

# The Legal Implications of Sea Level Rise: *Winner of the 2022 ELULS Law School Note Competition*<sup>1</sup>

By: Brooke Cleary<sup>2</sup>

By 2100, scientists predict the sea will rise at least three feet above its current level.<sup>3</sup> The National Oceanic and Atmospheric Administration's ("NOAA") most severe projection is an alarming eight feet.<sup>4</sup> While the sea will rise gradually, flooding, migration, and other consequences will be rapid. Therefore, sea level rise is a pressing legal issue.

## Public Health

The impacts of sea level rise includes various types of flooding. Tidal flooding will be exacerbated as the sea continues to rise, affecting everyday life for coastal inhabitants.<sup>5</sup> Regarding public health, flooding will cause significant complications since it will block routes for emergency vehicles and medical services. Flood waters will host disease-carrying insects and spread infections such as malaria, dengue fever, shellfish poisoning, and marine-borne illnesses.<sup>4</sup> Displaced wildlife will be forced to relocate into communities, furthering flooding's public sanitation and safety issues.<sup>6</sup> The hardships citizens may face due to sea level rise also have the potential to increase mental health issues.<sup>6</sup>

Flooding will contaminate Florida's freshwater systems, such as aquifers.<sup>7</sup> While saltwater has always lurked beneath aquifers, saltwater's



density allows freshwater to float on top.<sup>7</sup> If the freshwater is pumped from the aquifer faster than it can be replenished, the saltwater underneath will rise, tainting Florida's freshwater supply.<sup>7</sup> Rising sea levels will only accelerate this crisis.<sup>7</sup> Not only will Floridians have inadequate access to safe drinking water, but also other states that rely on Florida's potable water.<sup>7</sup> If saltwater seeps into Florida's aquifers, a legal issue will arise because, at minimum, local land development regulations shall "provide for protection of potable water wellfields."<sup>8</sup>

In sum, rising sea levels will tremendously impact sanitation, potable water, and public health. Since the law is essential to promote society's health and well-being, local governments must find a way to solve or mitigate this complex issue.

## Real Estate & Coastal Habitat

As sea levels rise, the condition and value of coastal properties will be jeopardized. Parties involved in real estate transactions should consider sea level rise when planning long-term investments and development strategies.<sup>9</sup> It can almost be assumed that a coastal property owner's due diligence includes researching flood zones, building

codes, and other provisions to protect real property.<sup>10</sup> Flooding from sea level rise and storm surge will damage property and increase insurance claims. Since flood insurance is not

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# From the Chair



Dear ELULS Section Members,

I am pleased to announce that the ELULS 50<sup>th</sup> Annual Update in Amelia Island was a huge success. With approximately 100 attendees, highlights included a wonderful welcome reception honoring fifty years of ELULS past-chairs, a full day of CLE programming, a celebratory luncheon and a closing reception with live music.

It was an honor to celebrate 50 years of ELULS with so many wonderful friends and colleagues. I look forward to the launch of our 50<sup>th</sup> Anniversary ELULS webpage in early 2023, which will include photos and videos of the 50<sup>th</sup> weekend. Also, I would be remiss if I didn't thank all of the 2022-23 ELULS sponsors and others who made the 50<sup>th</sup> Annual Update so special. Finally, I want to thank Cheri Wright for all of her hard work over the past several years as our section administrator. Cheri has moved into a new position at the Bar but we cannot thank her enough for her service and dedication to the section.

We have a lot of wonderful events and webinars coming in early 2023 so please keep an eye on the ELULS webpage. I hope everyone has a happy new year. I look forward to seeing everyone in 2023!

Best Regards,

Josh Coldiron

ELULS Chair 2022-23





# Gainesville First to Eliminate Single-Family Zoning

By: Chris Berg<sup>1</sup>

By a four-to-three vote, Gainesville's City Commission recently passed three ordinances on second reading eliminating the single-family zoning classification from its Land Development Code (LDC) and its Comprehensive Plan. This action makes the City of Gainesville the first local government in Florida to eliminate single-family zoning.

## Why Gainesville and why now?

According to the City, more than 63% of Gainesville's residential land is restricted to single-family housing. The Commissioners pushing for the change argued, in part, that the ordinances would increase the stock of affordable housing in the city.

## What updates were made to the zoning ordinance?

The ordinance amending the Future Land Use Element and Map of the City's Comprehensive Plan eliminates the single-family land use category on the Future Land Use Map and replaces it with the Neighborhood Residential (NR) land use category. The NR land use category allows for single-family detached dwellings and neighborhood-scale multi-family developments. It allows for maximum density of eight dwelling units per acre and four units per building.

The ordinance amending the LDC and zoning map atlas eliminates the single-family zoning district and replaces it with the newly created NR district. The amendment also creates a neighborhood-scale multi-family land use classification and makes it a permitted use within the NR zoning districts. That land use classification

allows for a multi-family development comprised of a minimum of two units per building and a maximum of four units per building. Neighborhood-scale multi-family uses in the NR zoning districts are subject to the newly enacted regulations. For example, development is limited to one building per lot or parcel and buildings are limited to two stories.

Additionally, developments that fall under the neighborhood-scale multi-family use classification in an NR zoning district must comply with newly enacted façade requirements. Off-street parking is limited to two parking spots in the front of the building between right of way and front façade with additional parking allowed in the rear of the building. Any such development must either provide one high-quality tree or preserve an existing high-quality tree. The main entrance of the building must be on the first floor and be part of the front façade, which faces a street. But entrances to the second floor may be located to the side or the rear of the building. It is important to note, however, that single-family dwellings are still a permitted use in the NR zoning district.

## How will this impact future development?

These changes will have an immediate impact on development, but this is a developing story. These changes impact future development because the ordinance amending the Comprehensive Plan prohibits the City from issuing or commencing any development orders, development permits, or land uses dependent

on the Comprehensive Plan amendment before the amendment goes into effect. But the process is ongoing.

## When do the amendments go into effect?

The amendments to the LDC will go into effect upon the Comprehensive Plan amendment's effective date. The Comprehensive Plan amendment will go into effect 31 days after the state land planning agency notifies the City that the plan amendment package is complete and in accordance with section 163.3184, *Florida Statutes*. But if the Comprehensive Plan amendment is challenged, it will not go into effect until either the state land planning agency or Administration Commission issues a final order stating that the amendment complies with state law. Given that the state land planning agency and the Department of Transportation issued comments objecting to the proposed amendment on first reading, the state land planning agency will not likely find the amendment compliant with state law. Further, section 163.3184(5), *Florida Statutes*, allows the state land planning agency and affected property owners to challenge the proposed Comprehensive Plan amendment in an administrative action.

## Endnote

1 Chris Berg, a GrayRobinson Real Estate and Land Use attorney located in the Tampa office, focuses his practice on land use, zoning, development, permitting, real estate, and environmental matters throughout the state of Florida.



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# Coastal Conservation Corner: An op-ed report on Florida's ocean and coasts and protecting the state's blue economy

## *Trying to Reason with Hurricane Season*

By Jon Paul "J.P." Brooker, Esq.<sup>1</sup>

As I write this in early December, there is a disturbance in the mid-Atlantic with a 30% chance of tropical cyclone formation according to the National Hurricane Center.

In November, we saw Hurricane Nicole make landfall in Florida, only the third named storm to do so in November in recorded history.

Most Floridians can attest that historically, once November rolls around, hurricane activity plummets precipitously, and it is rare for tropical weather to develop late in the fall. But this is simply becoming less and less true as hurricane seasons are becoming more severe due to a changing, warming climate. And beyond storm activity lasting later into the year, late season storms are more powerful due to lingering warmer water which is like gasoline on the fire for tropical systems. It seems more and more likely that hurricanes that enter the Gulf of Mexico later in the year, like Hurricane Ian, are rapidly going to develop into major hurricanes, as Ian quickly did.

We Floridians are used to hurricanes – it is a way of life in Florida to prepare for storms, and even to indulge in the rare weather event with the fabled hurricane party. That is a part of the fabric of the Floridian identity. But as a native Floridian, I can tell you that the changes in our tropical weather that we are seeing year-in and year-out fill me with

deep concern. And to me, the root cause of these changes is crystal clear – it is attributable to anthropogenic climate change.

We humans have put too much carbon in the atmosphere which has resulted in global warming that has made our oceans hotter than normal, fueling tropical weather, and higher than usual due to the melting of the polar ice caps. We have also overdeveloped the coasts, drastically reducing natural buffers like mangroves, coral reefs, and dune ecosystems that protect our shorelines from storm activity, and resulting in dramatically worse impacts on the human environment.

But worsening tropical weather should not be a foregone conclusion in Florida. We need a twofold approach to address this problem focusing on both mitigation and adaptation, and it is on Floridians to advocate for reforms that will bring these changes about.

We need to mitigate against a changing climate by reducing the amount of carbon we put into the atmosphere, and by taking excess carbon out of the atmosphere. In Florida, there are some common-sense approaches we can take that include protecting habitats like seagrass meadows and mangrove forests. In addition to providing the important coastal protections mentioned above, these habitats are also

carbon sinks, preventing carbon from being released into the atmosphere and contributing to warming. We need mitigation efforts that focus on emissions reductions, but we also need mitigation and adaptation efforts focused on preserving remaining blue-green carbon sinks, and restoring depleted ones. And in terms of adaptation, coastal hardening is obviously going to be needed in some places, but we also need to consider alternatives that include ecosystem protection and restoration.

Florida needs to triple down on its coastal habitat protections in order to provide that sorely needed mitigation and adaptation against a changing climate and against increasingly unruly and unpredictable hurricane seasons – and this will yield other positive benefits for the state too, like helping to improve water quality, improving depleted fisheries, and helping protect the coastwide economy.

### Endnote

1 Jon Paul "J.P." Brooker is the Director of Florida Conservation and an attorney with Ocean Conservancy, the world's oldest marine conservation non-profit. He is a sixth generation Floridian from Brevard County, currently based in St. Petersburg, and sits on the Executive Council of ELULS. His opinions are his own.

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# The Property Line: FEMA Flood Regulations Could Prevent Many in Florida from Rebuilding

By Robert Volpe<sup>1</sup>

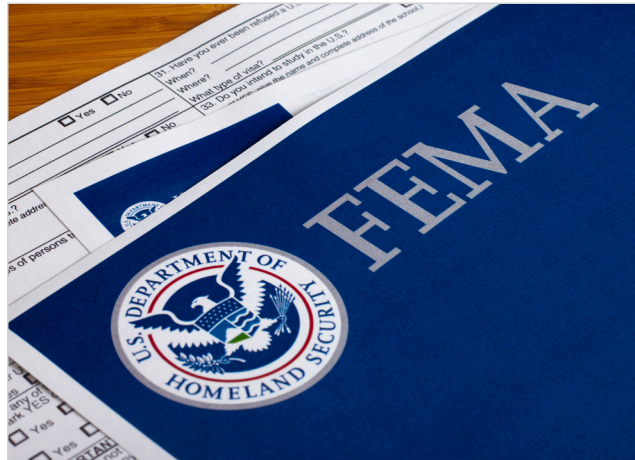
First, welcome to the inaugural edition of “The Property Line,” which will be a recurring addition to the ELULS Reporter. This column will cover legal issues surrounding land use, growth management, and development in Florida, including law, regulations, policy, and practical application. To provide a topic for this column, or to contribute, contact Robert Volpe ([rvolpe@holtzmanvogel.com](mailto:rvolpe@holtzmanvogel.com)).

ELULS Board Member, Robert Lincoln ([robert.lincoln@flalandlaw.com](mailto:robert.lincoln@flalandlaw.com)), brought this issue to our attention: current FEMA flood regulations will cripple rebuilding efforts after Hurricanes Ian and Nicole caused severe damage across Florida. Let’s explore.

The National Flood Insurance Program (NFIP) (42 U.S.C. 4001 et seq.; 44 CFR §§ 59-80) was intended to encourage local governments to incorporate flood hazards in their land use and development decisions. Communities participate by adopting and enforcing regulations and codes that apply to development in Special Flood Hazard Areas (SFHAs). Floodplain management regulations must contain minimum NFIP requirements that apply to existing structures with proposed “substantial improvements” or repair of “substantial damage.” Participating communities receive discounted rates for flood insurance.

In communities participating in the NFIP, the minimum design flood elevation for new construction and substantial improvements is the Base Flood Elevation (BFE), including any additional freeboard required by local ordinances. Additionally, substantial improvements in Special Flood Hazard Areas (SFHA) must have the lowest floor elevated to or above the BFE (that is, the flood elevation having a 1-percent chance of being equaled or exceeded in any given year).

Under the NFIP regulations, as



embodied in the Florida Building Code (FBC) and local floodplain regulations, existing buildings whose “lowest floor” is below the BFE must be elevated (or demolished and reconstructed) above the designated BFE plus freeboard if they are “substantially improved” or “substantially damaged” (as by a hurricane).



In fact, the FBC was amended in 2017 to add a 1’ freeboard requirement for all residential buildings, which means their “lowest floor” is no longer elevated above the BFE. That

means tens of thousands of houses built since the 1980’s and elevated to then-current BFE standards now must be further elevated if they are substantially improved or substantially damaged.

The NFIP defines “Substantial Improvement” and “Substantial Damage” as follows:

**Substantial improvement (SI)** means any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure (or smaller percentage if established by the community) before the “start of construction” of the improvement. This term includes structures that have incurred “substantial damage,” regardless of the actual repair work performed. 44 CFR §59.1

**Substantial damage (SD)** means damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damaged

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## THE PROPERTY LINE

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condition would equal or exceed 50 percent of the market value of the structure before the damage occurred. Work on structures that are determined to be substantially damaged is considered to be substantial improvement, regardless of the actual repair work performed. 44 CFR §59.1

Additionally, flood designations have changed over time; many properties in Florida are now within SFHA where they once were not. The release of updated FEMA flood elevation maps can substantially change property flood designations.

Therefore, under the FBC and local floodplain regulations, any buildings and residences that were damaged by Hurricane Ian and Nicole by more than 50% of the market value of the structure **must** rebuild above the BFE. Further complicating this already fraught issue, reconstruction costs have dramatically increased over recent years, and the assessed value of structures maintained by the local Property Appraisers have not kept pace; that is, the “market value” of any given structure (and it is the structure that is relevant, not the entire property including the land) as determined by the tax roll may be such that even a moderate amount of damage will exceed the “substantial damage” threshold and require the structure to be elevated above the BFE plus 1’ freeboard. This could prove financially impossible for many Floridians, especially because while many insurance policies do provide coverage for obtaining this compliance by way of rebuilding, it is often the case that this coverage is not sufficient to fully cover the cost.

FEMA provides several resources on NFIP guidelines:

- <https://www.fema.gov/flood-insurance>
- [FEMA Substantial Improvement/Substantial Damage Desk Reference, FEMA P-758 \(May 2010\).](#)
- [Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials, FEMA 480, \(February 2005\).](#)



What are some possible solutions for a property owner faced with meeting NFIP requirements?<sup>2</sup>

1. Elevate your property - This is the most obvious and direct solution; however, it can also be prohibitively expensive.
2. Floodproofing - FEMA allows “floodproofing” for non-residential structures located in A flood zones.
3. Appraisal of market value – Substantial damage and substantial improvements are based on the structure’s market value. An appraisal may provide an updated market value and relief to some property owners.
4. Letter of Map Amendment (LOMA) - A LOMA is an official amendment to a FEMA Flood Map that establishes that a specific property is not within the SFHA or a designated flood zone.
5. Obtain a variance - Variances may be granted by the local authority. The NFIP regulations do not set forth absolute criteria for granting variances. See 44 CFR § 60.6. Criteria for a variance may include: a showing of good cause; determination that failure to grant a variance will result in an exceptional hardship; determination that granting a variance will not result in off-site impacts or flood impacts;

and evidence that the variance is the minimum necessary to afford relief.

Florida homeowners and property owners have a long road ahead to rebuild after this recent hurricane season. Navigating the FEMA flood zone restrictions is only one of the roadblocks along the way. ELULS has formed a working group to further analyze and address this issue. If you are interested in participating, contact Robert Volpe ([rvolpe@holtzmanvogel.com](mailto:rvolpe@holtzmanvogel.com)) or Byron Flagg ([byron.flagg@gray-robinson.com](mailto:byron.flagg@gray-robinson.com)).

### Endnotes

1 Robert Volpe is a partner at Holtzman Vogel Baran Torchinsky & Josefiak in in Tallahassee. He represents property owners and developers on a variety of land use and real estate development issues.

2 The information provided does not, and is not intended to, constitute legal advice. Readers should contact their attorney to obtain advice with respect to any particular legal matter. No reader should act or refrain from acting on the basis of information in this article without first seeking legal advice from counsel in the relevant jurisdiction. Only your individual attorney can provide assurances that the information contained herein is applicable or appropriate to your particular situation. All liability with respect to actions taken or not taken based on the contents of this article are hereby expressly disclaimed.

# ON APPEAL

By Larry Sellers, Holland & Knight LLP

*Note: Status of cases is as of December 2, 2022. Readers are encouraged to advise the author of pending appeals that should be included.*

## FIRST DCA

*Delasol Homeowners' Association, Inc. v. Lenka Vojtiskova and Department of Environmental Protection*, Case No. 1D22-1532. An appeal of a Department of Environmental Protection ("DEP") final order dismissing: (1) appellant's request for an extension of time to file a petition for administrative hearing after the expiration of the relevant time period and for failure to show good cause, and (2) appellant's amended petition for an administrative hearing as both untimely and legally insufficient. The amended petition was dismissed without prejudice and with leave to amend. Status: Notice of appeal filed May 17, 2022; appeal dismissed on November 2, 2022.

*In re: Affirming Existence of Recreational Customary Use on 1,194 Private Properties Located in Walton County*, Case No. 1D21-3532. Appealing a final judgment, which ruled the County was unable to establish that customary use on certain parcels of defendants' properties had been either "uninterrupted" or "ancient," both of which must be proven under the judicially created customary use test.

The final judgment also rejected an argument that the judicially created customary use doctrine is unconstitutional, which is the subject of the cross appeal. Status: Notice of appeal filed November 19, 2021; notices of cross appeal filed December 2, 3 and 8, 2021.

*Kenneth L. Williams v. Department of Environmental Protection*, Case No. 1D21-2594. Appeal from an order granting DEP's motion for contempt for failure to comply with the terms of the final judgment requiring Williams to undertake certain corrective actions in regard to a solid waste storage facility. Status: Affirmed *per curiam* on September 16, 2022.

*Sierra Club, et al. v. Department of Environmental Protection*, Case No. 1D21-1667. Appeal from a final order adopting a recommended order rejecting a challenge to five Basin Management Action Plans ("BMAPs") (the Suwannee River BMAP, Santa Fe River BMAP, Silver Springs, Upper Silver River and Rainbow Spring Group BMAP, Wekiwa Spring and Rock Springs BMAP, and Volusia Blue Springs BMAP) and determining that these BMAPs were valid because they were designed to achieve the Total Maximum Daily Loads, as required by sections 373.807 and 403.067,

Florida Statutes, and implement the provisions of those laws. Status: Oral argument held on June 14, 2022.

*Florida Environmental Regulation Specialists, Inc. v. Department of Environmental Protection*, Case No. 1D21-0741. An appeal from a trial court order granting DEP's motion for summary judgment on a claim for breach of contract relating to the termination of an agency term contract for the cleanup of petroleum contaminated sites. Status: Affirmed on June 1, 2022; motion for rehearing denied June 21, 2022; motion for rehearing en banc denied July 6, 2022; notice of intent to seek review by Florida Supreme Court filed June 28, 2022, Docket No. SC22-850; petition for review denied November 8, 2022.

*Suwannee River Water Management District v. Seven Springs Water Company*, Case No. 1D21-888. The Suwannee River Water Management District ("SRWMD") filed an appeal of its own final order adopting the ALJ's recommended order and renewing the water use permit authorizing Seven Springs to withdraw water in Gilchrist County for bulk sale to an adjacent water bottling facility. Status: Dismissed pursuant to Rule 9.350(a) on June 8, 2021.

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## ON APPEAL

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*Florida Springs Council v. Suwannee River Water Management District and Seven Springs Water Company*, Case No. 1D21-1445. This appeal involves the dismissal of a petition challenging a final order that renewed the water use permit at issue in Case No. 1D21-888. The petitioner argued that an SRWMD rule authorizes the filing of the petition because the Governing Board took final action (granting the permit) that substantially differs from the written notice of the District's decision describing the intended action (which was to deny the permit). **Status:** Reversed and remanded on November 30, 2022.

*City of Newberry, City of Archer and City of Alachua v. Alachua County and the Alachua County Charter Review Commission*, Case No. 1D21-640. Appeal from an order granting summary judgment and determining that the ballot title and summary of the County's Charter Amendment establishing a County Growth Management Area comply with the requirements of section 101.161, Florida Statutes, as well as the relevant case law. **Status:** Oral argument scheduled for September 21, 2021 cancelled.

*Crum v. Florida Fish & Wildlife Conservation Commission*, Case No. 1D21-367. Appeal from two orders granting motions to dismiss two successive amended complaints that challenge the rulemaking authority of the Florida Fish and Wildlife Conservation Commission with respect to marine life pursuant to its constitutional authority in article IV, section 9 of the Florida Constitution. **Status:** Affirmed *per curiam* on March 2, 2022. On June 13, 2022, the court denied the motion for rehearing en banc and certification but granted the motion for rehearing, withdrew its prior opinion, and issued a substitute opinion affirming the amended complaints. Judges B. L. Thomas and Roberts dissented from the denial of the motion for rehearing en banc. Notice to invoke discretionary jurisdiction of Florida Supreme Court filed July 13, 2022, Docket No. SC22-912; petition for review denied November 2, 2022.

*Palafox, LLC v. Carmen Diaz*,

Case No. 1D20-3415. Appeal from an ALJ's final order denying a motion for attorney's fees pursuant to section 120.569(2)(e), Florida Statutes. The ALJ concluded Diaz and her attorney filed the amended petition for an improper purpose but the motion for fees and sanctions was not timely filed. **Note:** The ALJ also entered a supplemental recommended order granting the motion for attorney's fees pursuant to section 120.595, Florida Statutes, because Diaz participated in the proceeding for an improper purpose. The agency entered a final order adopting the recommended order, and Diaz has appealed that order. *See Diaz* appeal listed below. **Status:** Notice of appeal filed November 25, 2020; oral argument held on January 12, 2022; reversed on February 9, 2022.

*Diaz v. Northwest Florida Water Management District and Palafox, LLC*, Case No. 1D21-2699. Appeal from a final order adopting a recommended order awarding fees and costs to Palafox and against Diaz in the underlying administrative matter as a sanction pursuant to section 120.595, Florida Statutes. The ALJ found and recommended that the district order the respondent pay Palafox reasonable attorney's fees and taxable costs in the amount of \$136,161. **Status:** Notice of appeal filed September 8, 2021; request for oral argument denied on July 5, 2022.

## SECOND DCA

*Reed Fischbach, Christopher W. McCullough and Joseph B. Sumner, III v. Hillsborough County*, Case No. 2D22-3270. Appeal from final order determining Hillsborough County Comprehensive Plan Amendment HC/CPA 20-11 is "in compliance." The Plan Amendment amends the County's Comprehensive Plan by replacing the text of the Future Land Use Element Residential Plan-2 ("RP-2") category and changing the requirements necessary to obtain an increased density level per acreage in the RP-2 category. **Status:** Notice of appeal filed October 6, 2022.

*Conservancy of Southwest Florida, Inc. v. Collier County and Collier*

*Enterprises Management, Inc.*, Case No. 2D21-2094. An appeal from a final judgment in defendants' favor, which rejected a challenge to a development order for Rivergrass Village as inconsistent with Collier County's comprehensive plan. **Status:** On December 2, 2022, the court reversed and remanded and certified conflict with the decision in *Imhof v. Walton County*, 328 So. 3d 32 (Fla. 1st DCA 2021).

## THIRD DCA

*Tropical Audubon Society, et al. v. Miami-Dade County et al.*, Case No. 3D21-2063. Appealing a final order of the Administration Commission determining that a comprehensive plan amendment for the construction of the Kendall Extension in Miami-Dade County to be "in compliance." **Status:** Notice of appeal filed October 19, 2021.

*Mattino v. City of Marathon, et al.*, Case No. 3D20-1921. Appeal of a final order from the Department of Economic Opportunity determining that comprehensive plan amendments by the cities of Marathon, Islamorada, and Key West in the Florida Keys are "in compliance." The challenged plan amendments allow up to 1,300 new permanent residential units to be built. **Status:** On August 3, 2022, the court reversed the determination with respect to the cities of Marathon and Islamorada, and affirmed with respect to the City of Key West. On September 20, 2022, the court denied Appellants' Motion for Rehearing and Clarification; Appellees' Motion for Rehearing, or, in the Alternative, for Certification to the Florida Supreme Court; and Appellees' Motion for Rehearing En Banc. Petition for review filed October 20, 2022, Case No. SC22-1424.

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## ON APPEAL

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### FOURTH DCA

*John H. Holshouser, et al. v. Niranajan Reddy and Department of Environmental Protection*, Case No. 4D22-1490. Appeal from a final order dismissing a petition for administrative hearing because it was not timely filed. The final order also rejected the petitioners' claim of equitable tolling. Status: Notice of appeal filed June 1, 2022; dismissed for lack of prosecution on September 13 2022.

### FIFTH DCA

*Wilde Cypress Branch, et al. v. Noah Valenstein, as Secretary, and Beachline South Residential, LLC*, Case No. 5D22-1870. Appeal from an order granting defendants' motion to dismiss a complaint seeking to enjoin both Beachline from building and DEP from issuing a permit in connection with a mixed-use residential and commercial development in Orange County. The complaint is based on a recently enacted provision in the Orange County charter, which in pertinent part seeks to confer rights on bodies of water within Orange County, provides injunctive relief as a remedy for any violation of those rights, and confers standing on certain persons to enforce those rights. The order dismissed the complaint because the charter provision is preempted by section 403.412(9) (a), Florida Statutes. The order also rejected claims that the preemption statute is unconstitutional. Status: Notice of appeal filed on July 28, 2022.

*River Cross Land Company, LLC and Christopher Dorworth v. Seminole County*, Case No. 5D22-293. Appeal from a declaratory judgment in favor of Seminole County declaring

that Article V, Section 5.2, of the Seminole County Home Rule Charter (relating to rural boundary and rural area) is constitutional and is not void for vagueness. Status: Notice of appeal filed February 2, 2022.

### 11<sup>th</sup> CIRCUIT COURT OF APPEAL

*Lionel Alford, et al. v. Walton County*, Case No. 21-13999. Appeal from a federal judge's ruling in a dispute about whether waterfront

Apalachicola Riverkeeper arguing the Army Corps of Engineers is holding back too much water in federal reservoirs upstream from Florida's Apalachicola River. Status: Notice of appeal filed October 6, 2021.

### UNITED STATES SUPREME COURT

*Suncor Energy (USA) Inc., et al. v. Board of County Commissioners of Boulder County, et al.*, Case No 21-1550. Petition for writ of certiorari asking the Court to resolve a conflict among the circuits on two questions: (1) whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate, and (2) whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. Status: Petition filed June 8, 2022.

*Sackett, v. EPA*, Case No. 21-454. Petition to review the Ninth Circuit's decision. Issue presented: Whether *Rapanos v. United States*—in which the Supreme Court held that the Clean Water Act does not regulate all wetlands, but without a majority opinion explaining why—should

be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act, in which only those wetlands that have a continuous surface water connection to regulated waters may themselves be regulated. Status: Certiorari granted on January 24, 2022; review limited to "Whether the Ninth Circuit Set Forth the Proper Test for Determining Whether Wetlands are 'Waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." Oral argument held October 3, 2022.



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property owners should receive compensation after Walton County temporarily closed beaches early in the COVID-19 pandemic. Status: Oral argument held November 17, 2022.

*In Re: ACF Basin Water Litigation*, Case No. 21-13104. Appeal from a ruling allowing Atlanta-area cities to take more water from the Chattahoochee River upstream from Alabama and Florida's Apalachicola Bay. The order dismissed claims by the National Wildlife Federation, the Florida Wildlife Federation, and



# Florida State University College of Law Summer/Fall 2022 Update

By Erin Ryan, Associate Dean for Environmental Programs  
and Director of FSU Center for Environmental, Energy, and Land Use Law



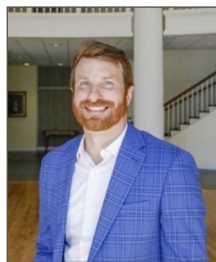
Erin Ryan, Associate Dean for  
Environmental Programs

and to the new members of our faculty, including James Parker Flynn, and Preston McLane.

**James Parker-Flynn** will shepherd the Center for Environmental, Energy, and Land Use Law as its new Director. He is hard at work creating an Environmental Policy Clinic to expand opportunities for students and faculty to contribute to the discourse on environmental solutions. **Preston McLane** ('09), Program Administrator of the Florida Department of Environmental Protection Division of Air Resource Management, has joined the Program as an Attorney Advisor and Visiting Professor. Preston will share his expertise on practicing public environmental law and teach Florida Environmental Law and a seminar on the Air Quality Management and the Clean Air Act.

And of course, I remain thankful for my other FSU environmental and land use law colleagues—Shi-Ling Hsu, Tricia Matthews, Mark Seidenfeld, Don Weidner, and Tisha Holmes—and most of all, to our wonderful students! Wishing all a very Happy Holiday Season. -- ER

*"I could not be more excited to join the incredible faculty in the Center for Environmental, Energy, and Land Use Law, and to work alongside them to continue and expand on the center's mission. I am equally thrilled to work with FSU Law's remarkable students, and to help prepare them for the challenges faced by attorneys and policymakers in the areas of environmental, land use, energy, and natural resources law—challenges that become more critical every day."*



James Parker-Flynn

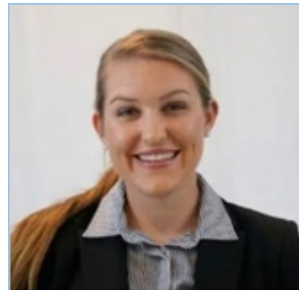


Preston McLane

*I am excited to join the Environmental Law Program faculty at the FSU College of Law and I look forward to helping students learn more about environmental law practice and career paths in both the public and private sectors.*

## Student Achievements

Congratulations to **Catherine Awasthi** and **Kathryn Wedemyer**, who graduated in Fall 2022 after completing the Environmental Certificate Program. The Certificate Program enables our J.D. students to specialize in the areas of environment, energy, and land use law.



Katie Wedemyer

*"I chose FSU specifically because of its nationally recognized environmental law curriculum, and the Certificate Program has exceeded my expectations in every regard. The program has given me not only a solid foundation in the more "traditional" environmental law subjects but exposure to critical emerging topics (climate change law and water resource management) and practical skills like negotiation. I will forever be grateful to the College of Law's world-class faculty and staff, whose scholarship and instruction have shaped me into an effective advocate, more holistic thinker, and overall better person. I graduate feeling excited and well-prepared for a career as an environmental attorney. Thank you!" --Katie Wedemyer*

Upon graduation, Catherine will serve as a Law Clerk for the Honorable Scott Makar at the First District Court of Appeal before serving as a Civilian Honors Attorney with the Army Corps of Engineers in the Jacksonville District. She was one of 37 students in North America awarded the Foundation for Natural Resources and Energy Law Scholarship Award for 2022.



Cat Awasthi

*"The FSU Environmental Law program is why I chose to attend FSU Law. The curriculum, faculty, speakers, and opportunities the program provided truly contributed to my success in securing a career with the federal government – and further allowed me to complete a unique joint degree that set me apart from candidates entering the environmental law field." --Catherine Awasthi*

## FSU COLLEGE OF LAW

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Each year, students take advantage of our highly-respected [Environmental Externship Program](#), which includes many extern opportunities in the fields of environmental, energy, and land use law. For the Summer and Fall of 2022, seven students joined the environmental externship program with four agencies:

- Florida Department of Agriculture and Consumer Services - [Benjamin Robinson](#)
- Florida Department of Environmental Protection - [Chloe Schulte](#) and [Alex Pepper](#)
- Florida Fish and Wildlife Conservation Commission - [Jennifer Camisa](#) and [Leonard Turner McCroan](#)
- Tallahassee City Attorney's Office, Land Use - [Juan Gonzalez Moreno](#) and [Elizabeth Sanchez](#)



[Student Animal Legal Defense Fund](#) (SALDF) at FSU Law has been selected (AGAIN!) as the national Chapter of the Year! The student organization was recognized with the award by the Animal Legal Defense Fund, a national organization dedicated to protecting the lives and advancing the interests of animals through the legal system, after a year of hosting many enriching events.

This past year, FSU's SALDF chapter led several enriching events including partnering with the FSU Environmental Law Society to raise awareness of harmful impact of animal agriculture; a protest alongside the Humane Society at the Florida Capital to protect dogs from abuse in puppy mills; and a successful animal law writing competition with Pets ad Litem, Inc. and the Florida Bar Animal Law Section. Professor [Tricia Matthews](#) serves as the faculty advisor of the organization.

This marks the fourth time FSU's SALDF chapter has won the award! [Congratulations on this much-deserved national recognition!!](#)

continued...

## Alumni Highlight



(L-R) Mark Barnebey, Crystal Anderson, and Holly Parker Curry

- Land use and local government attorney **Mark Barnebey ('83)** received the Best Lawyers in America 2023 "Lawyer of the Year" award in Land Use and Zoning Law in the Sarasota metro area. Mark has been practicing in land use and local government for 35 years and is Board Certified in City, County, and Local Government Law. Mark currently leads Blalock Walters, P.A. land use and local government practice groups. He serves the Manatee/Sarasota area.
- **Crystal Anderson ('10)** has joined the Department of Environmental Protection Office of General Counsel as Assistant General Counsel. She provides legal advice to staff in the Office of Resilience and Coastal Protection, mostly related to permitting, contract administration, legislative proposals, and agency rulemaking. Her practice focuses on matters associated with coastal development, aquatic preserves, coral protection and restoration, and the beaches, inlets, and ports program.
- **Holly Parker Curry ('21)** has joined Theriaque & Spain as an Associate Attorney in Tallahassee, FL. She will practice land use, zoning, local government, and environmental law. Prior to joining Theriaque & Spain, Holly served as a law clerk for the Honorable Robert L. Hinkle in the United States District Court for the Northern District of Florida.

## Faculty Achievements

- D'Alemberte Professor **Shi-Ling Hsu** published *Whither, Rationality?*, in 120 MICH. L. REV. 1165 (2022) and *Adapting to a 4C World*, in 52 ENVTL. L. REP. 10211 (2022) with 17 others. Forthcoming publications include the *Climate Insecurity*, in 2023 UTAH L. REV. \_\_ (2023)
- Associate Dean **Erin Ryan** have forthcoming publications including the *Privatization, Public Commons, and Takingsification in Environmental Law*, in 171 U. PENN. L. REV. \_\_ (2023) and *How the Success and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and Rights of Nature Movement*, in 73 CASE WESTERN RES. L. REV. \_\_ (2022).
- Professor of Administrative Law **Mark Seidenfeld** participated in the 2022 Poucher Lecture entitled, *The Major Question Doctrine: Implications of West Virginia v. EPA on the Administrative State* at Levin College of



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Law – University of Florida on October 20, 2022. He served as a panelist, together with Jessica Owley and Nathan Richardson. The discussion will be published in the University of Florida Law Review in 2023.

- Dean Emeritus Donald Weidner have a forthcoming publication in *BUS. LAWYER* (2022), *The Unfortunate Role of Special Litigation Committees in LLCs*.
- Courtesy Professor of Law Tisha Holmes published the Assessment of an Evacuation Shelter Program for People with Access and Functional Needs in Monroe County, Florida during Hurricane Irma, in VOL 306, *SOCIAL SCIENCE & MEDICINE* (2022) with Patrice Williams, Sandy Wong, Kathryn Smith, John Bandzuh, & Christopher Uejio.

### **Fall 2022 Distinguished Lecture: “From Consultation to Consent: Beyond Box Checking”**



Elizabeth Kronk Warner, University of Utah S.J. Quinney College of Law Dean and Professor of Law, delivered the FSU College of Law Fall 2022 Distinguished Environmental Lecture on October 12, 2022. Dean Kronk Warner is a nationally recognized expert in the intersection of environmental and Indian law. A citizen of the Sault Ste. Marie Tribe of Chippewa Indians, she served as an appellate judge for the tribe and as a district judge for the Prairie Band Potawatomi Tribe. Dean Kronk Warner's lecture discussed the challenges for collaborative environmental governance and consultation requirements in federal Indian law, and she offered recommendations for improvements.

### **Climate Change Talks Conclude with Mixed Messages**

While Florida was being hit by a rare landfalling November hurricane, leaders from around the world were meeting in Egypt for the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (“COP”). For two weeks, participants – including heads of states, delegates, and observers – met to discuss and negotiate the global community's continued response to climate change, *“with the key aim of ensuring full implementation of the Paris Agreement.”*



James Parker-Flynn, Director  
FSU Center for Envtl., Energy, and  
Land Use Law

Over the course of the conference, the COP released several decisions, including the final Implementation Plan, regarding climate change mitigation and adaptation. Responses to the COP's decisions have been mixed, at best. Many in the climate change community are frustrated by the COP's failure, once again, to call for the phase-out of all fossil fuels or set more aggressive emissions reduction requirements to ensure the world can meet the Paris Agreement's goal of limiting warming to 1.5 degrees Celsius. As explained by the UN Secretary-General, António Guterres, in his concluding statement: *“We need to drastically reduce emissions now – and this is an issue this COP did not address.”*

Instead, the final Implementation Plan calls only for the “phasedown of unabated coal power” and the “phase-out of inefficient fossil fuel subsidies,” while simultaneously advocating for a transition to “low emissions” and renewable energy sources. Some worry that the undefined term “low emissions” provides a “significant loophole” that “could be used to justify new fossil fuel development against the clear guidance of the UN Intergovernmental Panel on Climate Change (IPCC) and the International Energy Agency (IEA).”

On the other hand, COP 27 did deliver one important breakthrough: an agreement, at last, to create a “loss and damage” fund that will provide to developing nations – those that have contributed the least to global warming but often suffer the most from its consequences – funding from developed nations to respond to losses and damages from climate change. The agreement to create the fund, however, is short on details. Instead, it provides that a “Transitional Committee” of members will begin consulting in March 2023, and will then provide recommendations to the 28th COP, which is set to take place in the United Arab Emirates in November 2023. Consequently, whether those recommendations will be sufficiently robust, or even adopted, is yet to be seen.



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## **Faculty Support now Certified Green**

As of September 2022, the FSU College of Law Faculty Support Office has been awarded a Garnet-Level Green Office Certification by the FSU's Sustainable Campus, the second-highest rating a department can achieve!

The Green Office Program is a certification process that helps FSU employees identify ways to make their workplace more sustainable and recognizes offices for their sustainability achievements. Led by Sam Gowen, the Faculty Support Office is responsible for providing general administrative support to the College of Law and managing enrichment lectures and events for the faculty and students. The Faculty Support Office adopted practices to minimize waste by moving away from single-use plastics, investing in reusable plates and utensils, and preventing food waste by close estimation of food orders and sharing leftover food.

Congratulations, Faculty Support Office!!!



(L-R) Jesse Paterson, Sam Gowen, and Cole Plominski



## **New FSU Grant on Sustainability and Climate Solutions**



FSU created a new grant program focusing on sustainability and climate change. With a total available funds of up to \$1,000,000.00 in 2022-2023, the **Sustainability and Climate Solutions Program** can fund faculty research proposals focusing on the environmental, social, and economic dimensions of sustainability, and/or climate change mitigation, risk assessment and management, adaptation, resilience, public health, business management and entrepreneurship, government and public policies, and education. Interdisciplinary and collaborative proposals are strongly preferred.

Application website opens on December 5, 2022, and proposals should be submitted by February 9, 2023.

## **Fall Programs Events**



Every year, the FSU Law Externship Office hosts an Externship Luncheon for students interested in externship and volunteer opportunities in environmental, energy, and land use law. Students had the opportunity to speak with representatives and attorneys from non-government organizations and several local and state

agencies and understand their offices and program offerings.

This year's luncheon was held on September 16, 2022, at the FSU Law Rotunda. Individuals who participated, and their organizations, include **Lou Norvell**, Senior



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Assistant City Attorney, City of Tallahassee; **Matthew Knoll**, Assistant Deputy General Counsel, Florida Department of Environmental Protection; **Judge Francine Ffolkes**, Division of Administrative Hearings; **Keith Hetrick**, Senior Attorney, Florida Public Service Commission - Office of the General Counsel; **Allan Charles**, Senior Attorney, Florida Department of Agriculture and

Consumer Services; **Quilla Miralia**, Intern/Extern Coordinator, Florida Fish and Wildlife Conservation Commission; **LaShawn Riggans**, Deputy County Attorney, Leon County; **Janet Bowman**, Senior Policy Advisor, The Nature Conservancy; and **Jordan Luebke**, Senior Associate Attorney, Earthjustice.



An **Introductory Session** was held on September 2, 2022, to welcome students and give information on the processes of earning the Environmental Law Certificate, share opportunities after graduation, and the Center's activities and programs for this academic year. Center Director **James Parker-Flynn** shared his experience practicing law with Carlton Fields, where he specialized in appellate practice, land use litigation, and environmental law, assisting clients with a wide array of regulatory and litigation issues. FSU Law Alum and Adjunct



Professor **Preston McLane** shared his work as Program Administrator of the Air Resource

Management Division of the Florida Department of Environmental Protection. Other members of the Environmental Law faculty were also present, including Professor **Tricia Matthews**, Professor **Mark Seidenfeld**, and Professor **Shi-Ling Hsu**. The session was hosted by Professor **Erin Ryan**, the Associate Dean for Environmental Programs.



The Center hosted a discussion on Professor Shi-Ling Hsu's new book, **CAPITALISM AND THE ENVIRONMENT: A PROPOSAL TO SAVE THE PLANET**, with guest discussants Professor **Carol Rose** of Yale Law School, and Professor **Michael Livermore** of University of

Virginia School of Law. Professor Hsu argues in his book that capitalism is a form of economic governance, steered by political choices, and that rescuing Earth from human-caused pollution and climate change requires harnessing the power of capitalism, not rejecting it.

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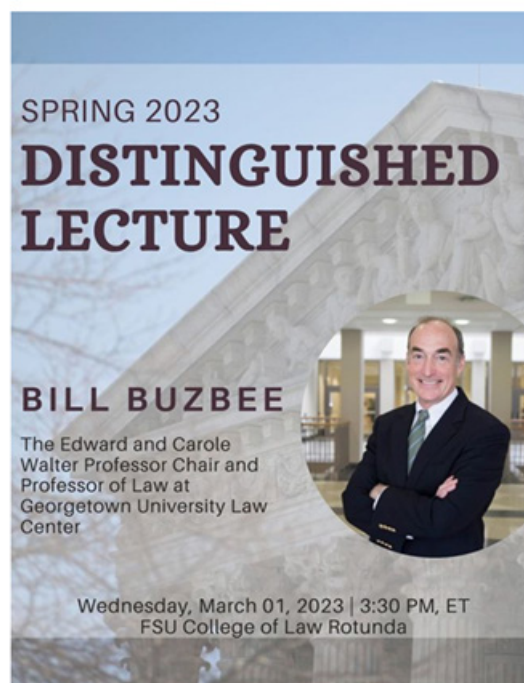


Tallahassee's Assistant City Manager **Abena Ojetayo** joined the FSU Environmental Law Enrichment Program last November 2. **Abena** spoke to law students about the city's efforts in pushing the agenda of clean energy alternatives and fostering resilience in Tallahassee.

Video recordings of our events are available at <https://rb.gy/jyvrrzd/>.

### Upcoming Events (Spring 2023)

Georgetown Professor **William Buzbee** will be presenting the Spring 2023 Distinguished Environmental Lecture. He holds the inaugural Edward and Carole Walter Professor chair and serves as the Faculty Director of Georgetown Law's Environmental Law & Policy Program. The Spring 2023 Distinguished Lecture, sponsored by the Florida Bar - Environmental, Land Use Law Section, is free and open to the public. The lecture will be held at the FSU College of Law Rotunda, on March 1, from 3:30 - 4:30 p.m. ET, with a reception to follow.



The Center will also welcome four notable FSU Environmental Law Alumni to inspire and share their professional journeys with our students. The Alumni Career Panel includes **Vinette Godelia** ('02) of Stearns Weaver Miller, **Preston McLane** ('09) of Florida Department of Environmental Protection, **Bonnie Malloy** ('10) of Earthjustice, and **Chelsea Cramer** ('15) of Alcoa. The Panel will be hosted by Professor **Erin Ryan**, Associate Dean for Environmental Programs, and will be held on January 18, from 12:30 - 1:30 p.m. ET, at the FSU College of Law Rotunda.

*continued...*





The Environmental Enrichment Lecture Series brings academics, policy makers, and practitioners in the environmental, land use, and energy fields to the FSU College of Law to share their insights with the students and faculty, the larger FSU community, and the wider Florida Bar community.

This Spring, we have invited Professor **Kathy Hessler**, Assistant Dean for Animal Legal Education at George Washington University Law School to give an online lecture on the environmental harms of aquaculture; Professor **William Burns** of Northwestern University will be joining us in-person to give a lecture on carbon dioxide removal and solar radiation management; and Florida Geologist Guy “**Harley**” **Means** will share his wealth of knowledge about Florida’s unique hydrogeology. Finally, certificate student **Alex Pepper** will give a special presentation on the legal and ethical implications of the ownership of captive wildlife, including the participation of live native reptiles!

Information on upcoming events is available at <https://rb.gy/jyvrzd> or reach out to Jella Roxas for more information ([jroxas@law.fsu.edu](mailto:jroxas@law.fsu.edu)). We hope Section members will join us for one or more of these events.



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## SEA LEVEL RISE

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required for every home in Florida, uninsured citizens that have flood damage will be in a financial rut, causing an economic crisis. The Federal Emergency Management Agency ("FEMA") establishes flood zones. Only the highest at-risk zones legally require flood insurance, however, because of the capriciousness of flooding, FEMA states that there is no such thing as a "no-risk zone."<sup>11</sup>

An example of the need for widespread flood insurance is Neptune Beach, Florida. The city's marshland is considered a flood zone, however, the northern half of the city's coastline is not because of the beach's dune system.<sup>12</sup> But Geographic Information System ("GIS") projections show that waves will eventually overtop the dunes.<sup>12</sup> Relying solely on dunes to protect coastlines is risky because hurricanes and storm surges can easily wash them away. Therefore, all coastal residents should acquire flood insurance even if their property is not in a flood zone.

Another real estate issue includes how sea level rise will shrink and change property boundaries. Changing boundaries may reduce a property owner's space to build, impact inland buffers, and increase submerged land management issues.<sup>12</sup> If property boundaries are unclear, legal disputes will grow exponentially.

From a land use perspective, rising seas will increase easement requests and easements through eminent domain. Counties will have to file proceedings to obtain easements over beachfront, private property for beach protection projects to repair and preserve coastlines.<sup>13</sup> To get court approval for an easement, counties will have to "seek to condemn only the sufficient property that is required for the project" and limit the easement to a specific period.<sup>14</sup> The project's intentions must have no evidence of bad faith and have a public purpose, for instance, "designed to preserve the shoreline, public and private property, and address environmental concerns."<sup>12</sup>

Without the project, erosion of the beach would continue through the dune line to the

extent it would threaten private property, public property, sea turtle nesting habitats and public recreation at the beaches. However, shore protection projects are unpredictable and no one really knows exactly how this project will be constructed or how often renourishment will be needed.

*Cordones v. Brevard Cnty.*, 781 So.2d 519, 521 (Fla. 5<sup>th</sup> DCA 2001).

More coastal counties will find themselves in the same situation as more beach nourishment projects will be implemented. In sum, sea level rise will aggravate problems regarding coastal homes, commercial enterprise, and the tourist industry, leaving beachfront communities questioning if they should build sea walls or retreat. Even with hard stabilization, coastal ecosystems will still be damaged as sea walls affect wildlife nesting and feeding.<sup>15</sup> Counties will be forced to infringe upon residents' personal property rights for beach restoration and environmental protection projects.

### Climate Refugees/Resources

Of the two billion people across the globe that would be forced to relocate because of sea level rise, six million are Florida residents.<sup>16</sup> These individuals would become climate refugees as they flee uninhabitable lands, causing mass migration. Population surges may strain landlocked cities' local utilities, water resources, food supplies, as well as sanitation materials.<sup>17</sup> Due to the uncertainty of sea level rise, coastal and landlocked citizens will be forced to assimilate rapidly without preparation.

### International Relations & Security

The consequences of sea level rise also include challenges regarding international relations. Underdeveloped nations will not have the financial capital to combat or retreat from the impacts of sea level rise. Other nations may face poverty, societal tensions, and weakened political institutions.<sup>18</sup> These problems will fall upon militaries whose bases will be severely damaged from sea level rise.<sup>19</sup>

The United States military is concerned that "sea level rise is likely to damage 1,774 of its installations worldwide."<sup>20</sup> Florida hosts 21

military sites and NASA Kennedy Space Center, making these government agencies vulnerable to sea level rise.<sup>18</sup> The majority of the United States Navy bases are in high-risk flood zones because they are placed on the coast.<sup>21</sup> A more pressing concern is that many maintain their original structure from the 1940s, meaning that they sit under base flood elevation.<sup>21</sup> The cost to repair, raise, and/or maintain Navy bases will be significant, thus, possibly affecting the United States' international security responsibilities.<sup>19</sup> The best long-term solution, and most cost-effective, would be to rebuild the United States Navy bases from scratch.<sup>21</sup> Since it would require significant coordination and patience to relocate people, ships, machinery, and weaponry, the Federal government needs to start planning now.<sup>21</sup>

### Where does this leave us?

Due to these legal issues, local, state, and federal authorities must coordinate to start preparing now. Sea level rise is an alarming, complex, and overwhelming concern that seems to have no concrete solution. Making sure comprehensive plans have been updated to include climate change's repercussions is a good starting point for local authorities.<sup>22</sup> Comprehensive plans hold local governments accountable to amend their agendas to reflect changes in state requirements and local conditions.<sup>23</sup> To prepare for sea level rise, a comprehensive plan should reflect flood zones that match FEMA's most current flood maps, include updated emergency evacuation routes, and align with higher government officials' planning (i.e., FEMA, DEP, NOAA).<sup>22</sup> Moreover, comprehensive plans should be adaptable since sea level rise causes city boundaries to shift. While it is difficult to figure out where boundary lines might move, city planners must write land use codes that consider shifting boundaries to ensure the protection of personal property, inland buffers, wetlands, and other environmental concerns.<sup>22</sup>

Cities should also update building codes to ensure elevation requirements and restrictions comply with sea level rise.<sup>22</sup> Building codes should have an elevation requirement of a minimum two-foot building height above base flood elevation.<sup>22</sup> Over-limiting a structure's elevation

## SEA LEVEL RISE

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constrains a property owner's ability to combat sea level rise.<sup>22</sup> Codes may also need adjusting to authorize existing coastal homes and businesses to raise their structures to mitigate impending flood damage.<sup>22</sup> Therefore, a city's best solution is to permit more flexibility for elevation restrictions, allowing citizens to be more resilient.

While it is the government's duty to protect its citizens, coastal residents and businesses can focus on their resiliency and combat sea level rise directly. Having flood insurance that is equivalent to the National Flood Insurance Program's standard is a proactive way to financially protect personal property.<sup>24</sup> Standard flood insurance will protect a policyholder's property from "overflow of inland or tidal waters, ... runoff of surface waters ... mudflow, or collapse or subsidence of land along the shore ... as a result of erosion."<sup>24</sup> Regarding commercial real estate, commercial enterprises should discuss with their planners to see if extra precautions need to be taken to prepare for the future.<sup>25</sup> Community members can also provide information and concerns to their local officials about updating flood zones, building codes, comprehensive plans, and general city preparedness.

To physically protect Florida's coastline, there are various types and combinations of coastal defenses that can prevent wave overtopping and mitigate flood risk. A simple solution includes dune fencing and/or restoration.<sup>25</sup> However, dunes can easily be washed away which creates the need for stronger structures. According to Daniel Roger, a coastal engineer from Jeremy Benn Pacific, guarding coastlines with a recurved wall with sloped revetment is a good coastal defense that can protect beach communities.<sup>26</sup> The curve design allows for the wave's energy to be re-directed out towards the sea instead of the shoreline, improving coastal flooding situations.<sup>26</sup> Despite their benefits, sea walls disturb the beach's recreational use and coastal wildlife, especially sea turtle nesting.

Another solution Daniel Rodger suggests is guarding our coastlines

with rock armor.<sup>27</sup> This inexpensive form of coastal defense dissipates the wave's energy so by the time it reaches the shoreline, the wave, and its potential to cause damage, are minimized significantly.<sup>27</sup> Unfortunately, a shortcoming regarding coastal rock armor includes oyster growth and interferences with people's ability to use the beach.<sup>27</sup> Therefore, another solution is a submerged nearshore breakwater.<sup>27</sup> While an expensive option, this coastal defense disrupts the wave's energy offshore so that the coastline has minimal waves and no overtopping.<sup>27</sup> And since the structure is offshore and not on the coastline, this alternative does not interfere with the beach's recreational use and coastal wildlife.<sup>27</sup> In sum, all four coastal defenses conduct varying performances that differ depending on the coastline's natural environment and the city's fiscalty.<sup>27</sup>

Coastal defense structures create another issue – who pays for this protection? Beach nourishment funding varies from city to city. Structures and activities seaward of Florida's Coastal Construction Control Line ("CCCL") fall under the Florida Department of Environmental Protection's ("DEP") jurisdiction to ensure the preservation and protection of Florida's dune system and beaches.<sup>28</sup> While some municipalities have restrictions, property owners may install sea walls, dune fencing, and/or dune restoration themselves.<sup>29</sup> These projects may require a permit from the DEP.<sup>26</sup> In sum, sea level rise and its repercussions are a pressing legal issue but with coordinative planning from government authorities and cooperation from citizens, resiliency is possible.

## Endnotes

1 For ELULS's 50th Anniversary and under the theme "Looking Backwards, Looking Forwards: 50 Years of Florida Environmental Law," law students were asked to write about "an important or pressing environmental and/or land use topic of the writer's choosing" and its intricacies in the legal realm. For Stetson University College of Law's announcement of Cleary's winning essay, see [www2.stetson.edu/today/2022/09/student-sea-level-rise-essay-wins-florida-bar-competition/](http://www2.stetson.edu/today/2022/09/student-sea-level-rise-essay-wins-florida-bar-competition/). The essay is being published as submitted by Cleary with footnotes converted to endnotes.

2 Brooke Cleary is a second year student at the Stetson University College of Law.

3 Pilkey, Orrin H. and Pilkey, Keith C., *Sea Level Rise: A Slow Tsunami on America's Shores*, 29 (2019).

4 Dunn, John M., *Drying Up: The Freshwater Crisis in Florida*, 199-200 (2019).

5 Pilkey, Orrin H. and Pilkey, Keith C., *Sea Level Rise: A Slow Tsunami on America's Shores*, 29 (2019).

6 *Id.* at 39.

7 Dunn, John M., *Drying Up: The Freshwater Crisis in Florida*, 199-200 (2019).

8 Fla. Stat. Ann. § 163.3202 (2022).

9 Jaramillo, Sebastian. Rising Sea Level and the Impact on the Real Estate Market, Daily Business Review. 2020. <https://www.law.com/dailybusinessreview/2020/02/21/rising-sea-level-and-the-impact-on-the-real-estate-market/>

10 Interview with Samantha "Sam" Brisolar, Community Development Director for the City of Neptune Beach (July 28, 2022) (tape on file, City of Neptune Beach).

11 Flood Maps, FEMA. November 10, 2021. <https://www.fema.gov/flood-maps>.

12 Interview with Samantha "Sam" Brisolar, Community Development Director for the City of Neptune Beach (July 28, 2022) (tape on file, City of Neptune Beach).

13 *Cordones v. Brevard Cnty.*, 781 So. 2d 519, 521 (Fla. Dist. Ct. App. 2001).

14 *Cordones v. Brevard Cnty.*, 781 So. 2d 519, 521 (Fla. Dist. Ct. App. 2001).

15 Pilkey, Orrin H. and Pilkey, Keith C., *Sea Level Rise: A Slow Tsunami on America's Shores*, 68 (2019).

16 *Id.* at 5-7.

17 *Id.* at 12.

18 Pilkey, Orrin H. and Pilkey, Keith C., *Sea Level Rise: A Slow Tsunami on America's Shores*, 43 (2019).

19 *Id.* at 49.

20 Dunn, John M., *Drying Up: The Freshwater Crisis in Florida*, 198 (2019).

21 Interview with Samantha "Sam" Brisolar, Community Development Director for the City of Neptune Beach (July 28, 2022) (tape on file, City of Neptune Beach).

22 Interview with Samantha "Sam" Brisolar, Community Development Director for the City of Neptune Beach (July 28, 2022) (tape on file, City of Neptune Beach).

23 Fla. Stat. Ann. § 163.3191 (2022).

24 Fla. Stat. Ann. § 627.715 (2022).

25 Interview with Samantha "Sam" Brisolar, Community Development Director for the City of Neptune Beach (July 28, 2022) (tape on file, City of Neptune Beach).

26 Wave Tank, *JBA Trust*. 2020. <https://www.jbatrust.org/how-we-help/physical-models/wave-tank/>.

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