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THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• George F. Gramling, III, Chair • Enola T. Brown, Co-editor • Andrea E. Zelman, Co-editor •

A Comparison of Forces at Work in Developing World Urbanization and American Urban Sprawl

by William C. Zegel, Water & Air Research, Inc.

Urbanization in the Developing World

The Forces at work in the urbanization of the Developing World may be described as "push" and "pull" forces. As changes in agricultural practices create unemployment in rural areas, people are pushed into the cities. And, as the cities become industrialized they create a strong demand for labor that exerts a "pull" on workers, moving them into the urban areas. The relative importance of the "push" and the "pull" may vary from city to city, but both lead to migration from rural to urban areas and an increased pace of urbanization.

Other factors that contribute to urbanization are socioeconomic development and improved education. Some studies indicate that as a population's socioeconomic position improves, more of the population wants to live in the city with its easier access to modern conveniences and cultural resources. In addition, rural-educated people migrate to urban areas to attain additional education or to take advantage of better paying job opportunities in the urban area.

Unfortunately, there are other forces at work in urbanization. In most countries there is usually a his-

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From the Chair

by George F. Gramling, III

This has been a very good year for our Section. The Section's Executive Council has initiated a number of new projects which will create opportunities for environmental and land use attorneys and for the affiliate members of our Section (comprised of environmental engineers and consultants, land use planners, law school students and others). One of these outstanding opportunities is the 10th Annual Public Interest Environmental Conference "Shaping Florida's Future: A Decade of Protecting an Eternity" held on February 19-21, 2004 at the University of Florida in Gainesville. This outstanding forum featured cutting edge discussions lead by top scholars and practitioners on a variety of environmental and public policy issues. The key speaker was author Carl Hiassen who drew an overflowing crowd and provoked laughs and an interesting debate. The Public Interest Committee headed by Erin Deady did an excellent job as always in planning and orchestrating this very exceptional forum.

The Treatise on Environmental and Land Use Law published by REGfiles is a prolific compilation of core, and fringe, Florida and federal environmental and land use law topics, authored by outstanding Florida practitioners and members of the Section. The Treatise is the Sction's centerpiece publication and is an ex-

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tremely valuable resource for the Florida environmental community. The Section's leadership improved the Treatise in many fundamental ways which make it more accessible and establish it as the "go to" source for environmental and land use law research, particularly with respect to those issues unique to Florida. The Treatise is now managed by three Committees which address (1) authorship of articles (chaired by incoming Section chair, Bob Fingar, and Martha Collins), (2) editing of contents (chaired by George Gramling and Enola Brown), and (3) marketing, including web based applications (chaired by Joe Richards and Thomas Spencer Crowley, III). The Treatise is updated semi-annually and forthcoming editions promise improvements because of the efforts of these committee chairs and members. Thanks also go to Gary Hunter, who continues to represent the Section's interests and to manage the Section's relationship with its publisher, REGfiles.

Our Section has enjoyed several new "Affiliate/Attorney Social" events. These events are intended to provide networking opportunities for Section Members, Affiliate Members and invited guests. The first "Affiliate/Attorney Social" was held in Tampa on February 26, 2004 and was co-sponsored by Frank & Gramling Law Firm, ECT, Inc., and Golder Associates, Inc. The event was a big success. Over 40 professionals including attorneys, engineers, scientists and government representatives, attended the event. The second "Affiliate/Attorney Social" was held in Orlando on April 8, 2004. It was sponsored by the Section, the Gray Robinson Law Firm, Mitigation Marketing, Inc., and E Sciences, Inc. Future social events are being planned. Our thanks go to Peter Partlow of E Sciences, Incorporated, our Affiliate Committee Co-Chair, for the planning and organization of these events.

Our Continuing Legal Education Committee has coordinated some excellent seminars including "Environmental Law Issues: Federal Environmental Laws: Florida Impacts," which was held on March 26, 2004; "Liability and Ethics for Environmental Lawyers and Professionals" which was held on August 21, 2003; and the Annual Update at Amelia Island on August 21-22, 2003. Paul Chipok, Mary Hansen and David Jordan spearheaded these CLE projects, and are working hard to build relevant and valuable CLE seminars.

We invite everyone to attend the annual update seminar on Amelia Island on August 19 – 20, 2004. Tom Pelham will deliver the keynote address, followed by a lively debate about the Florida Hometown Democracy constitutional amendment. Larry Sellers will provide his excellent annual assessment of legislative and constitutional changes. The annual update will feature reports from state agencies including the Department of Environmental Protection, the Water Management Districts, and the Fish & Wildlife Conservation Commission.

If you haven't viewed the Section's web page at *www.ELULS.org*, please do so. You will find that the Section's web page is an excellent source for direct access to the Section's projects, membership, Executive Council and other contacts, as well as links to environmental and land use resources. Joe Richards has tirelessly improved the web page and has mentored our Executive Council through Internet and other information access opportunities for many years.

The Florida Bar *Journal* Column committee has consistently procured excellent, cutting edge articles by section members concerning diverse topics on environmental and land use law, including the pro-con article on the Florida Hometown Democracy constitutional amendment in February, 2004, and law student Kevin Regan's article, "Protecting Florida's Rare Plants from Extinction," in the July/August 2003 issue. The success of our *Journal* roles and articles stems, too, from Robert Manning's leadership of this committee.

New Executive Council member Enola Brown assumed the role as editor of the Section Reporter along with co-editor Andrea Zelman. Thanks to Enola, the Section Reporter stays on schedule for publication and continues to contain valuable news and law updates for the Section membership.

We have been consistently building bridges with our colleagues across the country through involvement in the ABA's Section of Environment, Energy, and Resources ("SEER"). Michelle Diffenderfer, Section Liaison, has helped open opportunities for our Executive Council and Section membership including joint CLE projects. The Section Executive Council is planning on holding its fall meeting in conjunction with the ABA SEER's 12th Section Fall Meeting on October 6 – 10, 2004 in San Antonio, Texas. This will provide us with the opportunity to learn more about SEER's organization and CLE programs and meet and develop relationships with environmental and land use lawyers from across the country.

The Access to Justice Committee has developed new projects that will assist lower income and disenfranchised people embrace environmental and land use issues. Nicole Kibert has assumed the chair of this Com-

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mittee, working closely with Committee founder Suzi Ruhl. One upcoming initiative to watch is the brownfields workshop, which is currently sponsored by the Environmental Law Institute ("ELI") and the Florida Brownfields Association ("FBA"). The workshop will assist brownfields stakeholders with the integration of public health issues into brownfields redevelopment in Florida.

The Law Schools Committee of the Section stays in contact with law schools in Florida to encourage law student's participation in environmental law issues. This year, five law schools received financial assistance from the Section. The Law School Committee administers the Section's Dean Maloney Memorial Writing contest. Winning students attend the annual meeting and the first prize winner receives $500 and the cost of attending the section's annual update meeting. The Section recently adopted a new policy, which we hope will encourage student participation even further, that allows up to ten law students to attend the annual update at no charge and compensates them for the annual update meals if they assist in the manning of their school information table. Materials from the conference will be donated to each law schools library.

These are just some of the activities of our Section. We welcome new members as always and encourage diverse participation from the Bar.

Planning By Popular Vote? 2004 Annual Update Focus

by Mary D. Hansen

What will Florida's growth management landscape look like if the Hometown Democracy constitutional amendment passes? Its language is clear, its implications reach every aspect of growth management and environmental protection, both private and public.

Some pundits have termed the amendment, which would place all comprehensive plan adoption and amendment powers in the hands of local voters by way of referendum, a "tectonic change" in Florida's current approach to growth and environmental issues.

Recognizing the need for a forum to discuss the legal and policy challenges of "planning by popular vote," the 2004 Annual Environmental and Land Use Law Update will explore and highlight these issues throughout the two-day seminar. The Update will convene at Amelia Island Plantation on August 19-20, 2004, with Section Committee meetings slated for August 21.

Seminar co-chairs Dave Jordan and Mary Hansen promise a lively discussion. In addition to the keynote focus, the Seminar will cover recent legislative and agency developments, new initiatives in water supply production and protection, model development rule drafting and a field seminar guided by the Section's affiliate members.

Further Update information will be available on the Section website in June.

On Appeal

by Susan L. Stephens and Lawrence E. Sellers, Jr.

Note: Status of cases is as of April 1, 2004. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

City of Miami Beach v. Royal World Metropolitan, Inc., Case No. SC04-233. Petition to review a Third DCA opinion holding that a section of the Bert J. Harris, Jr., Private Property Rights Protection Act that states "this section does not affect the sovereign immunity of government" does not bar a private property rights claim against the City. 863 So.2d 320 (Fla. 3d DCA 2003), *reh'g denied* (2004). Status: Petition for review filed February 19.

Crist v. Department of Envtl. Protection, Case No. SC03-844. Petition by the Attorney General to review a First DCA decision holding that the trade secrets exemption in what is now section 812.045, Florida Statutes, should be read to exempt from disclosure as public records all trade secrets meeting the definition in section 812.081, regardless of whether such documents are stored on or transmitted by computers, to the extent those documents were submitted to a public agency under a written claim of confidentiality. The court held that the exemption applied to public records disclosures even though it is contained in a chapter entitled "Computer-Related Crimes" and not the Public Records Law, Chapter 119, Florida Statutes.

SePro Corp. v. Department of Envtl Protection, 839 So. 2d 781 (Fla. 1st DCA 2003), *reh'g denied* (2003). Status: Petition filed May 7, 2003. The original parties filed notices of non-participation because their dispute had been resolved and, on September 25, 2003, the court removed them as parties. DEP filed a motion to realign the parties on October 20, 2003, to show its support of the Attorney General's position, which would effectively leave no respondents in the case. On March 9, the Court issued an order to show cause why the case should not be dismissed as moot, since the parties in interest were gone. Crist and DEP filed responses to the order on March 24.

Aramark Uniform & Career Apparel, Inc. v. Easton, Case No. SC02-2190. Petition to review First DCA decision reversing a trial court ruling in favor of Aramark on Easton's suit for the migration of environmental contamination from Aramark's property to Easton's property. The First DCA held that Easton had a strict liability cause of action against Aramark. 825 So. 2d 996 (Fla. 1st DCA 2002), *reh'g denied* (2002). Status: Oral argument held August 26, 2003.

Haire v. Department of Agriculture and Consumer Services, Case No. SC03-446; *Brooks Tropical, Inc. v. Department of Agriculture and Consumer Services*, Case No. SC03-552. Petition to review a Fourth DCA opinion reversing a temporary injunction enjoining DACS inspectors from entering upon private property to search for citrus trees infected with citrus canker or in close proximity to infected trees without individually issued search warrants. The court held that the statute requiring removal of citrus trees within 1900 feet of a tree infected with citrus canker did not violate due process, but that the statute authorizing area-wide search warrants to locate affected trees was unconstitutional. Nonetheless, magistrates have the discretion to include multiple properties in affidavits and search warrants based upon his or her determination that probable cause to search each included property exists. 836 So. 2d 1040 (Fla. 4th DCA 2003), *reh'g denied* (2003). Status: The Court affirmed on February 12, and approved the issuance of a single search warrant for multiple properties where probable cause is established to search the named properties and provided the properties are described with particularity. The court also authorized electronic signatures on the warrants. 29 Fla. L. Weekly S67.

FIRST DCA

Department of Environmental Protection v. Save Our Suwannee, Inc., Case No. 1D04-1258. Appeal of a Second circuit court decision holding that large dairies in Florida must apply for wastewater discharge permits to comply with federal and state clean water laws and stating that the DEP has only partially performed its duties to adopt and enforce the federal NPDES permitting program in Florida by entering into consent agreements with some dairy farms that have the practical effect of exempting those farms from permitting. The judge ordered DEP to immediately require all dairy animal feeding operations with more than 700 mature cattle to apply for NPDES permits or to demonstrate that the operation is entitled to an applicable exemption. The DEP was specifically enjoined from relying on section 403.0611 of the Florida Statutes as authority to use an alternative scheme to traditional permitting for dairies. Case No. 2001-CA-001266 (Fla. 2nd Cir. Mar. 5, 2004). Status: Notice of appeal filed March 23.

Department of Envtl. Protection v. St. Marks Refinery, Inc.,, Case No. 1D03-1047. Appeal of a declaratory judgment holding that a 1992 addendum to a consent order between Seminole Refinery and DEP, that provided for a release from liability for St. Marks for contamination at the refinery prior to 1992 when St. Marks purchased the facility, was valid and enforceable, even though Seminole allegedly violated the terms of the consent order. Status: The court affirmed *per curiam* on February 16. 2004 Fla. App. LEXIS 1890.

Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates Co. and DEP, 1D03-1717. Appeal of a DEP final order dismissing ECOSWF's petition challenging DEP's decision to issue an ERP to IMC to authorize mining and reclamation activities on property known as the Ona Mine, on the ground that ECOSWF alleged standing only as a citizen pursuant to section 403.412, without alleging that a substantial number of its members would be substantially affected by issuance of the permit. The final order noted that section 403.412, Florida Statues, as amended in 2002, only allows citizens to intervene in an ongoing administrative proceeding and does not allow a citizen to initiate an administrative action without showing that his or her

substantial interests would be affected. Status: Motions to dismiss the appeal were denied on July 31, 2003 (857 So. 2d 207) and January 22, 2004; motions for rehearing were denied October 28, 2003. In their answer briefs, the appellees argue that the appeal is moot because of the subsequent reenactment of Chapter 403, F.S. *See ECOSWF et. al., v. DEP*, 852 So. 2d 349 (Fla. 1st DCA 2003).

Environmental Confederation of Southwest Florida, Inc. v. Charlotte County and DEP, 1D03-784. Appeal of a DEP final order dismissing ECOSWF's petition challenging DEP's decision to issue a Class I underground injection permit to Charlotte County, on the ground that ECOSWF alleged standing only as a citizen pursuant to section 403.412, without alleging that a substantial number of its members would be substantially affected by issuance of the permit. The order noted that section 403.412, Florida Statutes, as amended in 2002, only allows citizens to intervene in an ongoing administrative proceeding and does not allow a citizen to initiate an administrative action without showing that his or her substantial interests would be affected. On appeal, the appellants argue that the 2002 amendment is unconstitutional because it violates the single subject requirement. Status: All briefs have been filed. In its answer brief, DEP has suggested the appeal is now moot because of the subsequent reenactment of Chapter 403, Florida Statutes. *See ECOSWF et. al., v. DEP*, 852 So. 2d 349 (Fla. 1st DCA 2003).

Charlotte County v. IMC Phosphates Co. et al., Case No. 1D02-4874. Appeal of a DEP final order (issued by a substitute agency head) granting an ERP permit authorizing phosphate mining and reclamation in a tract known as the Manson Jenkins property that includes the West Fork of Horse Creek. DOAH Case Nos. 01-0180, 1081 and 1082; DEP OGC Nos. 01-0364, 01-0371 and 01-0372. Status: The court affirmed *per curiam* on January 29. 865 So.2d 483.

SECOND DCA

IMC Phosphates Co. v. Department of Environmental Protection, Case No. 2D03-4682. Appeal of a final order of the Department of Environmental Protection denying IMC an ERP permit and conceptual reclamation plan approval for phosphate mining and reclamation in a tract known as the Altman Tract. Status: Notice of appeal filed October 15, 2003.

FOURTH DCA

O'Connell et al., v. Department of Community Affairs et al., Case No. 4D03-380. Appeal of a final order of the Department approving Martin County's commercial lands need methodology and finding the County's amendments to the Economic Development Element and to the Future Land Use Map that would allow commercial development to be in compliance with the Growth Management Act. Status: Oral argument held March 2.

FIFTH DCA

St. Johns River Water Management District v. Womack, Case No. 5D03-2493. Appeal of a Circuit Court decision ordering the District to pay Womack $262,383 in damages pursuant to 42 U.S.C. s. 1983, for denying Womack equal protection under the laws and holding that the District's action constituted an unreasonable exercise of police power in violation of s. 373.617, Florida Statutes. Womack had filed an application for a MSSW permit to allow subdivision and development of his property along the Wekiva River, a portion of which lay within the Riparian Habitat Protection Zone of the River. Over the course of two years, Womack and his engineer submitted six separate development plans, all of which were denied by the District. Womack's neighbor, Patricia Harden, who openly opposed the development, was the chair of the Governing Board of the District at the time, and the District, while denying Womack's plans, had in the meantime approved construction of a number of other structures within the RHPZ. The circuit court held that the only reasonable conclusion for the continued denial of Womack's application was Harden's control of District personnel and collusion of the District Board and staff at her request. Status: Notice of appeal filed July 28, 2003; motion to dismiss filed December 29, 2003; motion in abeyance pending proceedings below.

U.S. SUPREME COURT

EPA v. Tennessee Valley Authority, Case No. 03-1162. Petition to review an Eleventh Circuit decision holding that EPA could not issue an administrative compliance order against the TVA without first filing an enforcement action in federal court. 336 F.3d 1236 (11th Cir. 2003). Status: Petition filed February 13.

County of Okanogan v. National Marine Fisheries Service, Case No. 03-1071. Petition to review a Ninth Circuit decision holding that the U.S. Forest Service acted within its authority to reduce the amount of water that may be diverted to ditches from the Chewuch River in Washington in times of low flow to protect listed salmon in the Okanogan National Forest. 347 F.3d 1081 (9th Cir. 2003). Status: Petition filed January 27.

Cooper Industries Inc. v. Aviall Services, Inc., Case No. 02-1192. Petition to review a Fifth Circuit decision holding that Aviall, purchaser of contaminated land, could sue the former owner under the Superfund law to share in the costs of a voluntary cleanup that is not being ordered by the government. 312 F.3d. 677 (5th Cir. 2002). Status: Petition granted January 9.

Rapanos v. U.S., Case No. 03-929. Petition to review a Sixth Circuit decision holding that a manmade drain, which flowed into a creek, which then flowed into a navigable river, provided a sufficient nexus between wetlands adjacent to the drain and navigable waters such that the Corps of Engineers could assert jurisdiction over the wetlands. 339 F.3d 447 (6th Cir. 2003). Status: Petition filed December 22, 2003. Scheduled for conference April 2.

Deaton v. U.S., Case No. 03-701. Petition to review a Fourth Circuit decision holding that the Corps of Engineers could require a dredge and fill permit for filling of wetlands adjacent to a roadside ditch because the roadside ditch, which eventually reached the navigable Wicomico River, could reasonably be considered a "tributary" and that therefore, the COE had jurisdiction over the adjacent wetlands. 332 F.3d 698 (4th Cir. 2003). Status: Petition filed November 10, 2003. Scheduled for conference April 2.

U.S. Department of Transportation v. Public Citizen, Case No. 03-358. Petition to review a Ninth Circuit decision holding that the DOT must prepare an Environmental Impact Statement analyzing the environmental effects, particularly air impacts, before it allows trucks from Mexico full access to U.S. roads. 316 F.3d 1002 (9th Cir. 2003). Status: Petition granted December 15, 2003. Scheduled for ar-

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ON APPEAL
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gument April 21.

Newdunn Associates v. Treacy, Case No. 03-637. Petition to review a Fourth Circuit decision holding that Newdunn needed a Section 404 dredge and fill permit for its ditching and draining activities in certain wetlands because the creation of ditches to drain the wetlands created the necessary hydrological connection to navigable waters to assert Clean Water Act jurisdiction. 344 F.3d 407 (4th Cir. 2003). Status: Petition filed October 27, 2003. Scheduled for conference April 2.

Norton v. Southern Utah Wilderness Alliance, Case No. 03-101. Petition to determine whether federal courts have the authority under the Administrative Procedure Act to review the adequacy of the Bureau of Land Management's management of public lands, following a Tenth Circuit decision concerning the use of off-road vehicles in Wilderness Study Areas that held that, once land is designated as a WSA, the BLM has a continuing obligation to manage the area so that it remains eligible for wilderness classification. 301 F.3d 1217 (10th Cir. 2002). Status: Petition granted November 3, 2003. Argued March 29.

Alabama v. North Carolina, Case No. 220132, original jurisdiction. Motion for leave to file bill of complaint to settle a dispute among the seven member states of the Southeastern Low-Level Radioactive Waste Compact pursuant to the Court's original jurisdiction, regarding North Carolina's withdrawal from the Compact in 1999 and liability for $90 million in sanctions based on that withdrawal. Status: The Court agreed to hear the bill on June 16, 2003. On November 17, 2003, the Court appoint a special master to mediate the suit.

South Florida Water Management District v. Miccosukee Tribe of Indians, Case No. 02-626. Petition to review an Eleventh Circuit opinion that the District's pumping of water from one water body (C-11) to another (WSA-3) requires a NPDES permit when this action serves to add phosphorus to the receiving water. 280 F. 3d 1364 (11th Cir. 2002). Status: On March 23, the court quashed and remanded for further factual findings to determine whether C-11 and WSA-3 are in fact separate water bodies and holding that, if not, no permit is required for the pumping. 2004 U.S. LEXIS 2376; 2004 WL 555324.

Alaska Department of Environmental Conservation v. EPA, Case No. 02-658. Petition to review a Ninth Circuit decision holding that EPA has the authority to overturn an air construction permit issued by the Alaska DEC on the basis that the permit did not require implementation of Best Available Control Technology. 298 F.3d 814 (9th Cir. 2002). Status: The Court affirmed on January 21. 124 S.Ct. 983.

Engine Manufacturers Ass'n v. South Coast Air Quality Mgmt District, Case No. 02-1343. Petition to review a Ninth Circuit decision upholding rules promulgated by the SCAQMD that require diesel engine fleet operators in Los Angeles to purchase low-emission, alternate fuel vehicles when replacing vehicles or expanding the fleet. The Engine Manufacturers Association argues that the rules have the practical effect of banning sales of traditional vehicles. 309 F.3d 550 (9th Cir. 2002). Status: Petition granted June 9, 2003. On December 15, 2003, the Solicitor General's motion for leave to participate as *amicus curiae* at oral argument was granted. Argued January 14.

SECOND CIRCUIT

Waterkeeper Alliance et al. v. EPA, Case No. 03-4470. Petition to review EPA's rule governing wastewater discharges from concentrated animal feeding operations (CAFOs), which became effective February 26, 2003. Status: Petition filed March 7, 2003.

Riverkeeper, et al. v. EPA, case No. 02-4005. Appeal of EPA's cooling water intake structure rule, published December 18, 2001, which creates a two-track plan for regulating new structures that are used to draw in water to cool electric generating equipment in an effort to reduce the impacts to fish and other aquatic organisms that get sucked into such systems or impinged against screening devices for the systems. The two-track plan would allow a facility to meet stringent standards in the rules or conduct a site-specific analysis to develop site-specific technology. Status: The court upheld most of the rule on February 3, but struck down a portion that allowed facilities to implement restoration measures as a way of meeting the rule requirements. 358 F.3d 174.

NINTH CIRCUIT

U.S. v. Phillips, Case No. 02-30035. Appeal of a district court decision sentencing a Montana developer to five years' probation after he was found guilty under the Clean Water Act for illegally diverting creek water onto his planned subdivision to fill ponds, then sending the water back to the creek laden with old mine tailings and other sediments from the property. Status: In a case of first impression, on January 28, 2004, the court affirmed the conviction, but reversed and remanded the sentence, holding that district courts *must* enhance sentences and *may* boost penalties for convicted polluters who cause the government to incur substantial Superfund-related cleanup costs. 356 F.3d 1086. Motion for rehearing pending.

TENTH CIRCUIT

Utah v. Norton, Case No. 03-4147. Challenge to an agreement reached in April between the Department of the Interior and Utah that reduces the amount of federal land eligible for designation as "wilderness areas" protected from logging, mining, drilling, and other development. This case could impact future designations of "wilderness areas." Status: Notice of appeal filed June 23, 2003; motion to dismiss pending.

ELEVENTH CIRCUIT

Florida Public Interest Research Group et al. v. EPA, Case No. 03-13810. Appeal of a district court order granting summary judgment in favor of EPA and intervenor Florida Department of Environmental Protection, which held that Florida's Impaired Waters Rule did not constitute a revision to Florida's water quality standards that must be approved by EPA. Status: Oral argument scheduled for April 27.

D.C. CIRCUIT

Northeast Maryland Waste Disposal Authority v. EPA, Case No. 01-1053. Challenge to EPA's emissions limits for small municipal solid waste combustors on the ground that they violate the Clean Air Act by improperly imposing the same level of control on a subcategory of 37 small combustors as is applied to large combustors, while exempting the smallest combustors altogether. Status: On February 24, the court re-

manded the rules to EPA to: (1) explain its decision to subcategorize small municipal solid waste combustors according to aggregate capacities of the plants at which they are located; (2) establish new MACT floors for small municipal solid waste combustors; and (3) readdress the beyond-the-floor standards. 358 F.3d 936.

New York v. EPA, Case No. 03-1380. Challenge to EPA's New Source Review rule amendments published on October 27, which expands the "routine maintenance/equipment replacement" exclusion from review under the New Source Review/Prevention of Significant Deterioration programs. The rule amendments were scheduled to take effect on December 26. Status: A motion to stay the equipment replacement rule was granted December 24, 2003. EPA petition for reconsideration is pending.

New York v. EPA, Case No. 02-1387. Challenge to EPA rule amendments granting additional exemptions from NSR/PSD requirements. Status: Notice of appeal filed December 31, 2002. EPA published notice of its final reconsideration of the rules on November 7. A renewed motion to stay the NSR rule amendments was denied December 24, 2003. A motion to consolidate with Case No. 03-1380 (above) was denied.

American Iron & Steel v. EPA, Case No. 00-1435. Petition to review EPA's final air pollution monitoring rule and performance standard published August 10, 2000, for requiring use of continuous opacity monitors. Status: Oral argument held February 25, 2003. Latest status report filed February 9, 2004.

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DEP Update

by Angela C. Dempsey

DEP's New Secretary - On February 13, 2004, Governor Bush appointed Colleen M. Castille as Secretary of the Department of Environmental Protection (DEP). On February 27, 2004 Castille moved from her position as the Secretary of the Department of Community Affairs (DCA) to begin her new duties as DEP's Secretary. Under her leadership, DCA did and continues to offer technical assistance to local governments and residents while supervising community growth, environmental assessment, disaster planning, community revitalization as well as comprehensive planning and affordable housing. Secretary Castille has worked to bring local government support for improved wastewater management, land conservation acquisition, and the protection of natural habitat in the Florida Keys. She was also appointed by Governor Bush to the Wekiva River Basin Coordinating Committee, where she served as vice chair.

The Governor and many environmental groups are impressed with Castille's dedication, experience and passion in the environmental arena. Before being appointed to DCA, Castille served as chief cabinet aide to Governor Bush and specialized in environmental matters. She researched and helped develop Cabinet policy regarding Local Government Comprehensive Plans, Areas of Critical State Concern, Developments of Regional Impact, Water-use Disputes and Community Development Districts. Colleen M. Castille, 44, was born in Japan where her parents were stationed with the United States Air Force. Castille received a degree in International Affairs from Florida State University.

St Marks Refinery litigation – Over the past 3 years, the Department has spent more than $12 million at this 55 acre Facility in Wakulla County, Florida, dismantling tanks, removing contaminated soil and disposing of solid and hazardous waste. The Facility was used for the past 50 years to produce and store asphalt, pentachlorophenol and petroleum products. Extensive assessment and monitoring at the property revealed impacts to the St. Marks River, adjacent wetlands and the underlying groundwater. Regulators also discovered contaminants, including dioxins, at levels well above state standards. In January 2004, the Department filed a civil suit in Leon County Circuit Court against the following owners and operators of the Facility: American International Petroleum Company, St. Marks Refinery, Inc., Seminole Refining Corporation and James T. Young. The complaint seeks completion of the cleanup, recovery of the more than $12 million in clean-up costs, penalties for environmental violations and financial compensation to restore damage to natural resources. Two of the defendants have failed to file a timely response to the Department's complaint and a default was entered. Discovery in the suit is ongoing.

Clean-up Target Levels and Global RBCA Rule Workshop - On February 26, 2004, another workshop was held on Rule 62-777, Florida Administrative Code (F.A.C.), Contaminant Clean-up Target Levels, and on the new Global Risk Based Corrective Action Rule 62-780, F.A.C. Some of the issues discussed were: the use of risk based corrective actions, terminating remediation without Department input and the status of current consent order or voluntary clean-up agreements. The comment period for the proposed rules ended March 19, 2004. The latest draft of the rules and a risk management options flowchart is available at http://www.dep.state.fl.us/waste/categories/wc/pages/CombinedRuleWorkshop.htm

Florida Caselaw Update

by Gary K. Hunter, Jr. and D. Kent Safriet

The Citrus Canker Law, authorizing the destruction of privately owned citrus trees, is constitutional. *Haire v. Florida Dep't of Agric. and Consumer Serv.*, 29 Fla. L. Weekly S67 (Fla. Feb. 12, 2004).

Citrus canker, a bacterial disease that attacks the fruit, leaves, and stems of various citrus plants, can ultimately lead to the death of infected trees. Section 581.184, Florida Statutes, known as the Citrus Canker Law (Law), was amended in 2002 to require the Department of Agriculture and Consumer Services ("Department") to remove and destroy all infected citrus trees and all trees within 1900 feet of an infected tree. The statute also provides for compensation for destroyed trees on a per tree basis. A number of individuals and municipalities ("Petitioners") filed suit against the Department challenging the constitutionality of the Law, claiming that it violates substantive and procedural due process rights.

With respect to the substantive due process claim, the Petitioners argued that a strict scrutiny standard should be applied, which would allow the destruction of private property only where a threat is "imminently dangerous" and an "actual necessity." The Department argued that because the police power authorizes the protection of the public health and welfare, and the Law is part of the police power, only a rational relationship, between the statute and a legitimate government objective, is required. The Supreme Court agreed. The Supreme Court held that while destruction of property is an extreme use of the police power, property rights are subject to the fair exercise of that power. The Supreme Court also noted that the Legislature has reviewed extensive scientific reports on the disease prior to enacting the Law and thus, the Supreme Court concluded that the removal of the exposed trees, even though they may be healthy, is reasonably related to the goal of eradicating the disease. Additionally, the Supreme Court was satisfied with the compensation requirements of the Law because they only set minimum payments without preventing a landowner from seeking judicial establishment of full and just compensation.

The Petitioners also claimed that the issuance of an Immediate Final Order (IFO) without a pre-deprivation hearing was a violation of procedural due process. The Supreme Court rejected this argument finding that the only pre-deprivation showing required by the Department is that the trees are 1900 feet from an infected tree. And, it is only this showing that a District Court – under the Law – reviews on a petition for stay filed within 10 days of the IFO's issuance.

An additional issue in the case involved the Department's ability to obtain multiple search warrants based on a single warrant application and affidavit. The trial court had required an application and affidavit for each property to be searched and prevented the use of electronic signatures for the warrants. The Supreme Court — affirming the District Court's decision to quash the trial court order — held that so long as probable cause is established to search multiple properties by one application and affidavit, multiple warrants may be issued. Further, because of growing acceptance of the use of electronic signatures, as well as the reasoning that a judge who permits the use of electronic signatures is "attesting to the act of issuing the warrant," the use of electronic signatures is sufficient.

Petition for annexation and the ordinance adopting the same, together, may constitute an express written contract waiving sovereign immunity and binding a local government. *Waite Development, Inc. v. City of Milton*, 29 Fla. L. Weekly D445 (1st DCA Feb. 19, 2004).

Landowner petitioned the City for voluntary annexation of its property with the intent to develop a subdivision. The Petition provided that the City would "provide, as construction of the subdivision roads [where] completed, water, sewer, and natural gas...lines to the lot line of each lot." The City granted the petition by the adoption of an ordinance. Although the City provided utilities to the first phase of the subdivision, it refused to provide any utilities for the second phase because of a newly enacted City ordinance that prohibited the City from paying the infrastructure costs for a private developer.

Landowner sued the City, alleging breach of contract and equitable estoppel. The trial judge granted the City's motion to dismiss, finding that there was no express written contract and therefore no waiver of sovereign immunity. The First DCA reversed on the grounds that the trial judge erred in determining that there was no express written contract. The DCA relied on the basic contractual principle that "several writings may constitute a valid and binding contract when they evidence a complete meeting of the minds...and an agreement upon the terms and conditions of the contract." Accordingly, the Complaint alleged an express written contract (*i.e.,* the Petition and the ordinance adopting the same).

Injunctive relief may be appropriate where, following preliminary plat approval and developer reliance, a local government alters the zoning of property; however, preliminary injunctive relief may not bypass the procedures required for a permanent injunction. *Charlotte County v. Vetter*, 863 So.2d 465 (Fla. 2d DCA 2004).

A developer obtained preliminary plat approval to develop a 92-acre parcel near an airport, zoned for a variety of industrial uses. Thereafter, the County amended its local comprehensive plan and ordinance to create an airport overlay which resulted in a down-zoning of the prop-

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Water Management District Updates

SWFWMD

by Karen A. Lloyd, Senior Attorney

Attorney General Declines Opinion on Water Transport Issue

In December 2003, the Northwest Florida Water Management District issued two general permits that authorized Wakulla Springs Bottled Water, Inc. to withdraw water from sites within Wakulla County. Once withdrawn, the water is to be transported in bulk to a bottling facility in Monticello, Florida in Jefferson County.

Wakulla County Comprehensive Plan Policy 2.5 requires County Commission approval by at least a 4/5 vote prior to the removal of surface water from the County. Wakulla Springs Bottled Water, Inc. applied for that approval but did not get it.

Thereafter, on February 18, 2004, Wakulla County requested an Opinion of the Attorney General on the following questions:

"1) Is a county preempted by Section 373.223(2), F.S., or any other provision of Florida law from regulating the transfer of surface water from the county?

"2) Does a county comprehensive plan policy that requires consent of the board of county commissioners for removal of surface water from the county have any effect in light of the Florida Water Resources Act of 1972 (§§373.012-373.200, Fla. Stat.)?

"3) Does a county have the authority under its comprehensive plan and land development regulations to regulate the location of commercial operations that may result in the transport of water from the county and to specify where such commercial operations may or may not be located?

"4) Can a county prohibit water bottling facilities from locating within the county to protect the health, welfare and safety of its citizens?"

On March 12, 2004 the Attorney General's Office advised Wakulla County that the questions are not matters on which the office may comment. "It is the policy of the Attorney General's office that opinions will be issued on questions involving the duties and responsibilities of several agencies or governmental entities only upon the request of all the agencies involved. In this case, the Department of Environmental Protection, the water management districts and the Department of Agriculture are involved but have not agreed that an Attorney General opinion is necessary.

Rule Updates

Amendments to 40D-21, Water Shortage Plan, F.A.C.

The Governing Board authorized staff to begin updating the District's water shortage plan that is required by Section 373.246, F.S. The District intends that the update will reflect the expected revisions to the 62-40, State Water Resources Implementation Rule, F.A.C., relating to water shortages, and lessons learned and experience gained from the 1999-2002 drought. The update may result in a re-write of 40D-21, F.A.C.

Staff held an initial round of rule development workshops late last year. Based on the public input received at the workshops, staff will hold another round of workshops in April and May 2004 on conceptual draft of revisions to 40D-21, Water Shortage Plan, F.A.C. The workshops will be held as follows:

Monday, April 19, 2004, from 1:00 to 3:00 p.m. in Board Room of the Southwest Florida Water Management District's Bartow Office, 170 Century Boulevard, Bartow, Florida.

Thursday, April 29, 2004, from 9:30 to 11:30 a.m. in Board Room of the Southwest Florida Water Management District's Sarasota Office, 6750 Fruitville Road, Sarasota, Florida.

Monday, May 3, 2004, from 1:30 to 3:30 p.m. in Board Room of the Southwest Florida Water Management District's Brooksville Office, 2379 Broad Street, Brooksville, Florida.

Southern Water Use Caution Area

The District has developed a draft recovery strategy for implementation when the Governing Board adopts the proposed minimum flows for the Upper Peace River, the minimum levels for Category 3 lakes on the Lake Wales Ridge and the minimum level for the Floridan aquifer to protect against coastal salt-water intrusion.

The strategy includes water resource development projects, water supply development projects, a financial plan and regulatory measures. The District held workshops on the recovery strategy during the last half of 2003 and in early 2004. The Draft SWUCA Recovery Strategy and all written comments and staff responses are posted on the District's Website at www.swfwmd.state.fl.us/waterman/swuca/SWUCA.htm. Staff will review the second draft of the Recovery Strategy with the Governing Board at its March and April 2004 meetings.

A second draft of the rules to implement the regulatory portion of the Recovery Strategy will be distributed after the April 2004 Governing Board. Rule development workshops and Governing Board presentations will then be conducted with a June 2004 Governing Board approval scheduled.

Case Update
Water Use Permitting – Milo Thomas vs. SWFWMD
Meaning of "Prior Right" Disputed

by Karen A. Lloyd and Margaret M. Lytle

Milo Thomas vs. Southwest Florida Water Management District, No. 5D02-3319 (Fla., 5th DCA). The Fifth District Court of Appeal upheld the District's final order denying a water use permit application submitted by Milo Thomas (Thomas), despite claims of a prior right to the use of the water. The District Court of Appeal also denied the Motion for Rehearing filed by Mr. Thomas.

As reported here about nine months ago, Thomas had appealed SWFWMD Final Order No. 02-062 denying his application to the Fifth District Court of Appeals. In that application, Thomas asked the District to modify his water use permit (WUP) to increase the authorized withdrawal quantities. The Thomas property is located within an area of Pasco County that has suffered severe adverse impacts to wetlands, lakes, and streams from groundwater withdrawals from the permitted regional wellfields. Mr. Thomas purchased a portion of the property that is the subject of the disputed application in 1985, after establishment of the regional wellfields.

The proposed increase was reviewed by District staff, who determined that the application failed to meet 5 of the 13 conditions for issuance of WUPs contained in Rule 40D-2.301(1), F.A.C. An Agency Action was issued proposing to deny the application. Thomas requested a hearing and argued he is entitled to the requested increase under the provisions of paragraph 373.1961(1)(e), F.S. Thomas argued that the District should ignore the failure to meet the conditions for issuance of a WUP and issue him a WUP on the basis of paragraph 373.1961(1)(e).

The thrust of the case by Thomas is that the intent of those advocating the enactment of paragraph 373.1961(1)(e), F.S., in 1974 was to allow the regional water supply authority to pump its wellfields as needed under its permit until a county resident in the county where the wellfield is located needs the water. Then, the resident would be entitled to the water by virtue of residing in the county.

Paragraph 373.1961(1)(e), F.S.:

(1) In the performance of, and in conjunction with, its other powers and duties, the governing board of a water management district existing pursuant to this chapter.

(e) Shall not deprive, directly or indirectly, any county wherein water is withdrawn of the prior right to the reasonable and beneficial use of water which is required to supply adequately the reasonable and beneficial needs of the county or any of the inhabitants or property owners therein.

The hearing officer's recommended order and the Final Order denied Thomas' application and rejected Thomas' argument. The Final Order found that accepting Thomas' argument would negate the statutory provision precluding a new use from interfering with an existing use. The Final Order determined that there were other rational interpretations of 373.1961(1)(e) that reconciled with the other provisions of Chapter 373.

One of the arguments made by the District included that *Village of Tequesta vs. Jupiter Inlet Corporation*, 371 So. 2d 663 (Fla. 1979), made it clear that the right to water arises only through a water use permit or an exemption. Without a permit to use the requested quantity, or an exemption, there is no prior right to use of the water in the county. Additionally, the District argued that implementation of Thomas's interpretation of Paragraph 373.1961(1)(e) would be infeasible.

SFWMD

by Enola T. Brown
Supreme Court Rules on S-9 Pump Station Dispute

On March 23, 2004, the United States Supreme Court issued its decision in the matter of South Florida Water Management *District v. Miccosukee Tribe of Indians, et. al*. The Supreme Court found issues of material fact on the issue of whether the water bodies separated by the S-9 pump station – the C-11 canal and the wetland area known as WCA-3 – are two bodies of water or, if left to nature, a single body of water, and remanded the matter back to the trial court for development of the record in this area. Of particular note, the decision also allows the Government to raise the issue of the "unitary water" argument – an issue raised initially in its *amicus* brief.

The case involved the Central and South Florida Flood Control Project, which has five parts: the C-11 canal; the S-9 pump station, which pumps water from the C-11 canal into the third element of the Project, the wetland area known as WCA-3; and two levees, L-33 and L-37, which keep the waters pumped into WCA-3 from flowing back into the C-11 canal.1 The issue in the case is whether the discharge of water from the C-11 canal from the S-9 pump into WCA-3 requires an NPDES permit. The trial court concluded that the C-11 and WCA-3 were separate bodies of Waters of the United States and thus the discharge of waters from the C-11 canal, which was contaminated with phosphorous, into WCA-3 was a point source requiring a permit. The Eleventh Circuit affirmed.

The majority of the Supreme

Court's opinion focuses on the "unitary water" argument advanced by the Government in its *amicus* brief. Under this theory, all the navigable waters within the United States should be considered unitarily for purposes of NPDES permitting. That is, pollution caused by the engineered transfer of water from one navigable water to another would not require an NPDES permit because the discharge could not be a release of pollutants into waters of the United States since, as a unitary body of water, the pollutant was already there. As noted, the Court declined to rule on this issue but permitted the Government to raise the issue on remand. Of particular note, the opinion points out that the Government's brief did not identify any EPA documents espousing the "unitary water" theory2 or any reported caselaw addressing the "unitary water" theory as espoused in the Government's brief.

Instead, the Supreme Court found material issues of fact precluding summary judgment on the question of whether C-11 and WCA-3 are, in fact, two separate bodies of water. Are the water bodies separate, as the Tribe contends? Or, if the S-9 pump were shut down, would the area flood forming a large body of water over the C-11 and WCA-3 basin. This is the question that the Supreme Court has sent back to the trial court for further development of the record.

Endnotes:
[1] The District maintains the water level in WCA-3 at a level higher than the lands drained by the C-11 canal.
[2] Indeed, Former Administrator Carol Browner's *amicus* notes that the EPA, at one time, reached the opposite conclusion.

FLORIDA CASE LAW UPDATE
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erty. The County also attempted to place new requirements on the development regarding plat approval and permit applications. The developer filed a complaint seeking injunctive relief. The trial court issued a preliminary injunction ordering the County to promptly issue site plan approval and all permits, and prohibiting the application of the new overlay district and standards to the project.

A party seeking preliminary injunction must show the likelihood of irreparable harm, the lack of an adequate remedy at law, substantial likelihood of success on the merits, and public interest considerations. Because the developer established extraordinary expenditures in reliance on the County's strong support of its project, the DCA found that the developer had no adequate remedy at law. However, the DCA also concluded that the trial court's injunction went too far because it granted final relief prior to a decision on the merits of the case. The DCA affirmed the injunction, but only insomuch as it ordered the County to "expeditiously proceed to complete" the permit application process pending the final hearing.

Internet Mailing List

by Joe Richards, Internet Committee chair

Don't forget to update your listing on the Section's Internet mailing list. Anytime you change your e-mail address you need to let us know or you will be miss out on enlightening legal discussions, case news and legislative updates as well as Section news and events. All this is provided right to your desktop when you are a subscriber. To update your information or to join for the first time go to *www.eluls.org*.

Mark your calendar!

2004 Environmental and Land Use Law Section Annual Update

August 19-21, 2004
Amelia Island Plantation

Seminar registration information will be available in June at *www.eluls.org*.

Law School Liaison

Florida State University College of Law: New Programs and Student Initiatives

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

This update highlights two of the key elements of the FSU College of Law Environmental and Land Use Law Program. First, the College of Law has launched an *Environmental Forum* series, which will provide a neutral forum for the discussion of timely environmental issues. The Spring 2004 *Environmental Forum*, is the third *Forum* to be held at the law school, April 7, 2004. The *Forum*, entitled *The Future of the Florida Panhandle*, focused on policy and legal issues associated with development of the Panhandle. Specifically, the *Forum* focused on three key issues:

1. What are the major development/conservation challenges facing the Panhandle over the next twenty years?

2. What are the three most important guiding principles for development/conservation in the Panhandle during this time frame?

3. Are the existing legal and political institutions capable of implementing those principles effectively?

The distinguished panelists include representatives from state government (Shaw Stiller, Assistant General Counsel at DCA), local government (Pat Blackshear, Director, Okaloosa County Department of Growth Management), the environmental community (Janet Bowman, Legal Director of 1000 Friends of Florida, Inc.), and the development community (Billy Buzzett, Director of Strategic Planning for The St. Joe Company). Tom Pelham, a partner in the Fowler White Boggs Banker law firm, former Secretary of DCA, and current Chair of the Land Use Committee of the American Bar Association's Section on State and Local Government Law, is serving as an expert commenter. FSU College of Law students Amy Cline, David Gadd, and Jonathon Edwards are also participating in the *Forum*. The Environmental and Land Use Law Section served as a co-sponsor for the *Forum*.

In addition, the College of Law's student-run Environmental Law Society (ELS) has also made enormous strides this academic year with an enrollment of more than 60 student members. Its officers, Danielle Appignani, Amy Cline, David Childs, and Mike Curran have launched a series of programs intended to enhance the intellectual environment at the College of Law and provide students with a better appreciation for the practice of law in the environmental and land use arenas. The Society has sponsored a Brown Bag Luncheon Series that brings prominent attorneys to the law school to discuss their areas of practice. The ELS, working with the Environmental and Land Use Law Section, has also organized a career panel that includes representatives from a broad array of environmental and land use practice areas. The Society is also exploring "service" projects that will enhance environmental protection at the law school and in the local community. The energy and enthusiasm of the law school's students in the environmental and land use area plays an important role in making the College of Law a leader in this arena.

University of Florida Levin College of Law: Public Interest Environmental Conference Draws 350-Plus

by Megan Sladek

More than 350 people - including top environmentalists, State Senate Majority Whip Paula Dockery, law students (some from Costa Rica University and Harvard), UF undergraduates, Sierra Club members and assorted state VIPs - traveled to Gainesville Feb. 19-21 for the 10th Annual Public Interest Environmental Conference (PIEC).

The conference, "Shaping Florida's Future: A Decade of Protecting an Eternity," featured four sets of concurrent panels. "Florida's Waters" addressed issues related to potable water availability in the state, while "Land & Development" dealt with population caps and zoning and enforcement issues. "Marine & Coastal" workshops showcased the latest developments in aquaculture and state-initiated coastal management programs. The catch-all series "Cutting Edge" offered workshops on alternative forms of energy, effects of mold in buildings, and global agriculture.

UF law students collaborated with members of the ELULS Public Interest Committee, including Mary Jane Angelo, Tom Ankersen, Ross Burnaman, Martha Collins, Marianne Cufone, Erin Deady, Melissa Gross-Arnold, Richard Grosso, Yvonne Gsteiger, Richard Hamann, Nicole Kibert, Kelly Samek, David Schwartz, and David White, to develop the conference panels.

Tulane University Professor of Law Oliver A. Houck opened the event at a reception Feb. 19 at the Florida Museum of Natural History. Houck is former general counsel and vice president, National Wildlife Federation; a director of Defenders of Wildlife and the Environmental Law

Institute; and member of the Environmental Defense Fund litigation review board and committees of the National Science Foundation.

Speakers also included Lee Arnold of Colliers-Arnold/Colliers International, chair of the Florida Council of 100 Water Resources Taskforce; Dr. David Guggenheim, conservation policy vice president, Ocean Conservancy; Sonny Vergara, former executive director of SW Florida and St. Johns River Water Management Districts; Michael Bean, noted wildlife law expert and Chair, Environmental Defense's Ecosystem Restoration Program; and attorney Jeanne Zokovitch, Legal Environmental Assistance Foundation.

The most anticipated event of the conference was Friday's keynote banquet speech by Carl Hiaasen, Miami-Herald columnist and author of nine best-selling novels, who is noted for the strong pro-environmentalist stands reflected through his characters.

Hiaasen encouraged the audience to do what they could to hold politicians - and anyone else with decision-making authority - accountable for what happens to our environment. If nothing else, he said, when bad decisions are made, he knows he can confront the responsible person and make sure he has a horrible day. Hiassen said finding political indiscretions to write about is "like shooting fish in a barrel. There's so much going wrong when it comes to the environment that it's next to impossible not to find something to look into."

After nearly an hour of clever stories and zany one-liners, a member of the audience asked Hiaasen why he didn't run for governor. Laughing, he responded that he is "morally and psychologically unfit to hold political office." This reply came on the heels of comments about the relish with which he disposes of the villains in his books (one character is eaten by an alligator).

The UF Environmental and Land Use Law Society organized the event with funding from the law school's Center for Governmental Responsibility, Florida Bar Environmental & Land Use Law Section, Law College Council, Law Center Association, UF Student Government, Jelks Family Foundation, and law firms of Hopping Green & Sams, P.A., Tallahassee; Lewis Longman and Walker, P.A., Tallahassee/Jacksonville/West Palm Beach; and Rumberger Kirk & Caldwell, Orlando.

PIEC co-chairs Erika Zimmerman and Ryan Osborne have passed the baton to Adam Regar and Ashley Cross-Rappaport, and planning for next year - along with a search for sponsors, speakers and volunteers - is already underway. For information, visit the conference website at *http://grove.ufl.edu/~els* or e-mail Adam (*adamregar@hotmail.com*) or Ashley (*elusiveash@yahoo.com*). And mark the date for next year's conference, scheduled for Feb. 24-26, 2005.

toric urban structure, often a relic of a colonial period, which is highly skewed in favor of one large city, or in larger countries, a few large cities, where capital and infrastructure resources are concentrated. There is apparently a tendency for the largest cities to accumulate much of the increase in urban population in spite of the best efforts of governments to plan development. Unfortunately a significant part of that urban growth is the surplus agricultural labor that has migrated to a city and, which often cannot find employment in the industrial sector. Because that growth is unable to earn a formal wage, it becomes part of a large, informal sector of the economy that offers little more than sustenance and increases the strain on city infrastructure.

Another factor in urbanization, which may be another relic of colonial rule, is the fact that urban development was originally based on a commercial export-oriented economy. Over the years, that economic base has industrialized and expanded to meet the domestic needs of the growing population. The result is a concentration of industrial development in existing centers where labor, consumers, and infrastructure are already available. This breaks the linkage between the city and the surrounding rural areas and creates a physical separation between the rich and the poor by the creation of a rich city core surrounded by the poor.

As a result of these trends, selected cities are growing at unprecedented rates, taxing the infrastructure that serves the city population and creating air and water pollution that may endanger the health of the citizens. These changes in the urban environment have obvious consequences for their human populations. Increased levels of airborne and waterborne pollutants have adverse effects on human life. Large cities develop air pollution problems from the burning of fossil fuels for transportation, electrical generation and heat. Urban water supplies must be monitored carefully for increased levels of toxins. Changes in the flow of water through cities may make them vulnerable to flooding. A conference on Environmental Quality and Sustainable Development held in the United States in October 1992 reported data from World Health Organization and United Nations Environmental Programme world air monitoring network. Scientists found that the ambient air quality found in most mega-cities was poor enough to cause serious health effects. The problems are common in all mega-cities, but are particularly serious in the developing countries of the world.

American Urban Sprawl

The United States is experiencing a similar demographic challenge. Between 1950 and 1997, the country's population increased by 116 million. In the next 50 years it is estimated that the population will grow by an additional 125 million. No other rich country faces such population pressure. However, no other rich country has the amount of relatively empty space that America has that can accommodate this population growth. America has chosen not to push the extra people into European-style cities with their mesh of residential blocks, contiguous shops, and public transport. Instead they have experienced almost the reverse of the trend toward urbanization. In 1920, there were roughly ten people per acre in America's cities, suburbs, and towns. By 1990, there were only four.

As a result, all over America people have begun to worry about the unfettered expansion of jobs, factories, houses, offices, roads and shops that goes by the name of "urban sprawl". In November 1999, voters approved 173 local referendums to limit suburban sprawl by, for example, allowing the purchase of farms near cities or by imposing boundaries restricting urban growth to particular spaces. There is a widespread view that sprawl is wasteful and ugly. There are several efforts to create national and statewide incentives to limit development in the suburbs and revitalize the urban cores, just the opposite of the urbanization problem of much of the rest of the world. Yet at the same time, Americans are flocking to malls, highways, and 100-mile wide cities. In fact, they appear to be doing so more enthusiastically, more wastefully and, in more sprawl creating ways than in the past.

The "push" and "pull" of America's urban sprawl are more closely related to "push" of crime and the "pull" of socioeconomic advantage. In 1992, a survey of people leaving New York City found that fear of crime was the most common reason for migrating to the suburbs. Those that are economically able, are pushed to the suburbs. Over the past three decades, urban poverty has grown distinctly worse and the number of people living in ghettos, where 40% of the population is below the poverty line, has doubled. This is the result of the evacuation of city centers by the middle classes, who take jobs and tax revenues with them. Thus the middle class is also being pulled to the suburbs, attracted by the jobs and socioeconomic advantages resulting from the move. Thus, urban sprawl is changing the nature of the division between rich and poor in American society by creating a physical separation.

An article in *The Economist* (8/21-27/99) draws the conclusion that urban sprawl is a product of public policy. Of particular interest are the factors, cited as policies and subsidies, that encourage urban sprawl. The first is America's transport policies. America is committed to sustained public spending on highways. Spending has totaled well over $1 trillion in the past 20 years. Because of the larger areas and low population density, spending on roads is disproportionately greater in suburbs than in city centers. *The Economist* quotes the State of Maryland's state planning director as calling the roads program an "insidious form of entitlement-the idea that state government has an open-ended obligation, regardless of where you choose to build a house or open a business, to be there to build roads, schools, sewers." The growth of the suburbs would not have been possible without such policies.

The second factor is the fact that America is a country where tradition and laws are often based on the Anglo-American philosophy of private property rights and local land use control. Almost every metropolitan area is divided into dozens, sometimes hundreds, of local administrative units (265 in Chicago, 780 in New York). Generally, each local govern-

ment is free to make its own decisions about whether to permit a new project, regardless of the cost the decision imposes on neighbors. In addition, local government usually gets to keep any resulting property-tax revenue. This results in a competition for commercial development that pulls new buildings towards richer suburbs and out of city centers. Adding to this pressure is the fact that city centers usually have ill-trained workforces, heavy welfare burdens, and cannot afford favorable tax treatment for developers. It is estimated that around 70% of American jobs are now in the suburbs.

The third factor is the American tax system. In America, all interest payments on a home can be deducted from income subject to federal and state income taxes. The profit on house sales can also be exempt from capital gains tax. The cost of this aspect of the tax system is estimated at $8 billion in 1998. By lowering the real cost of owning a house, it encourages people to buy bigger properties, which favors larger houses and large lots. One study has suggested that the tax system alone reduces the population density in urban areas by 15%.

Comparison of Forces

When comparing the problems of urbanization and American urban sprawl, one is struck by the power of two forces: the desire of the rich to be separated from the poor, and tradition. Both problems have resulted in a physical separation of the rich from the poor. In the cities of the developing world, the core of the major city tends to house the rich. Their neighborhoods are surrounded by the urban poor, who are generally housed in marginal areas of the cities, and at greater distance, the rural poor. In the United States, urban sprawl has placed the rich in gated communities in the suburbs with the poor housed in the ghettos of the central city. As the middle class gains wealth, it naturally tends to move toward the areas reserved for the rich.

Tradition is also an important underlying factor. Urbanization continues the tradition of a major city as the center of culture, capital, and education, as well as an agent of exploitation of the region around it. American urban sprawl continues the tradition of local land use control, private property rights, and disregard for impacts of local land use actions on others or the community at large.

Lessons to be Learned

The American experience suggests that a well-planned and maintained road system allows free movement of people and goods. America is finding that poor people are easily able to move from the central city to the suburbs. Regulations requiring large lots and houses keep them out of the gated communities, but they are able to find housing in some of the older suburbs. Coincidentally, the suburbs are starting to suffer from some of the crime and joblessness that afflict inner cities. A reliable road system also allows decentralization of industry as can be seen from the proliferation of industrial parks in the American suburbs.

Applying this notion to the problem of urbanization in the Developing World, we must assume that the funds can be found to develop a reliable expanded road system in the region of major cities. Such a system could contribute to solving the problem of urbanization by providing the mechanism for the easy movement of people and goods. This mechanism could then help support establishing better connections between the urban area and the surrounding region. An initial step would be the relocation of administrative functions to smaller cities. This could lead to industrial expansion in designated areas (similar to industrial parks) once the needed infrastructure is installed. Infrastructure needs may be minimized by co-locating industries that can use each other's byproducts. This would lead to relocation of significant middle class populations from the large city and provide a source of jobs in the smaller cities and the rural area.

The Developing World's experience in putting their centers of culture, education and capital in the central areas of their major cities is instructive to America. With the decampment of the middle class to the suburbs, America is also experiencing a migration of museums, libraries, galleries, schools, banks, and corporate headquarters out of the centers of her cities. This diffusion is limiting the synergy that occurs when these institutions are in close proximity with each other. Their reinstatement in the city center will also attract the middle class and help to balance the urban and regional populations.

The people of the world have much to teach each other. It only takes a willingness to listen and share. The advent of the information age has opened new means for the creative use of the full intellectual resources of the world. The creation of a more efficient urban system with equitable growth benefiting a whole nation is a goal worthy of our best joint efforts.

Endnote:

[1]Excerpted by the author from "City Matters," e-publication, 1999.

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