit provided to the community as a whole, rather, the test is whether there is a “logical relationship” between the services provided and the benefit to the property.⁴⁵

Nonetheless, while there is significant deference to local governments, not every service provided by a municipality can be funded by a special assessment.⁴⁶ Police services are a clear example of a municipal service which special assessments may not fund because police services benefit people, not property.⁴⁷

B. Public/Local Improvements

An issue related to the special benefits prong of the *Boca Raton* analysis is what is meant by “public” or “local” improvements, and whether special assessments can only be issued for such improvements. While neither “public” nor “local” are found in the *Boca Raton* test, the public benefit justifies government action to provide the improvement or service while the private benefit justifies requiring the landowners to contribute a portion of the expense.⁴⁸

The judiciary has held that the term “local improvements” signifies improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefitted.⁴⁹ Eugene McQuillin,

a renowned municipal law practitioner and educator, described local improvements as those that benefit the part of the community around the improvement:

A local improvement is a public improvement which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the improvement.⁵⁰

The excerpt above does not address whether a public improvement must benefit more than one property or whether the properties that benefit from the improvement must be contiguous.

C. Proper Apportionment

The proper apportionment prong of the analysis is rarely disputed. In short, no legislative method as to apportionment of a special assessment will be overruled so long as it is reasonable.⁵¹ Importantly, however, special assessments should not exceed the benefits conferred upon the property improved.⁵²

D. Reasonableness

Courts must give deference to the taxing authority’s legislative determination as to the existence of a special benefit.⁵³ The legislative determination will be upheld unless it is “palpably arbitrary”⁵⁴ or “oppressive.”⁵⁵ Special assessments are presumed to be correct and the burden is on those contesting a special assessment to establish its invalidity.⁵⁶ The level of deference, the standard of judicial review, and the difficult burden placed on challengers shed light on the broad powers local governments have to impose special assessments.

III. PROPERTY ASSESSED CLEAN ENERGY PROGRAMS

An expansion of local governments’ special assessment power is the implementation of Property Assessed Clean Energy (PACE) programs. These initiatives provide upfront capital to property owners to retrofit their properties with energy efficiency upgrades.⁵⁷ Property Assessed Clean Energy programs use the special assessment power

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on a voluntary basis to fund publicly beneficial improvements to privately owned properties which may be geographically dispersed.

A. Supplemental statutory authorization

Although Florida local governments' home rule powers confer the authority to initiate special assessments, the Florida Legislature has also adopted specific authorizing legislation for PACE programs. Florida Statute § 163.08 identifies reducing greenhouse gases and promoting energy efficiency as legislatively adopted goals of the State of Florida.⁵⁸ In pursuit of these goals, local governments may grant loans to property owners so that those property owners may make qualifying improvements to their properties.⁵⁹ In turn, the lending local government may levy a special assessment on the property for repayment of the loan.⁶⁰ Under the statute, qualifying improvements include energy efficiency upgrades, renewable energy permits and wind resistance improvements.⁶¹ Flood hazard mitigation projects, such as elevation, are not qualifying improvements.⁶²

B. PACE loan process

Although PACE processes differ from municipality to municipality, the basics are the same.⁶³ At its simplest level, PACE begins with a property owner voluntarily entering into an agreement with the local government. Next, an energy audit is performed to estimate the energy cost savings that would result from the qualifying improvement and to determine whether those savings justify the upfront costs of the qualifying improvement. Third, a property owner chooses a qualified contractor to perform the work. Fourth, the local government disperses capital to the property owner and the property owner pays the contractor. Lastly, the property owner repays the initial capital back to the local government through annual special assessments added to his or her tax bill.

Depending on the specific project, property owners typically pay back the special assessments over a period of five to twenty years. In any case, a local government may contract with a private provider to facilitate its role in the PACE process.

C. Benefits of the PACE model

The PACE model provides access to capital that traditional loan programs cannot. Because the PACE debt attaches to the property and is repaid through the tax bill, PACE may be made available to property owners without regard to their creditworthiness. Lower income property owners can have greater access to low-cost, long-term financing, and can realize significant savings on their utility bills.⁶⁴

D. Criticisms

Although PACE programs have been commended for their innovative framework, they are not without criticisms. This financing model does differ from a traditional special assessment in key ways such as the potential geographic diversity of loan recipients, that participation is voluntary and the fine line between a public and a purely private benefit. The PACE financing model also differs from traditional loans in that PACE liens enjoy lien priority.⁶⁵ Concerned mortgagors believe that PACE will alter traditional mortgage lending practices, will pose unusual and difficult risk management challenges for lenders, do not have the traditional benefits associated with taxing incentives, and are not essential for successful programs to facilitate energy conservation.⁶⁶ The Federal Housing Finance Agency (FHFA) has cautioned that PACE programs "present significant safety and soundness

concerns that must be addressed by Fannie Mae, Freddie Mac and the Federal Home Loan Banks."⁶⁷

1. Uniqueness of PACE program special assessments

In regard to PACE being "unlike routine special assessments," causing key alterations of traditional mortgage lending and posing an unusual risk to lenders,⁶⁸ PACE programs are not significantly different from other special assessment applications. For example, local districts—or special assessment funded units of local government that make improvements to neighborhood infrastructure—provide for voluntary participation⁶⁹ and usually focus on a wide array of improvements and services, not just on physical enhancements like improved streets or sidewalks.⁷⁰ Thus, the new projects and voluntary nature of PACE are in line with the modern trend of special assessments.

2. Non-Traditional Benefits

Fannie Mae and Freddie Mac's claims that PACE programs are without the "traditional benefits associated with taxing incentives ..." and are "not essential for successful programs to facilitate energy conservation"⁷¹ seem to be misplaced. The benefits derived from PACE programs are not only in line with the traditional special assessment benefits, but they often offer even more benefits than such incentives. With PACE, the public improvement is clear: conserving energy within the community and reducing greenhouse gas emissions. Further, PACE programs help participating property owners lower their monthly bills, potentially increase the property value of the home. The

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relevant inquiry is not whether the primary purpose of the special assessment is to benefit an individual property owner, but rather if the public improvement specially benefited the real property.⁷²

3. Size and Duration

Another FHFA concern about PACE is the “size and duration of PACE loans exceed typical local tax programs.”⁷³ Concerns about the size of PACE commitments does identify a characteristic of PACE loans. The Florida authorization for PACE sets a maximum loan amount of the lesser of 20% of the just value of the property as determined by the county property appraiser or the amount which may be repaid in annual payments which are less than the energy savings as determined by the energy audit.⁷⁴

Nonetheless, while PACE funded improvements can initially be expensive, such as installing solar panels to property, some PACE programs only allow participation when the project will pay for itself and then some during the life of the special assessment. It is also important to note that PACE projects are not always expensive; from interior lighting upgrades to weatherization, some projects have low upfront costs.

4. Credit and collateral

A related concern among critics is that PACE programs do not focus on creditworthiness.⁷⁵ This concern is mitigated by two factors. One, because property owners will immediately benefit from monthly utility savings, they will be in a better position to pay a special assessment. Two, like any tax owed local government, PACE loans are secured by collateral: the assessed property. This status is one characteristic that makes PACE financing possible:

Pursuant to state law, PACE assessments take priority over all other obligations on a property, including mortgages, meaning they are considered a “senior lien” because

they subordinate mortgage obligations. This is necessary to secure favorable financing rates because lenders want assurance that the financial obligations will be repaid. This is why FHFA, Fannie and Freddie have cried foul.⁷⁶

Despite Florida Statutes’ clear description of PACE loans as having priority over mortgages, Federal Courts have held otherwise.⁷⁷ Several Florida communities have responded to this concern by limiting PACE programs to non-residential properties or by requiring mortgage holder approval before granting PACE funding.⁷⁸ In any case, this characteristic remains the most controversial aspect of PACE financing.

IV. SAFE: APPLYING PACE TO THE FLOODING INSURANCE PROBLEM

Nothing inherent in the PACE financing model precludes it from supporting sustainable development practices other than energy efficiency upgrades. Indeed, the Florida legislation itself authorizes its use for wind damage mitigation projects, something with a public benefit more aligned with the policy rationale for encouraging flood damage mitigation than energy efficiency. The need to lessen the impact that flooding has on local communities by raising structures at risk of floods is one example of a community problem well suited to a PACE-type financing solution. The conceptual distinction between financing programs for energy efficiency and for flood elevation is the source of the cost savings that would encourage property owners to take advantage of the financing, and the comfort that lenders would have that the savings would minimize risk of default.

A. Special Assessments for Flood Elevation

A hypothetical SAFE program—or Special Assessments for Flood Elevation—could mirror the current PACE framework. First, a willing property owner could voluntarily enter the program and hire a professional to assess his or her property to determine its elevation information. The professional would take into account the overall structural soundness of the building, soil conditions at the

site, and any hazards found at the site in order to determine the cost of the most feasible elevation technique for the structure.⁷⁹ Next, if the capital cost is low enough to be repaid through annual assessments over time, the local government could finance elevating the structure. The property owner could then hire a professional to complete the work and pay back the originally provided capital via a special assessment added to his or her tax bill.

It is important to note, however, that elevating a property using this method may not be in the best interest of every property owner. To ensure real economic benefits from structure elevation, the SAFE program could be limited to offering participation to property owners for whom the annual full risk rate flood insurance premium reduction will be an amount equal to or greater than the annual payments required to pay back the elevation project’s upfront cost.

B. Applying Florida law to SAFE

Using the two-prong test from *Boca Raton*, the property subject to the special assessment would have to derive a special benefit from the service provided by the special assessment and the local government would have to properly apportion the collected revenue among the properties assessed.⁸⁰ The special benefit from elevating a structure over BFE would be the structure’s reduced flood risk and the reduced, or eliminated, flood insurance premiums for that property.⁸¹ The Florida Supreme Court has recognized that reduced insurance premiums demonstrate a special benefit to real property.⁸² In regard to the second *Boca Raton* prong, each property would be individually assessed the cost to repay its PACE loan, making the amount assessed proportional to that property’s benefit.

Not only would SAFE meet the *Boca Raton* test, it would conform to the inherent characteristics of special assessments as well. First, there is a clear public purpose for such a program. The more structures that are elevated in a flood zone, the less of a chance these structures will be damaged by floodwaters. In turn, the local governments implementing the program will devote fewer resources

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to the rebuilding process. Furthermore, once the expense of elevation has been repaid, the money saved by property owners no longer subject to extremely high flood insurance premiums will be redirected. Properties elevated by the program can be more easily bought and sold when not confronted with the cost and uncertainty of the flood insurance program. Finally, the subsidized flood insurance program will benefit by reducing its risk portfolio.

As the proposed SAFE program is quite similar to a PACE program, it is likely that it would also share some of the same criticisms. Specifically, lenders and mortgage holders may be apprehensive because of the cost of elevating a structure and the superior lien priority the SAFE financing will receive. While the cost to elevate structures is great, the proposed program may actually favor lenders. For property owners subjected to staggering rate increases – and uncertainty – as a result of the Biggert-Waters Act and its aftermath, the increased costs of insurance are very possibly a greater threat to their ability to pay their mortgages than the costs of repaying a SAFE loan. In other words, the full risk rate insurance premiums are themselves a threat to mortgage holders. A SAFE program could mitigate that risk, not exacerbate it.

The lien priority enjoyed by SAFE loans is also part and parcel of one benefit of the program that would also actually benefit lenders. Many coastal property owners must have flood insurance. These property owners who are facing increased insurance premiums see increased costs because of the full risk rate to insure their properties against flood damage, not because of their ability to pay. Therefore, a SAFE loans lien priority allows poor creditworthiness to not be an obstacle preventing the property owners in the greatest need of SAFE financing from accessing that funding.

V. RECOMMENDATIONS

A. Further research

This paper provides largely anecdotal evidence about the dramatic

cost differences between historic NFIP rates and full risk rates. Likewise, the cost to elevate structures varies widely and has not been thoroughly researched. Determining the economic benefits of a SAFE program demands reasonably reliable data on the cost to elevate a structure and the corresponding avoided insurance premiums. Further useful research into a SAFE program could include more specific information on the insurance rate increases faced by Florida property owners and more accurate data on the costs to elevate structures.

B. Governmental action

The Florida Legislature could quickly bring attention to SAFE programs by adding structure elevation to the range of qualifying improvements under Florida Statutes § 163.08. This approach would make elevation a structural improvement that local governments could fund through the existing statutorily described PACE financing model. Also, because the home rule powers of local governments include the authority to levy special assessments, any Florida local government can likely develop a SAFE program by making money available for SAFE loans and by adopting a local ordinance to allow annual assessments for their repayment.

Endnotes

- 1 FEDERAL EMERGENCY MANAGEMENT AGENCY, U.S. DEPARTMENT OF HOMELAND SECURITY, ANSWERS TO QUESTIONS ABOUT THE NFIP 1 (March 2011).
- 2 *Id.*
- 3 *Id.* at 3.
- 4 THE LIBRARY OF CONGRESS, HOUSE REPORT 113-017 - CONCURRENT RESOLUTION ON THE BUDGET -- FISCAL YEAR 2014, http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp113iKSsr&r_n=hr017.113&dbname=cp113&&sel=TOC_122048& (last visited Feb. 18, 2015).
- 5 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, HIGH-RISK SERIES AN UPDATE 386 (February 2015).
- 6 FEDERAL EMERGENCY MANAGEMENT AGENCY, BUILD BACK SAFER AND STRONGER, http://www.fema.gov/media-library-data/20130726-1858-25045-7797/build_back_stronger02_2013.pdf (last visited Feb. 18, 2015) [hereinafter “FEMA Build Back”].
- 7 FEDERAL EMERGENCY MANAGEMENT AGENCY, QUESTIONS ABOUT THE BIGGERT-WATERS FLOOD INSURANCE REFORM ACT OF 2012, http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12_qa_04_2013.pdf (FEMA defines full risk rate as: “the premium that reflects both the risk assumed by the program (that is, the expected average

claims payment) and all administrative expenses. In the case of flood insurance, this means the premium takes into account the full range of possible flood losses, including the rare but catastrophic losses as well.”) (last visited Apr. 12, 2014).

8 *Id.* (stating that a portion of this 20 percent will have to pay an increase of 25 percent annually until the full risk rate is achieved; 5 percent of subsidized users will see this increase immediately).

9 STATE OF FLORIDA, FLORIDA QUICK FACTS, <http://www.stateofflorida.com/Portal/Desktop-Default.aspx?tabid=95> (last visited Feb. 18, 2015).

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11 Jerry D. Parrish, *The Effect of Changes in the National Flood Insurance Program on Florida*, <http://www.floridatrend.com/print/article/16501> (last visited Feb. 23, 2015).

12 *Id.*

13 Jeff Harrington, *Premiums rising for national flood program, though Florida pales in payouts*, TAMPA BAY TIMES (June 15, 2013), <http://www.tampabay.com/news/business/banking/premiums-rising-for-national-flood-program-though-florida-pales-in-payouts/2126888>.

14 *Id.*

15 Marianela Toledo, *A \$24K flood insurance policy? Welcome to Florida's new normal*, FLORIDAWATCHDOG.ORG (January 13, 2014), <http://watchdog.org/123093/a-24k-flood-insurance-policy-welcome-to-floridas-new-normal/>; for examples in other states, see <http://www.weather.com/news/science/environment/new-flood-insurance-rules-bring-chaos-heartache-coastal-homeowners-20130927> (stating that a homeowner in Hawaii previously paid roughly \$2700 in flood insurance premiums but, after Biggert-Waters, received a bill for \$26,000; and a homeowner in New Jersey previously paid around \$520 in premiums and recently received an estimate of \$5,000 to \$8,000).

16 FEDERAL EMERGENCY MANAGEMENT AGENCY, HOMEOWNER FLOOD INSURANCE AFFORDABILITY ACT OVERVIEW, http://www.fema.gov/media-library-data/1396551935597-4048b68f6d695a6e-b6e6e7118d3ce4_64/HFIAA_Overview_FINAL_03282014.pdf (stating that the Act was signed into law on March 21, 2014) (last visited Apr. 12, 2014).

17 See generally Florida Flood Insurance Premiums, <https://www.floridafloodinsurance.org/premiums.php> (reporting that in 2011, before the Biggert-Waters Act took effect, Florida property owners were already paying about \$450 per \$100,000 every year) (last visited Feb. 23, 2015).

18 FEMA BUILD BACK, *supra* note 6.

19 *Id.*

20 *Id.*

21 *Id.*

22 An elevation certificate is an administrative document used to record building elevation and, thereby, compliance with a community's floodplain management ordinance. See National Flood Insurance Program Elevation Certificate and Instructions, <https://www.fema.gov/media-library/assets/documents/160> (last visited Feb. 23, 2015).

23 FEDERAL EMERGENCY MANAGEMENT AGENCY, FACT SHEET, <http://www.fema.gov/media->

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30 See generally Chester James Antieau, *The Special Assessments of Municipal Corporations*, 35 MARQ. L. REV. 315 (1952).

31 OSBORNE M. REYNOLDS, JR. LOCAL GOVERNMENT LAW (2d Ed. West) (2001) (citing Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931) (holding that the federal Constitution does not limit the discretion of municipal authorities on whether an improvement is paid for by taxes or special assessments)).

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77 See, Rust v. Johnson, 597 F.2d 174, 179 (9th Cir. 1979) (local governments cannot take any action to collect unpaid taxes assessed against property “which would have the effect of reducing or destroying the value of a federally held purchase-money mortgage lien.” (quoting United States v. General Douglas MacArthur Senior Village, Inc., 470 F.2d 675, 680 (2d Cir. 1972), *Cert. denied sub nom.* County of Nassau v. United States, 412 U.S. 922, 93 S.Ct. 2732, 37 L.Ed.2d 149 (1973))).

78 Deady, *supra* note 76, at 25.

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80 City of Boca Raton, *supra* note 40.

81 FEMA BUILD BACK, *supra* note 6.

82 City of North Lauderdale v. SMM Properties, 825 So. 2d 343, 349 (Fla. 2002) (stating that to pass the logical relationship test set forth in *Lake County*, a special assessment must be shown to have demonstrable benefits to real property such as reduced insurance premiums or enhanced assessed property value).

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