

Adaptation Action Areas in Florida The State of Play

by Thomas T. Ankersen, Brandon Pownall, Alexa Menashe

Introduction

In 2011, the Florida Legislature amended the *Community Planning Act* (CPA). Among many growth management changes, the CPA authorizes – but does not require – coastal communities to designate areas at risk of coastal flooding due to extreme high tides, storm surge, or other vulnerabilities related to the impacts of sea level rise. Coastal communities may designate an Adaptation Action Areas (AAA) in the Coastal Management Element of their comprehensive plan in areas including, but not limited to, those “areas for which the land elevations are below, at, or near mean higher high water, which have a hydrologic connection to coastal waters, or which are designated as evacuation zones for storm surge.”¹ Upon this optional designation, funding and other resources for improved infrastructure and planning within the AAA can be prioritized.² This legislation encourages local governments to take a spatially explicit, sub-jurisdictional approach to adaptation planning.³ This encouragement is also reflected in the creation of planning grant programs that fund efforts to create AAA’s or that support actions taken within those already created, and in the development of resource materials to aid local government officials.⁴

The goal of this type of adaptation planning is to improve coastal communities’ resilience to flooding and other coastal hazards identified in the comprehensive plan designation for a specific, geographic area within the community. Within these areas,

a coastal community can establish its own policy preferences to achieve defined adaptation actions and focus resources where the community determines it is most needed. This can include addressing the built environment and critical infrastructure, addressing the natural environment as a first line of defense and addressing the needs those with least ability to adapt.

This article briefly describes the origins of the 2011 AAA legislation.⁵ We identify every local government that has amended its comprehensive plan to include AAA language and characterize it as either aspirational or operational – depending on whether spatially explicit boundaries have been drawn.⁶ We also seek to determine the dominant “theme” behind the AAA language, based on its focus on the built environment, natural resources and social equity, and whether the AAA is a regulatory instrument, or is focused on implementing projects. We conclude that despite nearly 10 years of existence, the promise of AAA’s as a policy planning tool has yet to be fully realized. We further conclude that given its implicit goal of priority setting, there is insufficient attention paid to social equity as a basis for creating and implementing AAA’s. We caution that this analysis is based on readily available public information, and AAA planning is occurring that has yet to reach fruition. In addition, because the statute is likely not preemptive,⁷ spatially explicit sub-jurisdictional adaptation planning may be occurring outside of the AAA framework.

A Brief Legislative History of AAA’s

The impetus for the state adaptation action area statute can be traced to the origins of the South Florida Climate Compact. Soon after the Compact was ratified, the signatories developed a federal and state legislative agenda.⁸ The federal agenda called for a law creating regional “Adaptation Action Areas” at the federal level, where the Compact region would serve as the initial pilot project, with significant federal funding to support it. At the same time, the signatories sought state legislation that would designate the entire Compact region as an Adaptation Action Area, as a means to secure the federal designation (and funding).⁹ In addition, the signatories urged support for state legislation that would “provide technical assistance and funding for local governments to review and revise

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From the Chair

by Jon Harris Maurer

The Environmental and Land Use Law Section (ELULS) has been busy in the lead up to what passes for winter in Florida with CLE programming and welcoming a new group of recently-admitted attorney members to the Section.

Many of you caught the terrific “Florida’s Emerging Coastal Resiliency Policy and Law” CLE in October featuring Whitney Gray (Florida Department of Environmental Protection) and Thomas Ruppert (Florida Sea Grant). We also had great interest in the emerging issues in our “What in the Devil is PFAS and Why Should I (or my Clients) Care” CLE

in December featuring Chris Teaf (Hazardous Substance & Waste Management Research) and Ralph DeMeo (Baker Donelson). Many thanks to Byron Flagg (Byron Flagg, Esq.) and Angela Morrison (Earth & Water Law Group), respectively, for organizing those CLEs.

In January we are looking forward to the annual “Legislative Forecast” CLE, when past Section Chairs and Capitol veterans Gary Hunter (Hopping Green & Sams) and Janet Bowman (The Nature Conservancy) will provide their insights for the upcoming 2020 legislative session. You can find that and all of our CLEs for

purchase through the Florida Bar’s CLE website.

For our next in-person event, be sure to mark your calendar for the afternoon of February 11, 2020. We will have an ELULS Executive Council meeting at the office of Hopping Green & Sams in Tallahassee, with a happy hour mixer to follow. The event is open to all members, and it’s a great place to network with Section members and learn about all of our activities.

Best wishes for the new year!

Jon Harris Maurer
Chair, Environmental and
Land Use Law Section



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ON APPEAL

by Larry Sellers, Holland & Knight, LLP

Note: Status of cases is as of December 13, 2019. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Donna Melzer v. SFWMD, et al., Case No. SC19-1993. Notice to invoke discretionary jurisdiction to review 4th DCA decision affirming in part and reversing in part the Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim. 44 Fla. L. Weekly D2356a (4th DCA September 18, 2019). The Everglades Law Center sought to require disclosure of the transcripts of a "shade" meeting held by the SFWMD Governing Board involving discussions regarding mediation between the District and its Governing Board in attorney-client sessions. The district court held that the trial court did not err in determining that statutory mediation communication exemption under Sections 44.102(3) and 44.405(1) preclude disclosure of the full transcript of the shade meeting conducted between SFWMD and its attorneys for the purpose of discussing settlement terms and appending litigation which mediation was ordered; to the extent that the transcript memorialized mediation communications, such portions of the transcript constituted mediated communications, and these communications disclosed by governmental attorney during a shade

meeting are to be redacted from the transcript of the shade meeting when it becomes a public record. The appellate court found that the trial court erred when it failed to conduct an in camera review of the transcript based on the parties' agreement that one was not necessary; it is fundamental error for trial court to rule on an exemption to public access to the full shade meeting transcript by redacting mediation communications without conducting an in camera review to determine if the claimed exemption applies. Accordingly, the court remanded for in camera inspection of the full transcript to assess whether redactions proposed by the District have been appropriately applied. Status: Notice to invoke discretionary jurisdiction filed November 27, 2019.

Florida Wildlife Federation, Inc., et al. v. Jose Oliva, Bill Galvano and The Florida Legislature, Case No. SC19-1935. Notice to invoke discretionary jurisdiction to review 1st DCA decision affirming in part, reversing in part and remanding the trial court's Final Judgment for Plaintiffs: (1) interpreting Amendment 1 to limit the use of funds in the Land Acquisition Trust Fund created by Article X, Section 28 to the acquisition of conservation lands for other property interests the state did not own on the effective date of the amendment and thereafter, and to approve, manage, restore natural systems thereon, and enhance public access or enjoyment of those conservation lands; and (2)

determining the numerous specific appropriations inconsistent with that interpretation are unconstitutional. 44 Fla. L. Weekly D2268a. Status: Notice to invoke discretionary jurisdiction filed November 15, 2019.

The City of Coral Gables v. Florida Retail Federation, Inc., et al., Case No. SC19-1798. Notice to invoke discretionary jurisdiction to review 3rd DCA decision reversing the trial court's final summary judgment upholding the City's ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court's determination that three state laws preempting the ordinance are not constitutional. 44 Fla. L. Weekly D2089a. (Fla. 3d DCA 2019). Status: Notice to invoke discretionary jurisdiction filed October 18, 2019.

Maggie Hurchalla v. Lake Point Phase I, LLC, et al., Case No. SC19-1729. Notice to invoke discretionary jurisdiction to review the 4th DCA decision upholding jury verdict finding Ms. Hurchalla liable for \$4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments in opposition to the project. 44 Fla. L. Weekly D1564a (Fla. 4th DCA 2019). Status: Notice to invoke discretionary jurisdiction filed October 7, 2019.

Lieupo v. Simon's Trucking, Inc., Case No. SC18-657. Petition for review of decision by 1st DCA in which the court certified the following question as one of great public

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ON APPEAL

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importance: “Does the private cause of action contained in s. 376.313(3), Florida Statutes, permit recovery for personal injury?” *Simon’s Trucking, Inc., v. Lieupo*, Case No. 1D17-2065 (Fla. 1st DCA, April 18, 2018). Status: On December 19, 2019, the Court answered the question in the affirmative.

FIRST DCA

Imhof, et al. v. Walton County, et al., Case No. 1D19-0980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county’s comprehensive plan. The trial court followed the Second District’s decision in *Heine v. Lee County*, 221 So.3d 1254 (Fla. 2nd DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. (Regular readers will recall that the Third District recently affirmed *per curiam* a similar ruling in *Cruz v City of Miami*, Case No. 3D17-2708.) Status: Oral argument date set January 15, 2020.

Pelican Bay Foundation, Inc. v. Florida Fish and Wildlife Conservation Commission and City of Naples, Florida, Case No. 1D18-4760. Appeal from a final order dismissing the Foundation’s challenge to a proposed rule that updated Manatee Protection Zones for all waterbodies within Collier County, which considered but rejected protection for the Clam Bay System. Status: Affirmed *per curiam* on August 27, 2019.

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

of those conservation lands; and (2) determining that numerous specific appropriations inconsistent with that interpretation are unconstitutional. Status: Affirmed in part, reversed in part and remanded on September 9, 2019; motions for rehearing denied October 22, 2019; notice to invoke discretionary jurisdiction filed November 15, 2019.

THIRD DCA

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

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

Florida Retail Federation, Inc., et al. v. The City of Coral Gables, Case No. 3D17-562. Appeal from final summary judgment upholding the City of Coral Gables ordinance prohibiting the sale or use of certain polystyrene containers, based upon trial court’s determination that three state laws preempting the ordinance are unconstitutional. Status: Reversed and remanded on August 14, 2019; notice to invoke discretionary jurisdiction of Florida Supreme Court filed October 18, 2019.

FOURTH DCA

Everglades Law Center Inc. v. SF-WMD, Case Nos. 4D18-1220, -1519 and -2124. Appeals from Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center’s Counterclaim. The Everglades Law Center sought to require disclosure of the transcripts of a “shade” meeting held by the SFWMD Governing Board involving discussions regarding mediation between

the District and its Governing Board in attorney-client sessions. The order concludes that the transcripts of such discussions constitute communications at a mediation proceeding within the meaning of Section 44.102(3), Florida Statutes, and therefore are exempt from disclosure under the public records law. Status: Affirmed in part, reversed in part on September 18, 2019 (44 Fla. L. Weekly D2356a); motion for rehearing *en banc* denied on November 19, 2019.

UNITED STATES SUPREME COURT

County of Maui, Hawaii, v. Hawaii Wildlife Fund, Case No. 18-260. Petition to review decision by the U.S. Court of Appeals for the 9th Circuit upholding a district court ruling, rejecting the County’s argument that a “discharge” only occurs when pollutants are released directly into navigable waters. The County operates a wastewater treatment plant that injects the treated wastewater through wells into the groundwater; some of that groundwater eventually enters the Pacific Ocean. Issue: whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source, such as groundwater. Status: Oral argument held on November 6, 2019.

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

Tolling and Extensions Under Florida's State Emergency Management Act

by Travis Hearne, Mechanik Nuccio Hearne & Webster

I. Overview of Governing Statutory Provisions.

Under Florida's State Emergency Management Act, Fla. Stat. § 253.31 *et seq.*, the declaration of a state of emergency by the Governor for a natural emergency tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration.¹ The declaration also extends the period remaining to exercise the rights under a permit or authorization for six months in addition to the tolled period:

(1)(a) The declaration of a state of emergency issued by the Governor for a natural² emergency tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization **for 6 months in addition to the tolled period.**³

A state of emergency declared by executive order may not last longer than 60 days unless extended by another executive order.⁴

To utilize the extension, a permittee must—within 90 days after

the termination or expiration of the emergency declaration—notify the issuing authority of the intent to exercise the tolling and extension:

(b) **Within 90 days after the termination of the emergency declaration**, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.⁵

The notification must be provided “within 90 days after” the declaration is terminated. This appears to allow a permittee to provide the notification at any time during which the declaration is in effect—the permittee does not appear to be required to wait until the declaration is terminated or expires to provide the notice. However, informal discussion with agency personnel revealed the possibility that some agencies may take the position that the notification must be delivered **after the expiration of the entire emergency tolling period as extended.** Thus, permittees should carefully track declarations and their extensions to ensure that

they submit the extension notice at the appropriate time. The extension notice will be valid even if the permit would have otherwise expired during the state of emergency or during the subsequent 90 day notification period.⁶

Only the permittee's written notice to an issuing authority is required to receive the extension; no action by the issuing authority is required for the extension to be granted, other than to verify that the permit is of a type covered by the statute.⁷ The permit extension is not subject to challenge by objectors or intervenors under Chapter 120, Florida Statutes, and parties who challenged the original permit issuance need not be notified of the extension.⁸

II. Types of Permits Covered and Excluded.

This extension applies to local government development orders; building permit expirations; Environmental Resource Permits (“ERPs”) granted under Part IV, Chapter 373, Florida Statutes; and the buildout date of a development of regional impact, including any extension of a buildout date that was previously granted as specified in § 380.06(7)(c).⁹ This includes Noticed General Permits; Mining Permits under Part IV of Chapter 373, Florida Statutes; Joint Coastal Permits under Chapter 62B-49, Fla. Admin. Code; Conceptual Approval Permits; and Delegated Local Government Permits issued pursuant to a delegated program under Part IV of Chapter 373, Florida Statutes.¹⁰

The extension is not available for ERP Permits that authorize activities outside the geographic area affected by the declaration; ERP Permits that include authorization under a programmatic or regional general permit issued by the U.S. Army Corps of Engineers; ERP Permits that are held by an owner or operator determined to be in significant non-compliance;¹¹

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or ERP Permits that are subject to a court order specifying an expiration date or buildout date that would be in conflict with the extension.¹² The extension is also not available for exemptions; for the duration of Jurisdictional Determinations or Formal Determinations; or for other permits or authorizations issued by FDEP or the WMDs under statutes other than Part IV of Chapter 373, Florida Statutes.¹³

III. Overview of Procedure to Determine Critical Dates.

In other words, once an executive order is issued declaring a state of emergency in a given locale, the remaining time to exercise rights under a permit is tolled—i.e., the “countdown” of the time left to take a permitted action is “suspended” or

“halted” during the state of emergency. At any time within 90 days of the emergency expiration date, the permittee must notify the issuing authority of its intent to utilize the extension period. If this notice is provided, the permittee’s time to exercise a right under the permit is extended until the date six months after the date established by adding a period equal to the length of the state of emergency (i.e., the length of the tolling period) to the permit’s default expiration date. In short, **to determine what date the permit expires as a result of this procedure:**

(1) Add the length of the applicable tolling period¹⁴ to the date the permit otherwise would have expired. The tolling period is in effect so long as a state of emergency exists in the locale, and extensions of the same state of emergency enlarge the tolling period. This establishes a date that this article

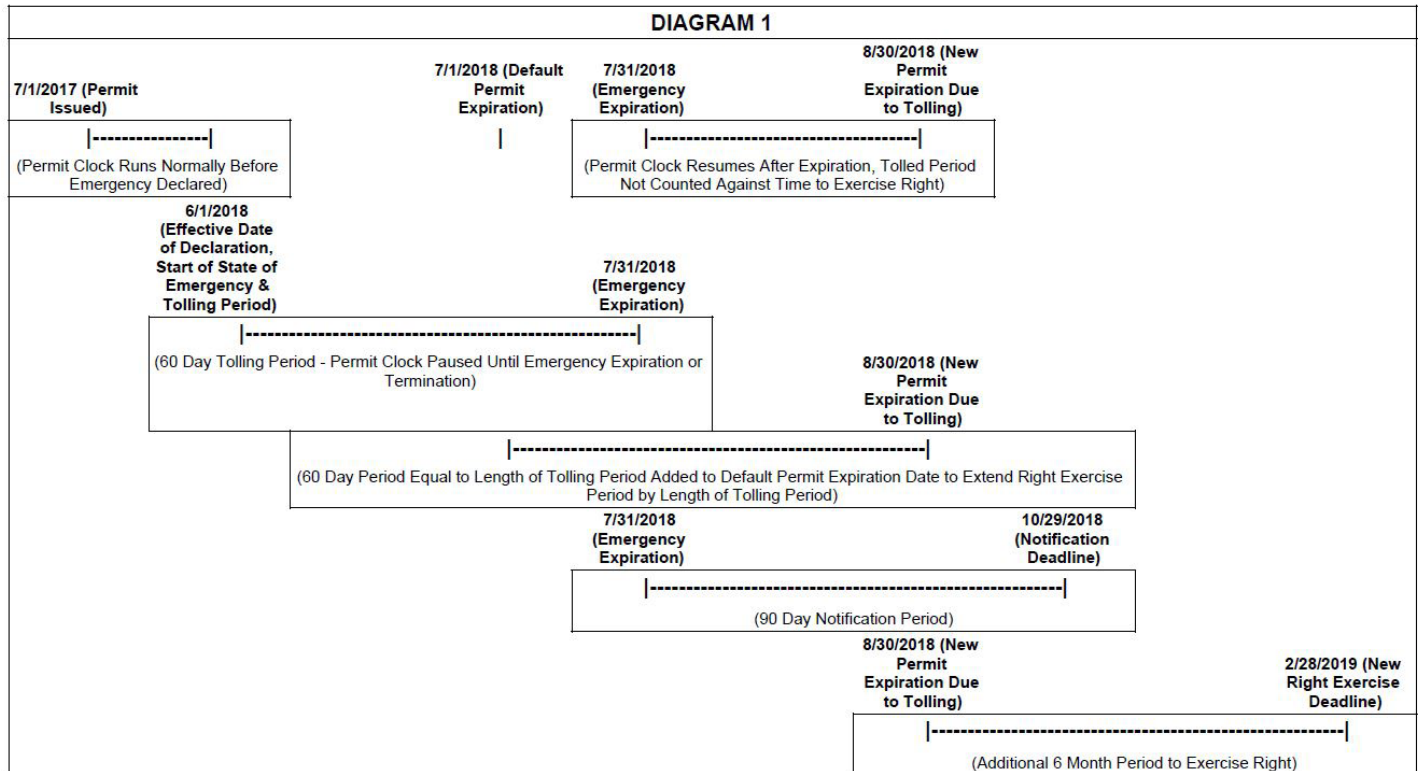
refers to as the “New Permit Expiration Due to Tolling.”

(2) Add six months to the “New Permit Expiration Due to Tolling” date for every separate state of emergency applicable in the locale. The permit will expire at the end of the resulting period.¹⁵

To determine the notification deadline, add 90 days to the date on which the last state of emergency expired or was terminated.

It is important to determine whether two separate states of emergency due to different causes are in effect at the same time in the same locale. In such a case, the tolling periods for the separate states of emergency run *concurrently* and not *consecutively*.¹⁶ However, the six month extensions run *consecutively*. In other words, *an additional 6 month extension period is available for each overlapping separate state of emergency declared in a given locale*.¹⁷

Date of Executive Order (Effective Date)	Default Permit Expiration	Date on Which 60 Day State of Emergency Automatically Expires (Effective Date + 60 Days) (Emergency Expiration)	Last Day of 90 Day Period Within Which Permittee Must Notify Agency of Intent to Exercise Extension (Expiration + 90 Days) (Notification Deadline)	New Permit Expiration Due to Tolling (Default Permit Expiration + Tolling Period)	Last Day on Which Right Under Permit May Be Exercised If Notification Has Been Provided Within the 90 Day Period (New Permit Expiration Due to Tolling + 6 Months) (New Right Exercise Deadline)
6/1/2018	7/1/2018	7/31/2018	10/29/2018	8/30/2018	2/28/2019



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IV. Hypothetical Example.

As a hypothetical example, if a permit is issued on July 1, 2017 and expires on July 1, 2018, the declaration of a 60-day state of emergency on June 1, 2018 will allow the permit to be extended until February 28, 2019, so long as the permittee gives notice by October 29, 2018: (See Diagram 1)

V. Effect of Extensions.

If the *same* state of emergency is extended by another executive order, the tolling period is likewise extended, and a new, later, emergency expiration date arises with each extension, pushing the applicable deadlines (both the 90 day notification deadline and the six-month new right exercise deadline) further into the future with each extension. Some states of emergency have been repeatedly extended to create long tolling periods exceeding, in some

cases, one year. Permittees should treat the date of an executive order extending a state of emergency as the new initial measuring date if the extension order is issued prior to the earlier declaration's default emergency expiration date (rather than considering the extension's effective date to be the date the prior declaration *would have* expired). For example: (See Diagram 2)

VI. Need For Repeated or Renewed Notification.

Research has identified no controlling authority governing whether permittees must provide a new notification after each extension. Theoretically, permittees should be required to provide only one notification at any time between the declaration's effective date and the end of the notification period. However, as noted above, some agencies may not accept a notification until the relevant states of emergency have been allowed to expire. Tracking the timelines and

extensions involved could prove difficult for agency staff. The best course of action for permittees is likely to make things easier for agency staff by combining notices into one communication to the agency to the extent possible; i.e., permittees should wait until the final expiration of the relevant states of emergency, determine how many are applicable and the deadlines involved, and then notify the necessary agencies at one time.

VII. Effect of Separate Overlapping States of Emergency.

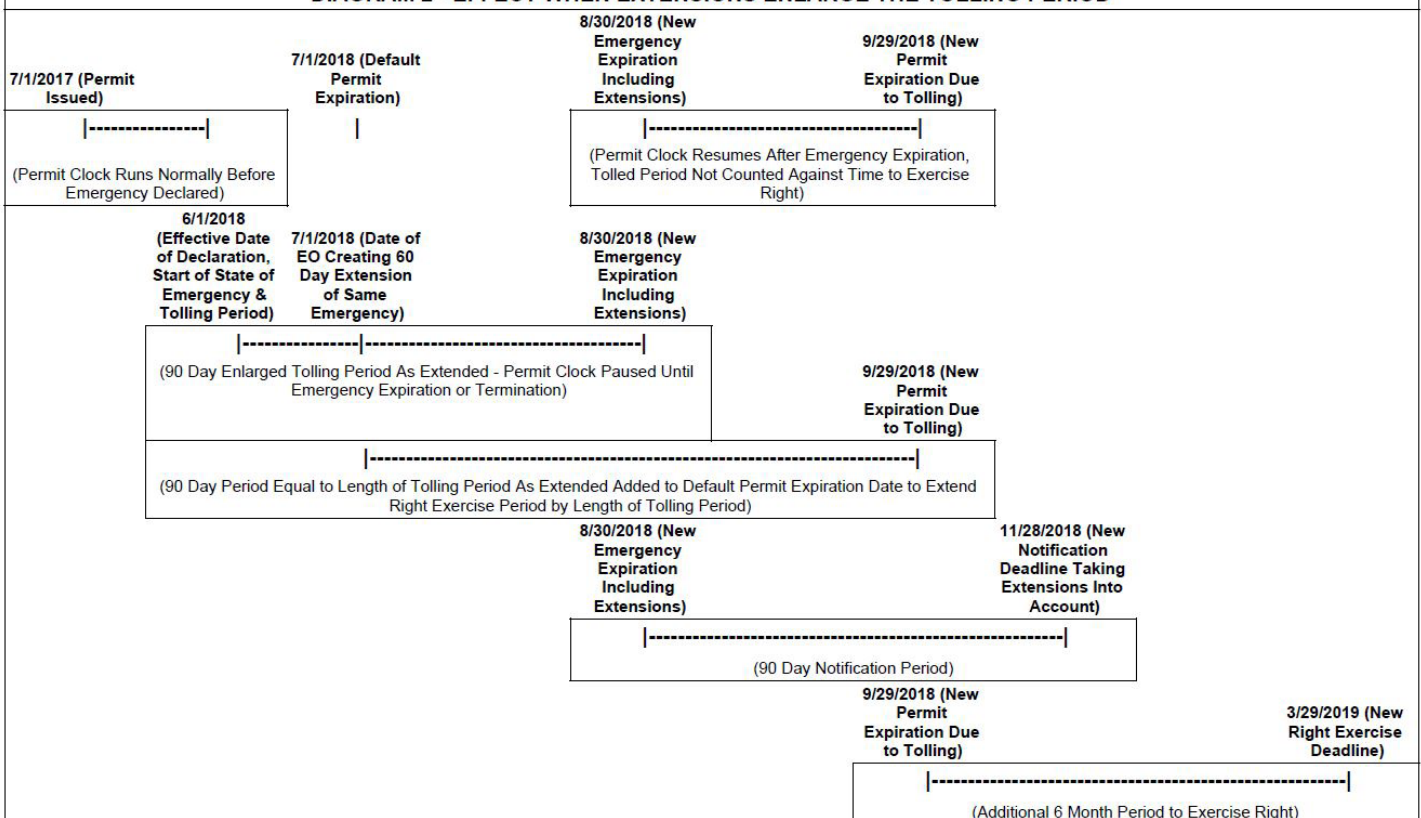
When two separate states of emergency overlap, the time during which the tolling periods overlap runs concurrently, not consecutively. However, the six month extensions are added together consecutively. For example: (See Diagram 3)

VIII. Computation of Time.

Regarding computation of time, Florida Rule of Judicial Administration 2.514(a) governs computation of time periods specified in any statute

Effective Date	Extension Date	Extension Length	New Emergency Expiration	New Permit Expiration Due to Tolling	New Notification Deadline	New Right Exercise Deadline
6/1/2018	7/1/2018	60 days (measured from 7/1/2018)	8/30/2018	9/29/2018	11/28/2018	3/29/2019

DIAGRAM 2 - EFFECT WHEN EXTENSIONS ENLARGE THE TOLLING PERIOD



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that does not specify a method of computing time. Fla. R. Jud. Admin. 2.514(a). Under this rule, when the period is stated in days or a longer unit of time, (a) begin counting from the next day that is not a Saturday, Sunday, or legal holiday, (b) count every day, including intermediate Saturdays, Sundays, and legal holidays; and (c) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, or falls within any period of time extended through an order of the chief justice under Fla. R. Jud. Admin. 2.205(a)(2)(B)(iv), the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday and does not fall within any period of time extended through an order of the chief justice.

Endnotes

1 Fla. Stat. § 252.363(1)(a).

2 A “natural emergency” is defined as “an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake.” § 252.34(8).

3 § 252.363(1)(a) (emphasis added).

4 § 252.36(2).

5 § 252.363(1)(b) (emphasis added).

6 *Submerged Lands & Environmental Resources Program Procedures Manual* at 2, *SLER 1428, December 2012 Update*. [hereinafter *SLERP Manual*] (“a request is valid so long as the request is filed within 90 days of the end of the state of emergency—even if the permit would have otherwise expired during the state of emergency or within the subsequent 90-day period.” (emphasis in original)).

7 Fla. Att’y Gen. Op. 2012-13, 2012 WL 1495312 (Apr. 25, 2012).

8 *SLERP Manual* at 3.

9 § 252.363(1)(a)1.–4.

10 *SLERP Manual* at 1.

11 § 252.363(1)(d) 3. A permittee is in “significant noncompliance” when the permit is subject to a “warning letter or notice of violation, the initiation of formal enforcement, or an equivalent action.” *Id.* *Letters of Non-Compliance and Compliance without Enforcement will not render a permittee in “significant non-compliance with a Consent Order, Final Order, judgment, or other document resolving an enforcement action will, however, establish “significant noncompliance.”* *Id.* If the permittee is not subject to a disqualifying enforcement action prior to sending the extension notification, and such an action arises later, the agency’s response letter should explain that the permit does not qualify for the requested extension, and must include Notice of Rights language required by Chapter 120, Florida Statutes. *Id.*

12 *SLERP Manual* at 2.

13 *Id.*

14 See discussion below at Section VII, *infra*,

regarding how the tolling period should be calculated when separate states of emergency overlap.

15 *SLERP Manual* at 3–4 (“[T]he date is extended by the duration of the applicable state of emergency (as measured in days) from the original expiration date stated in the permit, plus an additional six months”). See Section VII, *infra*, and Notes 16 and 17, *infra*.

16 *Id.* at 4 (“[T]he length of the ‘tolled period’ for purposes of the extension granted would not be calculated as the sum of the entire duration of each separate declaration. Instead, the ‘tolling’ period begins when the first declaration of emergency goes into effect, and ends when the last declaration expires . . . To put it more simply, for the purposes of tolling under 252.363, F.S., either a state of emergency exists (in which case the permit expiration date is tolled), or it does not.” (emphasis in original)).

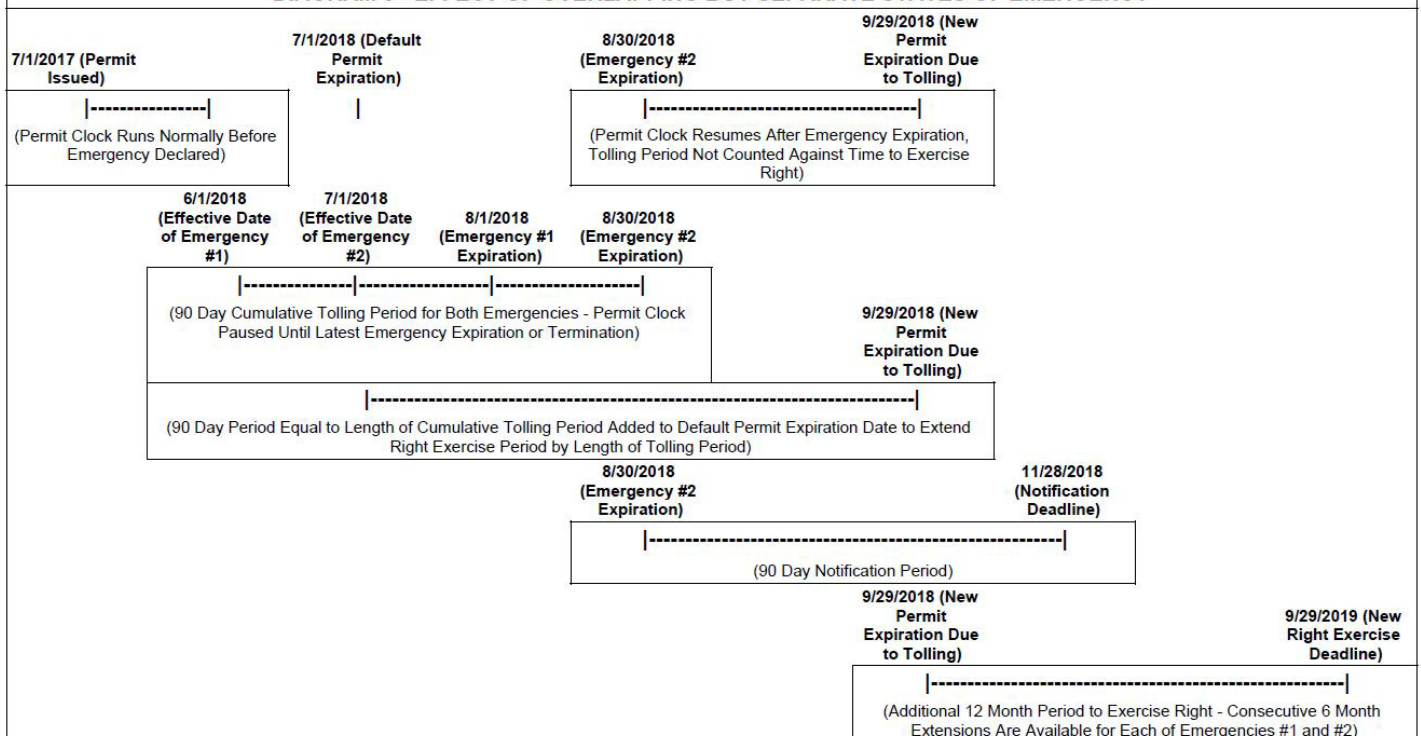
17 *Id.* (“In contrast, the 6-month additional extension is provided by ‘the declaration’, and thus 6 months should be added for each declaration of a state of emergency by the Governor . . . Extensions of an existing declaration (established by subsequent Executive Orders), clearly extend the tolling period, but do not provide additional 6-month extension periods.” (emphasis in original)).

18 See Executive Order 19-234, available online at <https://www.floridadisaster.org/global-assets/executive-orders/eo-19-234-hurricane-dorian-extension-1-10-25-19.pdf>

19 See Executive Order 19-207, available online at <https://www.floridadisaster.org/globalassets/executive-orders/eo-19-207-hurricane-michael-extension-6-9-27-19.pdf>

Emergency #1 Effective Date	Emergency #2 Effective Date	Emergency #2 Expiration	New Permit Expiration Due to Tolling	Notification Deadline	New Right Exercise Deadline (6 Months for Emergency #1 + 6 Months for Emergency #2)
6/1/2018	7/1/2018	8/30/2018	9/29/2018	11/28/2018	9/29/2019

DIAGRAM 3 - EFFECT OF OVERLAPPING BUT SEPARATE STATES OF EMERGENCY



Environmental Case Law Update

by Gary Hunter, Hopping Green & Sams

City of Jacksonville, Petitioner, v. Dames Point Workboats, LLC, and Department of Environmental Protection, Respondents. 2019 Fla. Div. Adm. Hear. LEXIS 232 (Final Order issued April 12, 2019)

Dames Point Workboats (Workboats) proposes to construct and operate a commercial tugboat and barge mooring and loading/offloading facility (the Project). Workboats has a fleet of approximately 40 vessels, comprised of barges, tow/push boats, and work boats that are used to provide a range of marine services to third parties. The Project involves the construction of three docks, mooring dolphins, and mooring piles waterward of the mean high-water line on sovereign submerged lands.

The Project will be located in the “Back Channel” area of the St. Johns River, directly north of Blount Island in Jacksonville, Florida. The Back Channel is classified as a Class III waterbody is impaired for lead. Workboats owns four adjacent waterfront parcels upland of the Project which collectively have approximately 425 feet of linear salt marsh and riprap shoreline bordering the Back Channel.

Respondent Workboats filed a Joint Application for an Individual Environmental Resource Permit, Authorization to Use State-Owned Submerged Lands, and Federal Dredge and Fill Permit in June of 2018. DEP found that the Project met the requirements for the Consolidated Authorization (CA) and issued the Consolidated Notice of Intent in July of 2018, proposing to issue the ERP and a ten-year sovereign submerged lands lease for the Project.

Petitioner City timely challenged the Department’s proposed issuance of the CA. The City argued that the lease is contrary to the public interest, will cause adverse impacts to benthic and salt marsh habitat, will result in the discharge of pollutants into the waters of the Back Channel, will pose a navigational hazard and cause harm to manatees, and will detract from, and interfere with, recreational activities in the Back Channel.

The matter was referred to DOAH and a final hearing was held in December 2018. A transcript of the final hearing was filed at DOAH on January 18, 2019. The parties timely filed their proposed recommended orders on January 28, 2019, and the ALJ issued a Recommended Order on March 1, 2019.

In the Recommended Order, the ALJ noted that two types of habitat exist at the Project site: salt marsh and submerged benthic habitat. The ALJ found that the salt marsh at the Project site is healthy, high-quality, high-functioning salt marsh habitat, and was not being removed or otherwise affected and will not be affected by the Project. The submerged benthic sediment at the Project site provides habitat for infauna, such as polychaete worms; and for epifauna, such as shrimp, crabs, and mollusks. No submerged aquatic vegetation or oyster bars were found at the Project site. The CA includes specific conditions to help protect the benthic habitat to help ensure that the Project will have only minimal impacts on the salt marsh habitat. Docks will be built four feet above the marsh floor to reduce shading and will be constructed using minimally-impactful techniques.

To protect the Florida Manatees, the only listed species inhabiting the Project site, the FWC has already established a slow speed, minimum wake zone extending 300 feet from the shorelines into the Back Channel. Workboats must install bumpers or fenders to separate vessels and docks, and each vessel must meet minimum clearance requirements to help prevent trapping or crushing of manatees. Additionally, the Project must be constructed and operated according to the Standard Manatee Conditions for In-Water Work.

Workboats has a recent history of noncompliance with DEP rules. Rather than take enforcement action, DEP decided to include a salt marsh restoration corrective action requirement in the CA. To provide reasonable assurance that the Project will not violate ERP statutes and rules, and to add accountability, the ALJ recommended adding five enforceable conditions to the final order.

First, Workboats may only load vessels from a specific dock, and the only equipment that may be used will be equipment small and light enough to traverse said dock. Second, domestic waste from boat heads must be handled through a waterless incinerating toilet. This condition expressly prohibits any sewage pump-out at the docks or on vessels and prohibits the discharge of incinerator toilet ash waste into waters of the state. Third, Workboats may not install or use fueling equipment at the docks or conduct major repair or reconstruction, except minor repairs specifically allowed. Any other activity, including but not limited to scraping, stripping, and recoating, that may degrade water quality or release pollutants into Waters of the State, is prohibited. Fourth, since the Back Channel is impaired for lead, Workboats may not use lead paint or lead-containing welding equipment on the docks or vessels moored in the Lease area. And fifth, the waterward ends of the docks and the mooring dolphins are to be marked by reflectors or lit by solar battery powered lights so that they are visible from the water at night by reflected light.

The ALJ concluded that Workboats met its statutory burden to present a prima facie case of entitlement to the environmental resource permit and issuance of the lease. The ALJ noted that Workboats also presented credible, competent, and substantial evidence beyond what was required. The ALJ found that the Project, with the above conditions, would meet all applicable statutory and rule requirements and not be contrary to the public interest. The burden shifted to the City to demonstrate, by a preponderance of the competent substantial evidence, that the Project does not comply with Florida Statutes and applicable environmental resource permitting rules. The ALJ determined that the City did not meet its burden. Petitioner City timely filed exceptions and DEP and Workboats timely filed responses.

On April 12, 2019, the DEP Secretary released the Final Order. The

continued...

CASE LAW UPDATE

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Final Order included explicit rulings on each party's exceptions. Both of Workboat's exceptions are granted to clarify ownership of the upland property and correct minor scrivener's errors in the ALJ's recommended order. All 14 of the Petitioner City's exceptions were denied. The Final Order adopted the Recommended Order as modified by Workboat's exceptions. The Final Order included the ALJ's five recommended conditions and added a sixth condition that explicitly prohibited Workboats from conducting any major repair, reconstruction, or maintenance activities, to ensure that only water-dependent activities are conducted within the lease area.

Hurchalla v. Lake Point Phase I, LLC, 2019 Fla. App. LEXIS 9609 (Fla. 4th DCA June 19, 2019)

Lake Point sued Hurchalla for tortious interference with a contract, and the jury found in favor of Lake Point. The trial court denied, and Hurchalla appealed, Hurchalla's motion for judgment notwithstanding verdict.

At issue on appeal was whether the trial court made reversible errors when it instructed the jury on Hurchalla's First Amendment and common law defenses and whether Lake Point presented sufficient evidence to defeat these defenses.

Lake Point was a contractor that entered into a public-private partnership agreement with the South Florida Water Management District on a stormwater treatment project. The relevant property was in Martin County, and the county government entered into an agreement with the district regarding the project. Hurchalla, a former Martin County Commissioner and noted environmentalist, took offense to the project when she learned that the project would supply water to the City of West Palm Beach. She emailed sitting county commissioners, expressed her views on the project, and detailed ways to stop the project.

Relevantly, Lake Point sued Hurchalla for tortious interference, and the jury found in favor of Lake Point. On appeal, Hurchalla made two arguments: (1) the trial court erred when it instructed the jury on her First Amendment and state

common law defenses, and (2) Lake Point did not present sufficient evidence to defeat both defenses.

On the first argument, the Fourth District noted that Hurchalla, during the charging conference and in her proposed instructions, mixed the elements of her First Amendment defense and her state common law defense. These two defenses have separate standards and burdens of proof. The First Amendment defense can be overcome if the opposing party produces evidence of actual malice. The state common law defense requires express malice. The Fourth District noted that these differences are material to a tortious interference claim. Because of these errors on Hurchalla's part, the Fourth District held that the trial court's incorrect instructions were not reversible error.

On the second argument, the Fourth District took note of the evidence presented at the trial court, mainly Hurchalla's false statements of fact conveyed in her email communications with the commissioners. The court determined that Lake Point submitted sufficient evidence to defeat both the First Amendment and state common law defenses.

The Fourth District affirmed the lower court's ruling.

Department of Environmental Protection v. TD Del Rio, LLC, 2019 Fla. Div. Adm. Hear. LEXIS 404 (DOAH July 24, 2019)

At issue was whether TD Del Rio should pay for the Department of Environmental Protection-demanded investigative costs and corrective actions related to property contamination violations. TD Del Rio owned the property in question that was contaminated with hazardous substances and petroleum. The department issued a notice of violation and ordered corrective action.

At an administrative hearing, the administrative law judge ("ALJ") heard witnesses and accepted evidence. In a recommended order, the ALJ found that the property contained hazardous substances and that TD Del Rio should be held to strict liability. The ALJ then determined that TD Del Rio should pay for the costs demanded by the department and should take corrective action.

The ALJ specifically noted that TD Del Rio could not assert a third-party

defense or an innocent purchaser defense. Regarding the third-party defense, the defense required TD Del Rio to have exercised due care. However, the ALJ found that, because TD Del Rio did not conduct a site assessment, it failed to exercise due care. Regarding the innocent purchaser defense, the defense required TD Del Rio to have conducted a sufficient pre-purchase inquiry regarding site pollution. Because TD Del Rio failed to inquire, it could not assert the defense.

In re: Tampa Electric Company Big Bend Unit 1 Modernization Project Power Plant Siting Application No. PA79-12A2, 2019 Fla. Div. Adm. Hear. LEXIS 422 (DOAH July 29, 2019)

The proceeding before the Siting Board ("Board") concerned (1) Tampa Electric Company's ("TECO") Big Bend Generating Station site certification and (2) Board authorization of TECO's Modernization Plan. Under (1), TECO sought site certification for its existing Generating Station Units 1, 2, and 3. Under (2) sought Board authorization to build and operate its Big Bend Unit 1 Modernization Project, which would repower its existing coal and natural gas fueled Unit 1 with natural gas and would retire Unit 2. The Department of Environmental Protection ("DEP") issued a Project Analysis Report and recommended approval for the Modernization Project.

The Sierra Club sought to intervene in the administrative proceedings. An administrative law judge ("ALJ") admitted evidence and heard testimony. The ALJ heard evidence regarding the Sierra Club's standing, and the potential climate change and general environmental impact of the site certification and Modernization Project. The ALJ also considered the potential noise and safety issues regarding the Modernization Project construction. The ALJ issued a recommended order approving the site certification and Modernization Project.

The Board reviewed the ALJ's order and reviewed a number of exceptions submitted by the Sierra Club and DEP. The Sierra Club took exception to a number of conclusions of facts and conclusions of law. The Board denied these exceptions, noting that

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(1) the Board, on review, cannot reject an ALJ's conclusions of fact that are supported by competent substantial evidence, and (2) conclusion of law objections must be stated with particularity. The Board granted some of DEP's exceptions, which dealt with scrivener errors, and denied some of DEP's more substantive exceptions, using the same rationales in its earlier analysis.

The Board adopted the recommended order.

In re: Commission review of numeric conservation goals, et al., 2019 Fla. PUC LEXIS 258 (DOAH August 7, 2019)

This consolidated Public Service Commission ("Commission") proceeding reviewed seven utility companies' conservation goals under the Florida Energy Efficiency and Conservation Act. The commission took evidence and heard witnesses.

The Commission posed eleven issues: (1) whether the respective companies' goals were based on an adequate assessment of available supply-side and demand-side conservation and efficiency measures, (2) whether the goals adequately reflect consumer costs and benefits, (3) whether the goals adequately reflect the costs and benefits to ratepayers; (4) whether the goals promote energy efficiency and demand-side renewable systems; (5) whether the goals reflect state and federal energy regulations; (6) whether the companies have a cost-effective test that the Commission could adopt; (7) whether the goals factor in free riders; (8) whether residential summer and winter energy-setting goals should be established for the next decade; (9) whether commercial summer and winter energy-setting goals should be established for the next decade; (10) whether the company had goals to establish and incentivize demand-side renewable energy systems, if any; and (11) whether the underlying dockets should be closed. The companies, in turn, answered.

The Commission also made four rulings. The Florida Industrial Power Users Group ("FIPUG") objected to an expert witness; the Commission denied the objection, since FIPUG did not comply with procedural

requirements when making the objection. The Southern Alliance for Clean Energy ("SACE") requested that the Commission remove the phrase "if any" from Issue (10), arguing that the relevant statute does not make this determination discretionary; the Commission rejected these arguments, stating that it was consistent with the last goal-setting procedure. SACE proposed an additional issue point to address low-income residents; the Commission determined that this concern can be addressed in Issue (8); and Florida Department of Agriculture and Consumer Services proposed an additional issue point concerning low-income consumer education and outreach; the Commission determined that this concern could be addressed in Issue (7) or (8).

Oliva v. Fla. Wildlife Fed'n, Inc., No. 1D18-3141 (Fla. 1st DCA, Sept. 9, 2019)

This appeal addressed Article X, section 28 of the state constitution. This constitutional provision began as a citizens' initiative and was passed by Florida voters in the 2014 election. The provision concerns public land acquisition trust funds. It details the how the state can finance land, water, and other property acquisitions and improvements. After the election, state officials mixed general revenue and Article X, section 28 revenue, and also used the revenue on land acquired before the amendment was passed.

The Florida Wildlife Federation and other plaintiffs sued state officials, alleging that these actions were unconstitutional under Article X, section 28. The trial court agreed and relied on a number of sources to glean the provision's scope and intent. The court looked to the citizens' initiative title, the initiative's ballot summary, and the history of related state land acquisition programs. The court, in

relevant part, held that the constitutional provision (1) created a trust fund for land the state would acquire after the passage of the provision, (2) prevented the state from spending Article X, section 28 revenue on land acquired before the passage of the provision, and (3) prevented the comingling of Article X, section 28 revenue and general revenue. In so holding, the court ordered the state to keep a record of where Article X, section 28 funds are spent and invalidated approximately 100 appropriations that used the mixed revenue.

The First District Court of Appeal heard the appeal and, in relevant part, reversed the trial court. The district court noted that the plain language of the constitutional "provision does not plainly restrict the use of [Article X, section 28] revenue to improvement, management, restoration, or enhancement of lands only acquired before 2015" and "does not plainly limit the improvement of property to those properties only recently acquired." This reading was supported by the Florida Supreme Court's advisory opinion to the Attorney General regarding the citizens' initiative. However, the district court stressed that it did "not speak to the legality of the appropriations since enactment of Article X, section 28, a question which is now pending."



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Florida State University College of Law

November 2019 Update

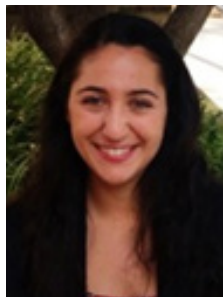
by David Markell, Steven M. Goldstein Professor

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

Recent Alumni Accomplishments



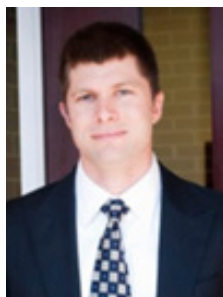
Garmestani



Landa



Melnick



Moye

- **Ahjond Garmestani** co-wrote an article, "Untapped Capacity for Resilience in Environmental Law" that was recently published in PNAS 116 (40).
- **Mackenzie Landa** is currently serving as Counsel for the U.S. House of Representatives Select Committee on the Climate Crisis, where she leads the committee's work on nature-based climate solutions. In addition to holding congressional hearings on climate change solutions and working on legislation such as H.R. 9, The Climate Action Now Act, the committee is tasked with developing a set of policy recommendations focused on ways Congress should confront the climate crisis. In her role on the committee, Ms. Landa focuses on how natural climate

solutions, such as conservation, restoration, and improved land management actions, can increase carbon storage and avoid greenhouse gas emissions in ecosystems, farms, and natural landscapes.

- **Benjamin Melnick** recently accepted the position of Director of the Division of Water Resource Management within the DEP.
- **George Douglas Moye** and his company, Moye Consultants, developed an energy storage technology that was selected as one of 25 semifinalists in the NASA iTech program. The technology is described as a simultaneous battery and capacitor design model that computes energy from the storage device's electrical current and design.

Recent Student Achievements and Activities

- **Ashley Englund** and **Alexander Purpuro** will be competing in the Jeffrey G. Miller National Environmental Law Moot Court Competition at Pace University in February 2020.
- A team comprised of FSU Law student **Sordum Ndam** and FSU Urban & Regional Planning students **Brittany Figueroa** and **Jonathan Trimble** was selected by the Florida Air and Waste Management Association to present as part of the Student Environmental Challenge hosted by the Association. The team's task was to select a rural coastal city in Florida and persuade the selection committee, through a written and oral



Florida Air and Waste Management Association Student Environmental Challenge Team

presentation, that this community should be selected for funding of sea-level rise resiliency and adaptation measures. The team presented sea-level rise resiliency solutions for Alligator Point, Florida to an AWMA Selection Committee comprised of representatives from the private sector, not-for-profit associations, and public sector on October 29, 2019. The team received second place in the competition.

- FSU Law's annual Moot Court Team Final Four Competition took place at the Florida Supreme Court on October 16, where students **Alex Clise**, **Holly Parker Curry**, **Gabriela De Almeida**, and **Erin Tuck** presented oral arguments before judges of the Florida Supreme Court and the First District Court of Appeal. Congratulations to all who competed and to **Holly Parker Curry** on being awarded Best Advocate!



From left to right Holly Parker Curry, Alex Clise, Erin Tuck and Gabriela De Almeida

- The Florida State University College of Law Trial Team won first place in the 2019 Mockingbird Challenge National Trial Competition! Congratulations to team members **R. McLane Edwards**, **Genevieve Lemley**, **Corie Posey**, and **Luke Waldron**.



From left to right Genevieve Lemley, Luke Waldron, Corie Posey and R. McLane Edwards

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FSU UPDATE

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Faculty Achievements

- Professor **Shi-Ling Hsu** published, with Professor Josh Eagle of the University of South Carolina, the casebook *Ocean and Coastal Resources Law*.



Professor Shi-Ling Hsu

- Professor **David Markell** published, with Robert Glicksman and Justin Sevier, "An Empirical Assessment of Agency Mechanism Choice" 71 ALABAMA LAW REVIEW _ (2020 FORTHCOMING).



Professor David Markell

- **Hannah Wiseman** delivered the 12th Annual Schultz Lecture in Energy at the University of Colorado Law School in October. Her lecture, entitled "Energy as a Locally Desirable Land Use," described how technological, economic, and legal changes have made siting options for energy resources more flexible, thus increasing opportunities to address communities' concerns about the impacts of energy development.



Professor and Associate Dean Hannah Wiseman

Spring 2020 Events

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

Spring 2020 Environmental Distinguished Lecture

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



Professor Cary Coglianese

Local Autonomy and Energy Law Symposium

Join us on Friday, February 21 for a discussion featuring keynote speaker **Richard Briffault**, Joseph P. Chamberlain Professor of Legislation, Columbia Law School; **Alexandra Klass**, Distinguished McKnight University Professor, University of Minnesota Law School; **John Nolon**, Professor of Law, Pace University Elisabeth Haub School of Law; **Erin Scharff**, Associate Professor of Law, Arizona State University Sandra Day O'Connor College of Law; **Rick Su**, Professor of Law, University of North Carolina School of Law; **Sarah Swan**, Assistant Professor, FSU College of Law; **Shelley Welton**, Assistant Professor of Law, University of South Carolina School of Law; and **Michael Wolf**, Richard E. Nelson



Professor Richard Briffault, Keynote Speaker

Eminent Scholar Chair in Local Government Law, University of Florida Levin College of Law. More information to be announced.

Environmental Law Enrichment Lectures

Inara Scott, Assistant Dean for Teaching and Learning Excellence and Associate Professor, Oregon State University College of Business, will present a guest lecture on Wednesday, January 29 at 12:30 p.m. in Room 208.



Professor Inara Scott

Shalanda Baker, Professor of Law, Public Policy and Urban Affairs, Northeastern University School of Law, will present a guest lecture on Wednesday, April 1 at 12:30 p.m. in Room 208.



Professor Shalanda Baker

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



Working to Protect Wetlands and Wildlife: Updates from Stetson's Institute for Biodiversity Law and Policy

Submitted by Erin Okuno

The Institute for Biodiversity Law and Policy at Stetson University College of Law coordinates educational, research, and service activities related to environmental law and policy issues at the international, national, and local level. The Biodiversity Institute is a past recipient of the Distinguished Achievement in Environmental Law and Policy Award from the ABA's Section of Environment,

Energy, and Resources. During summer and fall 2019, Stetson's Biodiversity Institute continued its work to protect wetlands and wildlife.

In July, Professor Royal Gardner (Director of Stetson's Biodiversity Institute), Erin Okuno (the Institute's Foreman Biodiversity Fellow), and three other attorneys filed an amicus curiae brief in the Supreme Court of the United States in the case of

County of Maui v. Hawai'i Wildlife Fund. The team filed the brief on behalf of four individual aquatic scientists and eight scientific societies. The brief explains why science must be considered to achieve the Clean Water Act's objective.

In collaboration with the Environmental Law Institute (ELI), Stetson's Biodiversity Institute completed a two-year research project as part of a Wetland Program Development Grant from the U.S. Environmental Protection Agency (EPA). Stetson and ELI reviewed program instruments and conducted interviews with program administrators for in-lieu fee (ILF) programs, which provide compensatory mitigation to offset impacts to wetlands, streams, and other aquatic resources around the country. ([Download the final report for free.](#)) This fall, Stetson's Biodiversity Institute and ELI began collaborating on another project to produce detailed guides on various components of ILF program implementation. The project also will be funded by an EPA Wetland Program Development Grant.

Thanks to a generous \$150,000 grant from the Joy McCann Foundation, Professor Gardner, Erin Okuno, and student research assistants at

continued...



Professor Gardner with students on a swamp walk in Big Cypress National Preserve



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STETSON UPDATE

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Stetson Law recently started a two-year research project on “Improving Long-term Protection of Aquatic Resource Compensatory Mitigation Sites.” The goal is to support the efforts of policymakers, regulators, conservation organizations, and other stakeholders to ensure effective long-term protection of compensatory mitigation sites in Florida and around the country. The Institute will identify current trends regarding site-protection instruments and financing mechanisms for the long-term protection and management of restored wetlands and streams by mitigation bankers, ILFs, and permittees.

At the international level, the Biodiversity Institute helped coordinate the 19th International Wildlife Law Conference (IWLC), which was hosted by the University of Barcelona Faculty of Law in June 2019. The conference featured sessions on marine biodiversity in areas beyond national jurisdiction, protected areas, regional connectivity, trophy hunting, and enforcement and liability. Plenary speakers included Professor Gardner (Stetson Law), Professor Ludwig Krämer (ClientEarth), Professor Luis E. Rodríguez Rivera (Universidad de Puerto Rico), and Dr. Guillaume Chapron (Swedish University of Agricultural Sciences). Stetson Law will host the 20th IWLC at its Gulfport, Florida campus on April 1–2, 2020.

On September 25–27, Stetson Law hosted the 16th Meeting of the Scientific Committee of the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC). The IAC is a regional intergovernmental treaty with 16 contracting parties. Stetson Law is an accredited observer to the IAC, and Stetson Law students, faculty, and staff were able to observe and provide support at the meeting, which included delegates from 12 countries. The meeting included a special screening of the award-winning documentary “Cacu: Un Cambio por la Vida.” Directed by Marvin del Cid, the documentary

highlights the efforts of local fishermen in Santo Domingo who work to protect sea turtle nests.

The Edward and Bonnie Foreman Biodiversity Lecture Series returned to Stetson Law this fall with lectures by Jason Lauritsen (Executive Director of the Florida Wildlife Corridor), Elizabeth Silleck (Senior Conservation Manager with the Environmental Defense Fund’s Oceans, Gulf of Mexico Program), and Dr. Jason M. Evans (Interim Executive Director of the Institute for Water and Environmental Resilience at Stetson

University). The lecture series will continue in the spring with presentations by Craig Pittman (Environment, Growth and Development Reporter for *Tampa Bay Times*) and Dr. Arie Trouwborst (Associate Professor of Environmental Law, Tilburg University, The Netherlands). To attend a lecture in person or remotely, email biodiversity@law.stetson.edu.

To learn more about Stetson’s Institute for Biodiversity Law and Policy, please review our 2018–2019 annual report and visit www.stetson.edu/law/biodiversity.



Professor Gardner at the
19th International Wildlife Law Conference



Stetson Law hosted the 16th Meeting of
the IAC Scientific Committee.jpg

UF Law Environmental, Land Use and Real Estate Program Update

NEW CERTIFICATE TRACK

The Program added a new track to its environmental and land use law certificate. Students may now elect between the environmental and land use track, or the land use and real estate track. Enterprising students can manage both. We graduated our first student in this track in the Spring of 2019 and anticipate several more this Spring. New faculty and new courses will add to our robust offerings designed to prepare students for the field.

NEW FACULTY



Sabrina Little

Sabrina Little joins the UF Law faculty full time as a permanent hire legal skills professor and support the Program's new land use and real estate track. Professor Little, who has served as a Visiting Legal Skills Professor teaching legal writing, comes to us with 10 years of commercial real estate experience at Greenberg Traurig. She will teach the Program's Real Estate Law Practicum and the new commercial and mixed use real estate compressed course in Miami, discussed below. She will also advise students who choose to pursue the new certificate track in land use and real estate.

NEW FIELD COURSES

Field courses have always been a special feature of the ELULP. We have added 2 new field courses and repurposed another using the College of Law's new first week compressed course model. Compressed courses are intensive 1 credit courses that are taught during the first week of the semester, which is reserved only for compressed courses.

COMMERCIAL AND MIXED USE REAL ESTATE IN MIAMI.

Professor Sabrina Little and Akerman Land Use and Real Estate Partner Spencer Crowley, an ELULP alum, will collaborate on a compressed course addressing the complexities of large commercial and mixed use real estate projects. The course will be taught from Akerman's Offices in Miami, and feature site visits to recent and in-progress projects.

TRANSACTIONAL CONSERVATION: REAL ESTATE, FINANCE AND TAXATION.



This course was co-taught in the Fall semester by Professor Tom Ankersen and Tom Kay, Executive Director of Alachua Conservation Trust (ACT), now an adjunct professor at UF Law and the ELULP. The course addressed conservation-based real estate transactions, state and local land acquisition programs, financing and the tax consequences of land donations. The course included a baseline documentation inspection at an ACT acquired conservation easement along the Santa Fe River and a swim in a spring acquired and managed by ACT.

MARINE AND COASTAL RESTORATION LAW AND SCIENCE.

This course represents a unique collaboration between Florida Sea Grant and UF Law to integrate law students and extension outreach professionals to address the science, law and policy of marine ecosystem restoration, specifically corals, sea grasses and sponges. The course will take place over 3.5 days in the Florida Keys at the Mote Marine International Center for Coral Reef Research and Restoration.

FLORIDA SEA GRANT LEGAL PROGRAM ESTABLISHED.



The Conservation Clinic has long been affiliated with Florida Sea Grant, the marine and coastal research and extension arm of UF, and much of the Clinic's portfolio supports coastal communities and stakeholders. That relationship has been formalized with the establishment of the Florida Sea Grant Legal Program as part of the national Sea Grant Legal Network. The Clinic is one two nationally that serve Sea Grant and its stakeholders in this manner. FSG supports enables to the Clinic to retain a legal fellow to assist Professor Ankersen in the Clinic.

PROGRAM GRADS RECEIVES PRESTIGIOUS FELLOWSHIPS.

2019 Program Graduate Kathryn Slattery was awarded a 2019 National Sea Grant Knauss Fellowship. Katie will spend her fellowship with EPA's Office of Water Quality in Washington D.C. She spent the Fall 2019 semester as the Florida Sea Grant Conservation Clinic Legal Fellow supporting the Clinic's work on sea turtle conservation, and in the Bahamas. 2019 program graduate Andres Perotti was awarded the 2019-2020 fellowship with the legal department at Oceana, an international NGO "dedicated to protecting and restoring the world's oceans on a global scale."

CONSERVATION CLINIC PROJECT SPOTLIGHT - THE BAHAMAS.



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ACTION AREAS

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their comprehensive plans and land development regulations or codes to incorporate climate change mitigation and adaptation planning strategies.”¹⁰ Presumably, this led to the downscaling of the initial national policy construct of federally designated regional adaptation action areas, to a Florida-specific one that flowed from the state to local government designated AAA’s through the comprehensive planning framework- resulting in the legislation that is the subject of this article.

Aspiring Versus Operating

Since the CPA was signed into law in 2011, at least twenty-five Florida counties and municipalities have amended their comprehensive plans to adopt AAA language¹¹, depicted on Figure 1 below.

The adoption language varies from local government to local government. All twenty-five AAA amendments are written in language that we have grouped into two categories: *aspirational* and *operational*. Aspirational refers to adoption language that calls for, but does yet not create, a spatially explicit AAA. Operational refers to adoption language, or post-adoption actions, that creates a spatially explicit adaptation planning area.

It is also possible for a jurisdiction to have both.¹²

This occurs where a jurisdiction subsequently acts upon its aspirational language and adopts an AAA pursuant to its own procedures. For example, Miami-Dade County operationalized its aspirational comprehensive plan language through a 2016 resolution that created the Arch

Creek AAA.¹³ The area spans five separate municipalities and seeks to “provide a model for multi-jurisdictional coordination on resilience.”¹⁴

Of the twenty-five local governments with at least aspirational language, we identified seven where AAA’s have been actually designated.¹⁵ Table 1 above lists all 25 local governments, provides the year of AAA adoption, and indicates the nature of the language as aspirational or operational. Some local governments have established self-imposed deadlines to make their AAA’s spatially explicit and operational.¹⁶

Spatial Explicitness

Perhaps the most significant

Aspirational Language	Year	Operational Language	Year
Boynton Beach	2016	Broward County	2013
Clearwater	2017	Fort Lauderdale	2014
Fernandina Beach	2017	Indian River County	2016
Jupiter	2019	Jacksonville	2017
Key West	2013	Miami-Dade County*	2016
Melbourne	2017	Satellite Beach	2013
Miami	2017	Vero Beach	2018
Miami-Dade County*	2016	Village of Pinecrest	2016
Monroe County	2016	Yankeetown	2016
Nassau County	2019		
North Miami	2016		
Palm Beach County	2014		
Pompano Beach	2018		
Sarasota City	2017		
Sarasota County	2016		
Tequesta	2017		
Titusville	2018		

*Operational resolution adopted, but not yet included in Comp plan

Table 1

feature of the AAA is the manner in which it is spatially defined. Local governments creating AAA’s have taken very different approaches. These approaches include relying on preexisting statutory zones such as the Coastal High Hazard Area (CHHA),¹⁷ storm surge models, tidally influenced drainage basins, and unique local conditions.

Several local governments, such as Jacksonville and Indian River County, have simply adopted existing planning area designations such as the statutorily mandated Coastal High Hazard Area or FEMA 100 year flood zone.¹⁸ Vero Beach defines its AAA as those areas “subject to storm surge from a Category 1 or 2 hurricane.”¹⁹ Miami-Dade County has created an AAA based on a tidally influenced creek basin.²⁰ Others have tailored their AAA’s to specific infrastructure projects. Broward County has made the Port Everglades Sand Bypass project an AAA of Regional Significance,²¹ and Fort Lauderdale has identified stormwater basins and areas needing sea wall repair as AAA’s.²² Satellite Beach uses a cultural feature, State Road A-1-A, to define one of its AAA’s, the “Erosion Adaptation Action Area (EAAA).”²³ While the basis for spatially defining AAA’s differs, all enable local governments to target adaptation planning based on local priorities.

Characterizing Extant AAA’s

AAA’s tend to reflect broad-based adaptation goals for the specific areas that can be gleaned from the language in the comprehensive plan. Even those governments that have yet to take the leap into operation

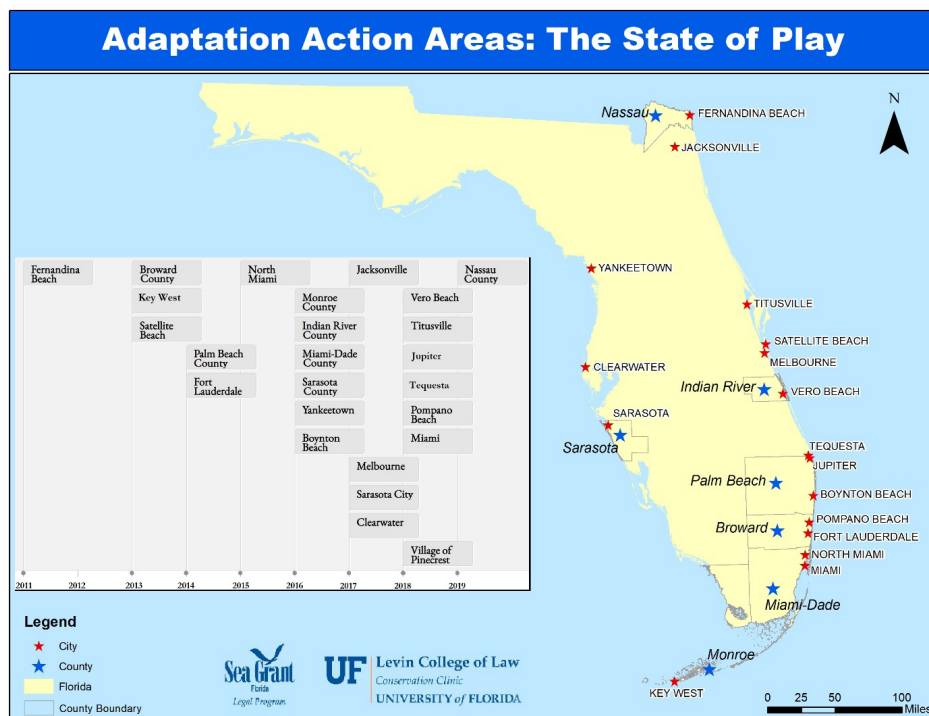


Figure 1

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generally have some goal set out in the aspirational AAA language in their comprehensive plan. These tend to address either the built environment or the natural environment, or sometimes both. A theme receives less attention, with one notable exception, is social equity. Fort Lauderdale has created sixteen AAA's and prioritized funding for thirty-eight projects within those AAA's²⁴. Fort Lauderdale's sixteen AAA's were all created with the intention address infrastructure deficiencies to protect the built environment from flooding,²⁵ and Broward County identified the area influenced by a sand bypass project as an AAA.²⁶

On the other hand, the Town of Yankeetown, focused its AAA almost exclusively on the natural environment, even terming it a "Natural Resources AAA."²⁷ Yankeetown's AAA emphasize the maintenance of freshwater flows to slow saltwater intrusion, the beneficial use of dredged spoil to maintain pocket beaches and salt marsh elevation, and strategies such as rolling easements and buffers and to promote habitat migration as sea levels rise. Similarly, the City of Key West, largely maintains a focus on natural resources including coastal wetlands and living marine resources, promoting the resiliency of fisheries and wildlife.²⁸

Less attention has been given to social equity in the planning language associated with AAA's. A notable exception is Miami Dade County's Arch Creek AAA, which includes a mix of income levels, and areas of both subsidized and native affordable housing that are subject to tidal flooding. Social equity was a specific objective in the process of creating the AAA.²⁹ The City of Jacksonville has also discussed ensuring social equity remains a consideration in its AAA development process, but it does not appear to have operationalized any AAA actions yet.³⁰

Regional and Multi-jurisdictional AAA's

Adaptation planning does not begin and end at jurisdictional boundaries, particularly in dense urban areas with many small cities. In these circumstances, AAA's can provide a useful vehicle to collaboratively

and consistently plan and implement adaptation priorities across jurisdictions. Regionalism in adaptation policy has been pioneered by the local governments participating in the Southeast Florida Climate Compact. Other regions of Florida have been engaged in similar efforts to varying degrees, often coordinated by regional planning councils.³¹ The Southeast Florida Climate Compact includes explicit recognition of AAA's and encourages local adoption.³²

Within the Compact counties, Broward County has taken a unique approach to adaptation action area planning that stems from its unique relationship to the municipalities within the County. Under the County Charter, municipalities are required to submit the land use element of their comprehensive plans to the County and obtain a determination of consistency with the County's Land Use Plan.³³ Within its Land Use Plan the County has created a category of AAA's it describes as "AAA's of Regional Significance."³⁴ Thus far, one of these has been created. The Port Everglades Sand Bypass Project is a project-specific adaptation action that serves downdrift beach communities.³⁵

As noted above, Miami-Dade's Arch Creek AAA spans 5 jurisdictions,³⁶ and was created specifically to foster inter-jurisdictional adaptation planning. It is also noteworthy because the boundaries of the AAA generally correspond to tidally influenced Arch Creek watershed, suggesting a basin approach to adaptation planning. These are the only multi-jurisdictional AAA's that have thus far been established.

Adaptation Action

Adaptation actions take two primary forms, enhanced regulatory scrutiny within the designated area and/or capital improvement projects within the area, or both. Additional regulation means that the AAA functions much like a traditional overlay zone in planning law, creating regulatory requirements within the AAA that "sit on top" of regulations that apply throughout the jurisdiction.³⁷ Additionally, adaptation actions can direct other resources to the AAA such as education and outreach.

Satellite Beach has implemented land development regulations in furtherance of its Erosion AAA. It

prohibits property owners in the AAA from seeking a second coastal setback variance when erosion has furthered encroached into the property.³⁸ Although its AAA designation remains aspirational, Nassau County explicitly characterizes its potential future AAA's as an overlay district and offers several examples of stricter regulation to accomplish its objectives.³⁹ These include, among others, increased stormwater management standards; required central sewer hookups or advanced septic treatment; higher pervious lot coverage percentages.⁴⁰

Fort Lauderdale, discussed below, offers the most compelling example of Adaptation Action Areas that focus on capital improvement projects.

Prioritized Funding

Encouraging local governments to set funding priorities is an explicit goal of the 2011 AAA legislation and, as previously noted, was the early historical impetus for pursuing the concept at the federal level by the Climate Compact. There are a host of local government finance vehicles to create dedicated or discretionary funding sources and streams in order to advance adaptation actions. Many of these, such as special assessments, tax increment funding, stormwater utilities, etc., are generally described in a 2013 report to the Southeast Climate Compact by the South Florida Regional Planning Council,⁴¹ and in a prior article is this Reporter.⁴² However, it does not appear that any of these sorts of recurring revenue streams have been discretely deployed in an extant AAA.

The principal means for a local government to set infrastructure funding priorities is through the Capital Improvements element of its comprehensive plan.⁴³ "Bricks and mortar" types of adaptation actions such as drainage improvements, raising road elevation and sea wall upgrades are more likely to be funded if they have been programmed through the Capital Improvements Element. In fact, failure to recognize the cost of actions called for in another part of the plan, such as the coastal management element could lead to consistency challenges under the growth management act.⁴⁴ The City of Fort Lauderdale has championed this approach to AAA funding prioritization, specifically

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tying 16 AAA's to 38 capital improvement projects (primarily drainage and sea walls), then including those projects in the capital improvement funding priorities for the City.⁴⁵

The City's Community Investment Plan provides: "The designation of AAA through this Community Investment Plan represents the City's commitment to invest public dollars to reduce the vulnerability of those areas to coastal flooding. Designated locations are being prioritized for infrastructure and other improvements intended to reduce impacts to assets currently experiencing coastal flooding as well as reduce the areas future risk and vulnerability to the effects of sea level rise."⁴⁶

A third way in which AAA's can set funding priorities results from attracting revenue streams that are external to the local government. Two of the most well-developed AAA's owe their development to external planning and research grants. Broward County and Fort Lauderdale were targeted by the State as a pilot project for the AAA process,⁴⁷ and Satellite Beach leveraged its own State planning grant with support from Florida Sea Grant through its biennial research competition.⁴⁸ Other local governments have received modest planning grants. Creating AAA's sets up these local governments for future opportunities. Both FEMA and HUD are increasing funds for pre-disaster mitigation, including community development block grants for qualifying communities, especially those that address social equity considerations.⁴⁹

Social Equity Considerations in AAA Planning

Local governments are adopting AAA's with the intention of protecting the vulnerable built environment, bolstering natural resource resilience or both. However, relatively little aspirational or operational attention has been devoted to the social equity impacts of flooding and of adaptation itself.⁵⁰ As this article suggests, AAA's are flexible planning tools. Municipalities are not limited to addressing grey and green infrastructure when operationalizing AAA's.

Targeting AAA's to address and prioritize adaptation equity should

also be a consideration.

Social vulnerability is the "susceptibility of social groups to the impacts of hazards, as well as their resiliency, or ability to adequately recover from them."⁵¹ Factors that indicate a susceptible social group include demographic characteristics such as age, gender, economic class, and race as well as social capital and access to emergency response personnel.⁵² Increasingly, these demographic factors can be mapped,⁵³ and those maps can be overlaid on current and future flood maps. The result is a spatially explicit geography that can be targeted for resources to ensure those living within it remain resilient to the challenges posed by storm surge, flooding and rising seas – and climate gentrification.⁵⁴

Some local governments have taken steps to address social equity in their AAA planning process. The Arch Creek AAA in Miami-Dade County stands out as the one operational AAA that has put social equity at its center.

Conclusions and Recommendations

Florida has 35 coastal counties and, according to the Florida Department of Economic Opportunity, at least 168 coastal municipalities,⁵⁵ all of which are subject to storm surge, tidal flooding and sea level rise, and all of which are required to include a coastal management element in their comprehensive plan.⁵⁶ Yet despite nearly 10 years on the books, only 25 of these local governments have taken advantage of the legislative directive to plan (or plan to plan) for adaptation using the legal figure of an "Adaptation Action Area," and only seven of these have actually delineated Action Area boundaries. Of course, this does not mean that other coastal communities are not proactively undertaking adaptation planning using different policy approaches. But if the intent of the legislature was to encourage sub-jurisdictional adaptation planning through this statutory vehicle then it may not be succeeding.

One reason for the slow pace of AAA adoption may be that primary source of State funding that has been provided to date has been through a limited pool of competitive planning grants. It may be beneficial for the State to consider a more robust program of adaptation-driven capital improvement

and/or programmatic funding, prioritizing state adaptation dollars to those communities that have created AAA's and identified projects or programs within those AAA's, and identified revenue sources and streams to serve as matching funds.

Regionalism has emerged as significant feature in climate adaptation planning in Florida and elsewhere in the United States.⁵⁷ Dense urban areas, where contiguous communities share similar adaptation challenges, vulnerable infrastructure, and socio-economic conditions lend themselves to trans-jurisdictional approaches. As evidenced by the Arch Creek AAA in Miami-Dade County, the Adaptation Action Area tool is an appropriate policy tool to plan across jurisdictions. Funding could be provided to regional entities, such as the regional planning councils, specifically for the purpose of promoting multi-jurisdictional AAA planning.

Finally, with the exception of the Arch Creek AAA in Miami-Dade County, none of the operationalized AAA's appear to incorporate considerations of social equity, and none of the adopted aspirational comprehensive plan language is explicit in directing delineation of AAA's with this in mind.⁵⁸ If the intent of the AAA is to create spatially-explicit policy preferences for planning and implementation of adaptation projects then ensuring that those who are most socially and economically vulnerable to tidal flooding, storm surge and sea level rise receive greatest consideration in AAA establishment would seem to be good policy.

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Endnotes

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Based on previous marine protected area work in the southern Bahamas, the Bahamas National Trust has engaged the Conservation Clinic to assist in developing best land use practices for the management of small inhabited and uninhabited islands within the archipelagic nation's national parks. The Clinic will also assist with the update of the Exuma Cays Land and Sea Park Management Plan.

CONSERVATION CLINIC PROJECT SPOTLIGHT – LIVING SHORELINES MASTER PLAN.



The Conservation Clinic collaborated with UF's Nature Coast Biological Station and the Town of Cedar Key to develop a master plan for the island

communities shorelines. ELULP LLM alum and Section Board Member Byron Flagg worked with the Clinic to create a permitting overlay in GIS to assist in determining regulatory approvals that would be required to implement the plan. The City adopted the master plan into its comprehensive plan.



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INTERNATIONAL WETLANDS RESEARCH COLLABORATION IN PANAMA.

The ELULP has partnered with the UF College of Engineering and the UF Water Institute in a research and training collaboration with the Ramsar Wetland Treaty Center for the Western Hemisphere, known by its Spanish acronym CREHO,

headquartered in Panama. Professor David Kaplan from Engineering joins Professor Tom Ankersen as academic managers of the Memorandum of Understanding between CREHO and the UF Water Institute. The two institutions will initially focus their research and training on intertidal wetlands and nearshore reefs. Professor Christine Angelini from the College of Engineering and ELULP Professor Tom Ankersen are collaborating with the UF Center for Latin American Studies to bring students to Panama in the Summer of 2020.

SCHOLARSHIP UPDATE

Professor's Amy Stein, Christine Klein and Mary Jane Angelo participated in the 2019 Southeastern Environmental Law Scholars symposium in Evins Mill, Tennessee. Professor Stein's presented her work-in-progress addressing the scope of presidential “emergency energy powers.” The 2020 SELS symposium will be held in Florida.

Our faculty continues to produce great scholarship across a broad spectrum of issues, and 2019 has been an especially productive year.

- Mary Jane Angelo, *Discordant Environmental Laws: Using Statutory Flexibility and Multi-Objective Optimization to Reconcile Conflicting Laws*, 38 Stanford Environmental Law Journal____ (forthcoming 2019).

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SUNNY OUTLOOK.

Renovations at Bruton-Geer Hall on the UF Law campus brought the opportunity to expand UF Law's solar energy capacity. The addition brings UF Law's total to 73 panels, generating 27.9 kW of capacity and producing 12% of Bruton-Geer's electrical needs. ELULP Professor Amy Stein championed the effort.

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MEMBERSHIP APPLICATION
ENVIRONMENTAL AND LAND USE LAW SECTION
WEBSITE: WWW.ELULS.ORG

NAME: _____

EMPLOYER/AGENCY/LAW SCHOOL: _____

ADDRESS: _____

CITY/STATE: _____ ZIP CODE: _____

PHONE: (____) _____ E-MAIL ADDRESS: _____

FLORIDA BAR NO: _____ DATE OF ADMISSION: _____

PROFESSIONAL SPECIALTY(IES)/AREAS OF INTEREST: _____

CHECK ALL COMMITTEES OF INTEREST TO YOU:

☐ AFFILIATE MEMBERSHIP

☐ CLE

☐ ELUL TREATISE

☐ FELLOWSHIPS

☐ LAW SCHOOL LIAISON

☐ FL BAR JOURNAL COLUMN

☐ SECTION REPORTER

☐ YOUNG LAWYERS

☐ LAND USE

☐ POLLUTION ASSESSMENT, REMEDIATION

☐ NATURAL RESOURCES

☐ ENERGY

☐ MEMBERSHIP

☐ PUBLIC INTEREST

MEMBERSHIP OPTIONS / DUES

The Florida Bar dues structure does not provide for prorated dues; your Section dues cover the period from July 1 to June 30. Your application and check should be mailed to The Environmental and Land use Law Section, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

I AM... (check one)	MEMBERSHIP OPTION	ANNUAL DUES
<input type="checkbox"/>	ATTORNEY – Admitted to Florida Bar	\$40
<input type="checkbox"/>	AFFILIATE – Professionals and Faculty	\$50
<input type="checkbox"/>	AFFILIATE – Students	\$20

I understand that all privileges accorded to members of the section are accorded affiliates and law students, except that affiliates may not advertise their status in any way, and neither affiliates nor law students may vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

CERTIFICATION: I hereby certify that I have never been denied admission to any bar, or been the subject of any proceeding questioning my moral character, disbarred from any legal bar, convicted of a felony, expelled from any University or Law School, or investigated for fraud, misappropriation or mismanagement of funds.

SIGNATURE: _____ DATE: _____