



Koontz v. St. Johns River Water Management District

by Sidney F. Ansbacher, GrayRobinson, P.A.

INTRODUCTION

The Supreme Court's recently issued *Koontz v. St. Johns River Water Management District* No. 11-1447, 2013 WL 3184628, 133 S.Ct. 2586, 540 U.S. __ (June 25, 2013), confirms money is property, that money can be taken, and that no one agrees what happens next. *Koontz* took years winding through the agency, Division of Administrative Hearings and courts. At various times, the parties argued that various kinds of takings occurred. The Supreme Court, in a

5-4 decision, reviewed and relied on an argument that Koontz raised and then dropped. The District's request that Koontz consider paying for certain District improvements in his basin constituted a possibly coercive exaction. The Court remanded the matter to the Florida Supreme Court.

A core component to the majority opinion was the determination that money constituted property subject to a takings claim. The majority decision followed logically from, and cited

favorably, the Court's earlier decision on IOLTA interest accounts in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the Court had ruled by a similar 5-4 majority concerning the Texas Supreme Court's mandate that IOLTA interest income went to legal aid. The Court in *Phillips* held the interest was properly belonging to the client whose principal funds were in its lawyer's trust account. The majority remanded for consideration of whether the legal aid mandate "took" the property, and

See "*Koontz v. SJRWMD*," page 19

From the Chair

by Nicole C. Kibert

It is an honor to be elected as Chair of the Environmental and Land Use Law Section – especially on the Section's 40th anniversary. First, I would like to thank Erin Deady for her enthusiastic and very productive leadership over the past year. Her leadership has resulted in strategic planning for our section that will serve us well in the years to come as the section adapts to a changing economy.

We had a wonderful ELULS Annual Update at the Sawgrass Marriott Golf Resort & Spa, Ponte Vedra Beach, FL from August 8-10th with a diverse and interesting program that also satisfied all ethics credits.

If you were unable to attend, we will send out an announcement when the audio program is available. It is my pleasure to recognize the contributions of the following individuals for their achievements in environmental and land use law and their service ELULS at the Section's Annual Luncheon held on August 9, 2013.

- Public Interest Committee Attorney Award – Ralf G. Brookes
- Judy Florence Memorial Outstanding Service Award – Kenneth A. Tinkler
- Stephens\Register Award – Dorothy E. Watson
- R. S. Murali Memorial Affiliate Member Outstanding Service

See "*Chair's Message*," page 2

INSIDE:

Private Property Rights Versus Florida's Public Trust Doctrine: Do any Uses Survive a Transfer of Sovereign Submerged Lands from the Public to Private Domain?	3
September 2013 Florida Case Law Update..	8
On Appeal.....	11
Law School Liaisons	
Florida International University	12
A Look Back at 2012-2013 and a Look Ahead to the 2013-2014 Academic Year at The Florida State University College of Law	13
UF Law Update.....	17

CHAIR'S MESSAGE

from page 1

- Award – Robert M. Wojcik
- Bill Sadowski Memorial Public Service Award – Steven M. Seibert

Congratulations are also in order for the:

- 2013 Florida Environmental Public Interest (FEPI) Fellowship winner: Tashyana Thompson with Univ. of Miami School of Law, Environmental Justice Project
- 2013 Wade Hopping Memorial Scholarship winner: Andrew Missel
- Dean Frank E. Maloney Writing Contest winners:
 1. Michael Nichola (FL A&M)
 2. Erin Coburn (Stetson)
 3. Tia L. Crosby (FL A&M)

In addition, I would also like to thank the 2013-2014 ELULS sponsors:

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We have a few sponsorship slots available for upcoming mixers and programs. If you are interested in sponsoring the section, please visit <http://eluls.org/our-sponsors/> for more information.

ELULS also sponsored a very well attended webinar with RPPTL on July 31st, “Koontz v. SJRWMD: Implications for Florida Environmental, Land Use, and Real Property Lawyers & Their Clients.” If you missed the program, it is available for playback here: <http://eluls.org/koontz-v-sjrwmd-implications-for-florida-environmental-land-use-and-real-property-lawyers-their-clients-webinar/>.

We have a stimulating year planned with a great schedule of CLE programs – both live and via webinar. We will send out updated program information as it is available. Please mark your calendars now for August 7-9, 2014 for the ELULS Annual Update’s return to Amelia Island Plantation.

If you are interested in getting more involved with ELULS, I invite

you to peruse the committees on eluls.org and contact the committee chair. In addition, you are welcome to attend meetings of the Executive Council. The 2013-2014 meeting dates for the ELULS Executive Council are as follows:

- October 10, 2013 – Orlando
- November, 2013 – Conference Call (Budget Approval)
- January 30, 2014 – Tampa (in conjunction with EL/RPPTL Seminar)
- Long Range Planning Retreat, 2014 – TBD
- June 26, 2014 – Gaylord Palms Resort, Orlando (in conjunction with The Florida Bar Annual Convention)
- August 6, 2014 (4:00 p.m.) – Omni Amelia Island Plantation

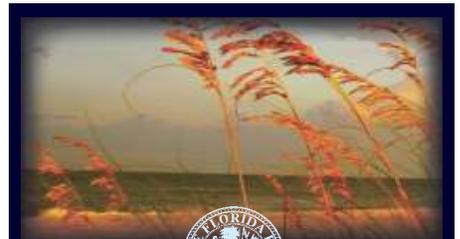
Lastly, one of the most important benefits of ELULS membership is our treatise. I am pleased to announce that Florida Environmental and Land Use Law Treatise is now updated with 2013 content and there is a mobile/tablet-friendly version available for use.

Thank you to all who have worked so hard to make ELULS the great success it is and for the work you will continue to do in the future. If you have any ideas about how to enhance or improve ELULS activities, I hope you will share your ideas with me – nkibert@carltonfields.com or (813) 229-4205. I am very much looking forward to working with all of you this year.

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

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Private Property Rights Versus Florida's Public Trust Doctrine: Do any Uses Survive a Transfer of Sovereign Submerged Lands from the Public to Private Domain?

Whether the public trust doctrine survives the transfer of sovereign submerged lands to private parties, and if so, which rights survive with it.

by Jesse Reiblich*, University of Florida Levin College of Law

Abstract

Florida's public trust doctrine protects certain public uses of navigable waters. Typically, these navigable waters are over sovereign submerged lands. For a variety of reasons, navigable waters are sometimes situated over private submerged lands. This results in a conflict between the rights of the private landowners, such as the right to exclude others, and the public's rights to use navigable waters for certain purposes usually protected by Florida's public trust doctrine. These purposes include, at a minimum, navigation, commerce, swimming, and fishing. This article attempts to: 1) clarify the tensions between private submerged lands and the public trust doctrine; 2) shed light on the unanswered question of whether the public trust doctrine survives the transfer of sovereign submerged lands to private parties; and 3) if the public trust doctrine survives such a transfer, explore which rights survive with it.

I. Introduction

In general, states hold title to sovereign submerged lands under navigable waters, but there are exceptions to this rule. For example, St. Augustine, Florida holds title to the submerged lands in its harbor.¹ Fort Myers, Florida likewise owns the submerged lands to the centerline of the Caloosahatchee River.² In still other circumstances, private landowners hold title to submerged lands.³ This is especially true in Florida, where the conveyance of submerged lands was an integral part of the state's development policy until well into the 1960s.⁴

The public trust doctrine preserves the rights of the public to use the

navigable waters over sovereign submerged lands for certain purposes, such as navigation, commerce, fishing, and swimming.⁵ The question of whether the public trust doctrine persists when these sovereign submerged lands have been transferred to private interests remains elusive. Furthermore, since each state decides which public uses of navigable waters will be protected by its public trust doctrine, the scope of the doctrine varies by state. Even when the public trust doctrine protects certain uses of navigable waters over private submerged lands, it is not always clear which uses are protected.

This article attempts to clarify this muddled area of Florida law by addressing the question of whether the public trust doctrine survives the transfer of sovereign submerged lands to private parties, and if so, under what circumstances. Clarification will help owners of these private submerged lands understand their rights under Florida law and will help the parties charged with enforcing and understanding the law to better understand the legal status of the navigable waters over private submerged lands.

II. The Public Trust Doctrine

The public trust doctrine traces its history to ancient Roman law,⁶ and came to common law legal tradition via the Magna Carta.⁷ The general principle of this doctrine is that the government holds certain lands and resources in trust and protects them for the use and enjoyment of all of its citizens.⁸ The two primary types of land protected by the doctrine in Florida are sovereign submerged lands, such as the beds of rivers and

navigable lakes, and tidal lands up to the mean high tide line. Sovereign submerged lands can generally be broken down into two categories: tidally influenced tidal lands and non-tidally influenced lands.

The U.S. Supreme Court explicitly recognized a U.S. public trust doctrine in an 1892 case, *Illinois Central Railroad Co. v. Illinois*.⁹ The Court held that the submerged lands under navigable waters are the property of the states and are subject to the public trust doctrine.¹⁰ The Court explicitly enumerated three public uses of navigable waters protected by the federal public trust doctrine: navigation, commerce, and fishing.¹¹ Commentators have characterized this "federal public trust doctrine" as a baseline minimum standard for individual states' public trust doctrines.¹² Beyond this baseline, the scope of this doctrine varies from state to state.¹³ At least two things are constant across all the states. First, because of the equal footing doctrine, every state inherited title to the beds of their navigable lakes, streams, and tidal waters when they joined the Union.¹⁴ Second, all navigable waters of the United States are subject to the federal government's navigational servitude on those waters, pursuant to the U.S. Constitution.¹⁵

Florida's public trust doctrine is explicitly codified in the Florida Constitution¹⁶ and by statute.¹⁷ Florida courts have recognized this doctrine since shortly after the *Illinois Central* decision.¹⁸ Florida's public trust doctrine protects certain uses of navigable waters over sovereign submerged lands. These judicially articulated uses include navigation, commerce, fishing, and bathing.¹⁹ In addition to

continued...

these traditionally protected uses, Florida's public trust doctrine may allow for additional uses, which courts have called "other easements allowed by law."²⁰ Accordingly, the Florida Legislature or Florida courts could presumably add protected uses to those listed above, but have not done so yet. The courts could determine that other uses are protected by Florida's public trust doctrine, despite not previously identifying these uses.²¹

III. The Public Trust Doctrine and Private Submerged Lands

Florida's public trust doctrine protects the public's right to use navigable waters over sovereign submerged lands for navigation, commerce, fishing, and bathing.²² Whether the doctrine protects these uses on the waters overlying private submerged lands has never been fully answered in Florida. Private land ownership usually includes the right to exclude others.²³ Because of the unique character of private submerged lands, the traditional right to exclude others conflicts with the public's right to use the waters overlying those submerged lands.²⁴ Which right trumps the other—the public's right to use the overlying waters or the private landowner's right to exclude others from her property? Do the waters over private submerged lands also become private and void of any public rights, like private lakes in Florida,²⁵ or are they still subject to the public uses that were authorized prior to the conveyance?

Florida's Constitution provides for sale of sovereign lands when it is in the public interest, and non-proprietary use of such lands as long as it is not contrary to the public interest.²⁶ Likewise, the Florida Supreme Court has ruled that the disposition of public lands to private landowners is permissible, subject to some conditions.²⁷ One of these conditions is that a disposition of public lands must not impair the rights of Floridians to use the navigable waters for navigation and other uses.²⁸ For instance, the Florida Supreme Court explained that the state may transfer public lands under navigable waters

to private ownership as long as the rights of the people of the state are not "invaded or impaired."²⁹ Furthermore, the Court has explained that sovereign submerged lands "are not included among the public lands that are subject to ordinary disposition."³⁰ Because of such conditions on the transfer of submerged lands, the public's right to use the navigable waters over private submerged lands would most likely survive a transfer of the land from public to private ownership.³¹ If these uses did not survive, such a transfer would necessarily impair the rights of the public to such lands.³²

In order to more closely examine this issue, it is worth considering the history of Florida transfers of submerged lands to private parties. Initial case law seemed to bar the state from granting submerged lands to private parties.³³ Regardless, the state has occasionally transferred these lands if a party filled them in or otherwise put them to beneficial use. Florida enacted several statutes that allowed a party to gain title to submerged lands this way, including the Riparian Act of 1856,³⁴ the Butler Act of 1921,³⁵ and the Bulkhead Act of 1957.³⁶ Together, these acts allowed private landowners to obtain title to sovereign submerged lands if they filled in, bulkheaded, or otherwise "improved" submerged lands.³⁷

Long after these acts were no longer in effect, the Florida Department of Environmental Protection initiated rulemaking in order to assert a reservation of the state's public trust rights in submerged lands that had been filled in, bulkheaded, or otherwise improved.³⁸ The DEP's rule also attempted to reclaim the state's interest in lands that had previously been filled in or bulkheaded but no longer were.³⁹ In *Anderson Columbia Co., Inc. v. Board of Trustees of the Florida First District Court of Appeal* invalidated this rule and made it clear that when a landowner filled or bulkheaded submerged lands pursuant to the acts these landowners gained title to these lands "absolute and equal to that of the upland."⁴⁰

In addition to invalidating the DEP's rule, the *Anderson* court made it clear that lands filled and bulkheaded pursuant to the acts are no longer subject to the public uses protected by the public trust doctrine.⁴¹

It logically follows that submerged lands otherwise improved pursuant to the acts are likewise no longer subject to the public trust doctrine. Accordingly, Florida has at least some formerly submerged lands that were previously under navigable waters that are not subject to the public trust doctrine. Likewise, Florida courts have left the door open for transfers of submerged lands that extinguish public trust protections on unimproved submerged lands.⁴² For instance, the Florida Legislature could pass legislation similar to the acts discussed above.⁴³

The *Anderson* court also explained the test for whether a grant of sovereign lands to a private party is permissible: "if the grant of sovereignty land to private parties is of such nature and extent as not to substantially impair the interest of the public in the remaining lands and waters it will not violate the inalienable trust doctrine."⁴⁴ In *Anderson*, the court determined that the grant was permissible because "ample space was left for the purpose of navigation and for the requirements of commerce."⁴⁵ Accordingly, the public trust doctrine could act as a limitation on future attempts by the Florida Legislature to further divest the state's interests in its sovereign submerged lands. The courts seem willing to allow the Legislature to give sovereign lands to private parties up to a point. Once that point is reached—once these divestments interfere with navigation or requirements of commerce to an unacceptable extent—the courts will invalidate these divestments. Furthermore, Legislation seeking to transfer submerged lands to private parties, and to make these lands no longer subject to the public trust doctrine, requires clear legislative intent to do so.⁴⁶ Without clear intent, the courts will probably find that public trust uses on such divested lands persist.⁴⁷

It makes practical sense for the courts to allow the Legislature to remove public trust uses from lands that are no longer submerged. But private submerged lands gained by "otherwise improving" submerged lands according to the above acts are likewise not subject to the public trust doctrine.⁴⁸ Furthermore, the Florida Supreme Court has delineated the limits of the lands that may be

gained under this tenet of the acts.⁴⁹ The private landowner only gains title to the submerged land under the footprint of the improvement, and not submerged lands adjacent to the submerged lands on which these improvements were made.⁵⁰ Regardless, the submerged lands under these improved structures represent at least one example of navigable waters over private land that are not subject to the uses of the public trust doctrine.

Other states have held that even when a private landowner owns submerged lands, these lands are still subject to public trust uses.⁵¹ Kentucky, for example, grants ownership of its submerged lands to riparian landowners. But these lands are subject to public trust uses, such as temporary anchorage.⁵² Michigan and New York likewise recognize at least some public trust uses of privately owned submerged lands.⁵³

Conclusion

Absent clear legislative intent to the contrary, the public trust doctrine may persist on some submerged lands conveyed to private parties. However, transfers of sovereign submerged lands made pursuant to the discussed acts likely extinguish the public trust doctrine protections on those lands. These lands include submerged lands that have been filled, submerged lands under the footprints of improvements made to those lands, and may include submerged lands that have been conveyed pursuant to statute, but not improved (and hence remain susceptible to the exercise of trust uses). The Florida Supreme Court has invalidated attempts by the state to reclaim public trust doctrine protections on lands divested by the state under these statutes. A determination of whether the trust has been violated by a conveyance appears to be based on a case-by-case analysis of whether the trust purposes have been frustrated on the waterbody as a whole, as opposed to the waters overlying the conveyed submerged lands.

As Florida continues to develop, occasions for conflict on waters overlying privately owned submerged land will likely increase. These conflicts will typically involve uses that would otherwise implicate the protections of the public trust doctrine. Courts may consider whether these public

uses survive the conveyance, at least until the purpose of the conveyance is fulfilled (e.g. filling). Common law easements by prescription may also apply. An examination of title may also provide answers on a case-by-case basis.

Endnotes:

* LL.M. Candidate, Class of 2013, University of Florida Levin College of Law, Environmental & Land Use Law; J.D. University of Florida Levin College of Law, 2011. I would like to thank Tom Ankersen and Richard Hamann for their help on this article.

¹ Chapter 6769, Laws of Florida (1913).

² Chapter 6962, Laws of Florida (1915).

³ See *infra* section III.

⁴ See generally Nelson M. Blake, *Land into Water—Water into Land: A History of Water Management in Florida* (2d ed. 2010).

⁵ See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

⁶ THE INSTITUTES OF JUSTINIAN 2.1.1 (Thomas Cooper trans. & ed. 1841).

⁷ “[S]ince Magna Charta the king has had no power to obstruct navigation or grant an exclusive privilege of fishing; and the right of the people in this respect cannot be restrained or counteracted by the sovereign as the legal and sole proprietor.” *State v. Black River Phosphate Co.*, 32 Fla. 82, 92, 13 So. 640, 643 (1893). There is some debate over this point. See James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol’y F. 1, 1 (referring to any history of the doctrine having its roots in the Magna Carta as “a mythological history of the doctrine.”). Regardless, the U.S. Supreme Court recognized a U.S. public trust doctrine in *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

⁸ 146 U.S. 387. See also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

⁹ *Id.*

¹⁰ *Id.*

¹¹ State title to lands subject to the public trust doctrine “is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.” *Id.* at 452.

¹² See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 5 (2007) (pointing out that when state public trust doctrines vary from U.S. Supreme Court pronouncements, “they almost always expand the federal public trust doctrine.”).

¹³ This variable scope refers both to the lands considered public as well as the uses protected by the doctrine. For example, Virginia authorizes landowners to control their tidal land all the way down to the mean low water mark, instead of the mean high water line, as is the case in Florida. See Va. Code Ann. § 28.2-1202 (2012) “the limits or bounds of the tracts of land lying on the bays, rivers, creeks and shores within the jurisdiction of the Commonwealth, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark

but no farther.” *Id.* See also *National Audubon Society v. Superior Court* 658 P.2d 709 (Cal. 1983) (determining that California’s public trust doctrine extends to even non-navigable tributaries of navigable waters).

¹⁴ *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 214 (1845).

¹⁵ *Id.* (explaining that “[b]y the 8th section of the 1st article of the Constitution, power is granted to Congress ‘to regulate commerce with foreign nations, and among the several states.’”).

¹⁶ “The title to land under navigable waters, within the boundaries of the state, which have not been alienated, including the beaches below mean high water line, is held by the state, by virtue of its sovereignty, in trust for all the people.” FLA. CONST. art. X, § 11.

¹⁷ FLA. STAT. § 253.034 (2012) (public lands “shall be managed to serve the public interest by protecting and conserving land, air, water, and the state’s natural resources, which contribute to the public health, welfare, and economy of the state.”).

¹⁸ *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893). See also *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 608-09, 47 So. 353, 355 (1908) (recognizing that the “states cannot abdicate general control over [sovereign submerged] lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good.”).

¹⁹ *Brannon v. Boldt*, 958 So.2d 367, 372 (2007) (“The public has the right to use navigable waters for navigation, commerce, fishing, and bathing and ‘other easements allowed by law.’” (citing *Broward v. Mabry*, 50 So. 826, 830 (1909))).

²⁰ 958 So.2d at 372.

²¹ For example, California and Hawaii recognize what one commentator has called “ecological public trust doctrines.” Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrine: Public Values, Private Rights, and the evolution toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 83 (2010).

²² See *supra* notes 19-20.

²³ The U.S. Supreme Court has called the right to exclude others “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176, 100 S.Ct. 383, 391 (1979).

²⁴ See generally THOMAS T. ANKERSEN, RICHARD HAMANN & BYRON FLAGG, *FLORIDA SEA GRANT, TP180, ANCHORING AWAY: GOVERNMENT REGULATION AND THE RIGHTS OF NAVIGATION IN FLORIDA* (3d ed. 2011) (providing an in-depth analysis of the federal, state, and local government law that surrounds the practice of anchoring on the navigable waters of the state of Florida).

²⁵ *Odom v. Deltona Corp.*, 341 So.2d 977, 989 (1976) (explaining that the Florida Supreme Court “has delineated rather forcefully the absence of public rights, including fishing, in privately owned lakes.”). This point might seem obvious, but California’s public trust doctrine, for example, is broad enough to include even some private waters. See *Golden Feather Cmty. Ass’n*, 257 Cal. Rptr. 836, 840 (Cal. Ct. App. 1989).

²⁶ FLA. CONST. art. X, § 11. “Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when

continued...

PRIVATE PROPERTY RIGHTS

from page 5

not contrary to the public interest.” *Id.*

²⁷ See *infra* notes 28-30.

²⁸ See *State v. Gerbing*, 56 Fla. 603, 611-12, 47 So. 353, 356 (1908) (recognizing that the state may grant certain rights and privileges to individuals for the use of lands under navigable waters “but such privileges should not unreasonably impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law.”).

²⁹ “[T]he trust doctrine, with reference to lands under navigable waters, cannot, on principle, be carried to such an extent as to preclude the state from transferring to private ownership limited portions of such lands when the rights of the people of the state are not invaded or impaired.” *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 60-61, 146 So. 249, 254 (1933).

³⁰ *State v. City of Tampa*, 88 Fla. 196, 220, 102 So. 336, 344 (1924).

³¹ A Federal Claims Court applying Florida law explained that “[a]lthough the state may convey legal title to submerged lands to private owners, any rights thus conveyed are always subject to the state’s overriding obligation to protect the public rights of swimming, bathing, fishing and navigation.” *Mildenberger v. U.S.*, 91 Fed.Cl. 217, 241 (Ct. Cl. 2010).

³² *But see Anderson Columbia Co., Inc. v. Bd. of Trustees of Internal Imp. Trust Fund of State of Fla.*, 748 So.2d 1061, 1066 (Fla. 1st D.C.A. 1999) (an example of a transfer of filled submerged lands that did not violate the public trust doctrine: “[t]he proof shows that ample space was left for the purpose of navigation and for the requirements of commerce, and that the paramount authority of the federal government was obtained for the construction of the improvement.”).

³³ “A state may make limited disposition of portions of such lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. The states cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good.” *State v. Gerbing*, 56 Fla. 603, 609, 47 So. 353, 355 (1908).

³⁴ Chapter 791, Laws of Florida (1856).

³⁵ Chapter 8537, Laws of Florida (1921). The Butler Act repealed the Riparian Act and was made retroactive to the date of adoption of the Riparian Act in 1856.

³⁶ Chapter 57-362, Laws of Florida (1957). The Bulkhead Act repealed the Butler Act and was codified as FLA. STAT. § 253.129: “The title

to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each such owner.” *Id.*

³⁷ The Legislature tried to clarify title to previously submerged lands by enacting legislation. See, e.g., FLA. STAT. § 253.12(9) (2012) “All of the state’s right, title, and interest to all tidally influenced land or tidally influenced islands bordering or being on sovereignty land, which have been permanently extended, filled, added to existing lands, or created before July 1, 1975, by fill, and might be owned by the state, is hereby granted to the landowner having record or other title to all or a portion thereof or to the lands immediately upland thereof and its successors in interest. Thereafter, such lands shall be considered private property, and the state, its political subdivisions, agencies, and all persons claiming by, through, or under any of them, shall be barred from asserting that any such lands are publicly owned sovereignty lands. The foregoing provisions shall act to transfer title only to so much of such extended or added land as was permanently exposed, extended, or added to before July 1, 1975.”

³⁸ See *Anderson Columbia Co., Inc. v. Bd. of Trustees of Internal Improvement Trust Fund of State of Florida*, 748 So.2d 1061, 1065-66 (Fla. 1st D.C.A. 1999). The proposed rule was to be codified as FLA. ADMIN. CODE r. 18-21.019(1), and it included the following objectionable language: “11. Submerged lands to be disclaimed shall be subject to the inalienable Public Trust. Such lands shall be available for the traditional public uses of fishing, swimming, and boating.” *Id.*

³⁹ *Id.* “2. Lands below mean or ordinary high water line which were filled in, bulkheaded, or permanently improved prior to the applicable date under subsection (1)(a), above, but which are no longer filled in, bulkheaded, or permanently improved in whole or in part, when application is made, shall not qualify for a disclaimer under this rule. 3. Title to lands which are no longer filled in, bulkheaded, or permanently improved, and therefore no longer comply with the Butler Act shall be claimed by the Board of Trustees as part of the Public Trust. This includes lands which have subsequently eroded due to natural causes. Applications for disclaimers for such lands shall be denied.”

⁴⁰ 748 So.2d at 1065 (citing *Holland v. Fort Pierce Fin. & Constr. Co.*, 157 Fla. 649, 656-58, 27 So.2d 76, 80, 81-82 (1946)).

⁴¹ *Id.* at 1066-67. “The Butler Act granted owners *exclusive* rights only over those parcels of submerged land underneath the foundations for wharves or ‘permanent’ structures or which were filled in and used for the construction of ‘warehouses, dwellings, or other buildings.’ Only such land is ‘*actually* ... permanently improved’ within the meaning of the statute. This reading of the statute harmonizes with section eight of the Act, which provides that nothing in the statute shall be construed to prohibit the public from boating, bathing, fishing or exercising ‘privileges’ previously allowed as to the

submerged land, ‘*until* such submerged lands shall be filled in or improved by the riparian owners as herein authorized.’ Ch. 8537, § 8, at 334, Laws of Fla. (1921).” *Anderson Columbia Co., Inc. v. Bd. of Trustees of Internal Imp. Trust Fund of State of Fla.* 748 So.2d 1061, 1066-1067 (Fla. 1st D.C.A. 1999) (citing *City of West Palm Beach v. Bd. of Trustees of the Internal Improvement Trust Fund*, 746 So.2d 1085, 1090 (1999)).

⁴² The *Anderson* court explained this point: “[t]he agency suggests that the legislature is without authority to convey sovereign lands absolutely, and that any conveyance must be subject to the public trust. The Florida Supreme Court long ago rejected this suggestion however when it said: These acts, together with the act here under attack, evidence a public policy established under legislative authority, beginning as far back as 1856, under which the state may part with the title to certain portions of its lands under navigable waters, of the kind and under the conditions described in the statutes, which policy and authority cannot be lightly disregarded by the courts.” *Anderson Columbia Co., Inc. v. Bd. of Trustees of Internal Imp. Trust Fund of State of Fla.* 748 So.2d 1061, 1065 (Fla. 1st D.C.A. 1999) (citing *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 69, 146 So. 249, 257 (1933)).

⁴³ See 748 So.2d at 1067. Future legislation would be subject to applicable public trust doctrine considerations.

⁴⁴ *Id.* at 1065-66.

⁴⁵ *Id.* at 1066.

⁴⁶ The Florida Supreme Court explained that “[a]s this Court held in *Black River Phosphate*, any divestiture of state sovereignty land pursuant to the Butler Act must be limited by the fact that the State holds sovereign submerged lands in public trust for the benefit of all the citizens of the State. 13 So. at 646; see also *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So.2d 339, 342 (1986); *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908). Thus, divestiture of sovereign lands under the Butler Act is in derogation of the public trust and the Butler Act “must be strictly construed in favor of the sovereign.” *Trustees of Internal Improvement Fund v. Claughton*, 86 So.2d 775, 786 (1956).” *City of West Palm Beach v. Bd. of Trustees of the Internal Improvement Trust Fund*, 746 So.2d 1085, 1089 (1999).

⁴⁷ 746 So.2d 1085.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1087. (during trial the Florida Department of Environmental Protection “conceded that the City was entitled to land immediately beneath its four piers, referred to as the ‘footprints’ of the piers.”).

⁵¹ See *Hall v. Wantz*, 336 Mich. 112 (1953); *Pierson v. Coffey* 706 S.W.2d 409, 411 (Ky.1985).

⁵² *Pierson v. Coffey*, 706 S.W.2d 409, 411 (Ky. 1985).

⁵³ 336 Mich. 112; *People v. Kraemer*, 7 Misc.2d 373, 384, 164 N.Y.S.2d 423, 433 (N.Y. 1957).



2013 Annual Update and Ethical Challenges for the Environmental Lawyer and Consultant

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September 2013 Florida Case Law Update

by Gary K. Hunter, Jr. and Thomas R. Philpot, Hopping, Green & Sams, P.A.

A County ordinance may not make the issuance of development permits contingent on a landowner's conveyance to the county without compensation of the fee simple title to property within a designated right-of-way and otherwise subject to eminent domain. Hillcrest Prop., LLP v. Pasco County, 24 Fla. L. Weekly Fed. D 33 (M.D. Fla. 2013).

In 2005, Pasco County enacted an ordinance that requires the County to deny a landowner's development permit and forbid development of land adjoining a new transportation corridor unless the landowner dedicates the land (conveys in fee simple) to Pasco County. The ordinance included a waiver provision allowing a county review committee to grant partial relief if the landowner, bearing the burden of proof, proves an "excess dedication." The landowner was required to hire experts and pay for traffic impact studies, and development appraisals and estimates. An appeal of the committee's decision to the Board of County Commissioners was available, but a landowner was required to exhaust the waiver provision before challenging a dedication in court. The ordinance also allowed landowners to apply for a variance from the strict requirements of the waiver provision if the waiver caused a hardship.

The County's transportation corridor protruded 50 feet into Hillcrest Property, LLC's (Hillcrest) land. Hillcrest sought to develop a grocery store shopping center and applied for preliminary site-plan approval. After several negotiations, Hillcrest signed the development order requiring Hillcrest to convey 110 feet of right-of-way (FDOT required additional right-of-way). After denying at least three construction plans, the County conditionally approved a construction plan, but demanded the dedication. Hillcrest executed the approval, but reserved its rights as "to any and all exactions imposed under the conditions of approval." Hillcrest did not apply for a dedication waiver

or variance and did not pursue an administrative appeal or inverse condemnation action. Pasco County has commenced no condemnation action, and the property is still undeveloped. Hillcrest sued.

Because the ordinance fails under the rational basis standard, the District Court held that the ordinance could not stand as violative of substantive due process protections. Although accommodating future land use and traffic are legitimate goals, the use of the County's ordinance to accomplish the goals is an abuse of the County's police power, tantamount to extortion of private property from landowners in violation of the Fifth and Fourteenth Amendment.

Certain land use conditions can operate as limited exceptions to the general rule that a government may not require citizens to give up constitutional rights as a condition for a governmental accommodation, such as a development permit. Land taken by an exaction must mitigate the public hardship to which the development contributes and must be roughly related in nature and extent to the impact of the planned development. Absent a showing of these, the land can only be taken through condemnation.

Pasco County's ordinance fails because it shifts the burden and requires landowners to prove an absence of a "rough proportionality" rather than requiring the government to prove the exaction is proportionate. It also allows the County to take more land—for free—than is necessary to mitigate the traffic congestion. As such, the ordinance is not rationally related to a legitimate government purpose. The Court also observed that after obtaining the landowner's property without providing compensation, nothing would stop the County from selling it for its full value. Pasco County has appealed this decision in the United States Court of Appeals for the Eleventh Circuit.

A Harris Act claim may not

be based on a claimant establishing a right vested in assurances from town officials that the Comprehensive Land Use Plan will be amended to accommodate the claimant's proposed development once the claimant purchases the land. Town of Ponce Inlet v. Pacetta, LLC, etc., et al., No. 5D12-1982, 2013 WL 3357520 (Fla. 5th DCA July 5, 2013).

Pacetta, a property owner, acquired waterfront property on the shores of the Halifax River in Ponce Inlet, Florida, between June 2004 and May 2006. Pacetta, the Town of Ponce Inlet (The Town), its council, the planning department and the citizens from 2004 to 2008 agreed that Pacetta's waterfront development would be approved by The Town even though approval required appropriate changes in the Comprehensive Land Use Plan (The Plan). In early 2008, The Plan was in its renewal cycle and the proposed amendment to The Plan to allow for authorization of the waterfront development was defeated. Pacetta filed suit seeking injunctive and monetary relief under the Harris Act.

The Fifth District Court of Appeal reversed the trial court's order that found The Town liable to Pacetta under the Harris Act. At the time Pacetta purchased the property, The Plan expressly prohibited the proposed development. The assurances by The Town's officials that The Plan would be amended to authorize the development could not be relied upon in good faith by Pacetta because the Officials lacked authority to unilaterally amend The Plan. Additionally, the Court noted that any decision that were to recognize a vested right based on assurances from the officials to amend The Plan would violate public policy since public hearings and other required government approvals for Comprehensive Plan amendments would not be followed.

An unfavorable Beneficial Use Determination (BUD) is not alone sufficient to show a deprivation

of all economic use of one's land where the owner does not take meaningful steps toward exploring options for development on the property. *Collins v. Monroe County*, No. 3D11-2944, 2013 WL 3455608 (Fla. 3d DCA July 10, 2013).

Sixteen landowners who own property in Monroe County filed petitions for a Beneficial Use Determination (BUD) pursuant to the Monroe County Year 2010 Comprehensive Plan (Plan). A BUD petition requires applicants to show that the plan and regulations in effect at the time of the application deprive the applicants of all reasonable economic use of their property. The County's Planning Director recommended, and the Special Master determined, that each landowner was deprived of all use and value of their property. The Special Master recommended that the County purchase each of the properties. The County's Board of Commissioners (BOCC) approved the recommendation and found that the appropriate remedy was just compensation.

In 2004, the landowners brought an inverse condemnation claim against the County, and the County filed a third party action against the State of Florida. The trial court granted summary judgment against the landowners and held that the BUD petitions could not ripen into as-applied takings claims. On appeal, the Third DCA reversed and held that the claims were properly brought as as-applied challenges to the application of land use regulations to specific property. The claims were ripe in 2002 when the BOCC issued the BUD regulations, and the claims were filed within the statute of limitations. However, the Third DCA noted that there was evidence that some properties did have development value because some landowners received building permits or even sold property after the BUD.

On remand, after a nine day bench trial on liability, the trial court found liability in favor of one land owner, who was the only landowner that took meaningful steps towards developing his property. No liability was found in favor of the other landowners. The economic impact of the regulation on the claimant, especially the impact on specific investment-backed expectations, is a factor in whether or not there has been a taking. The court

could not find that the land owners had been deprived of all economic use of their properties solely based on the BUDs and BOCC resolutions when building permits were issued after those permits. Further, since the first land use regulations were not enacted until seven years after Monroe County was designated an area of critical state concern, the court reasoned that the landowners chose not to explore development options at their own risk. The Third DCA affirmed.

The Power Plant Siting Act's (PPSA) challenge provisions do not preempt the challenge procedures of the county zoning ordinance when the rezoning occurs before a PPSA application is filed. *Seminole Tribe of Fla. v. Hendry County*, 114 So.3d 1073 (Fla. 2nd DCA 2013).

McDaniel Reserve Realty Holdings owned land abutting the Seminole Tribe of Florida's reservation in Hendry County. At McDaniel's request, the County passed Ordinance 2011-07 to allow construction of an electric power plant on the land. The Ordinance rezoned 3,123 acres of land from general agricultural use to a Planned Unit Development (PUD). McDaniel then sold the land to Florida Power & Light Company (FPL).

Section 163.3194(1)(a), Florida Statutes, requires all developments and development actions to be consistent with an adopted comprehensive plan. The Seminole Tribe filed a complaint for declaratory relief arguing that the County's enactment of the Ordinance was inconsistent with the County's comprehensive plan. The Tribe also filed a petition for writ of certiorari, asking the trial court to quash the county ordinance. The circuit court denied certiorari and concluded that the PPSA procedure preempts section 163.3215, Florida Statute's challenge procedure. The circuit court reasoned that the PPSA is a centralized and coordinated method intended to license all power plant projects, and the Tribe should raise consistency issues under the PPSA. The circuit court granted the County and FPL's motion to dismiss with prejudice based on preemption.

On appeal, the Second District Court of Appeal reversed and held that the PPSA did not preempt

Chapter 163, Florida Statutes. The PPSA would not allow the Tribe to challenge the rezoning if the rezoning took place before the PPSA application is filed. Chapter 163's challenge provisions offer a more comprehensive remedy than the PPSA process. Under the PPSA, the board only determines if the proposed land use is consistent with the land use regulations on the date that the power plant application was filed. Since McDaniel's strategically changed the zoning requirements before the application was filed, the Ordinance effectively changed the baseline that would be reviewed in the PPSA process.

The PPSA process and Chapter 163 are separate and distinct paths to challenge rezoning decisions. The PPSA reviews ordinances for consistency, but does not review those ordinances for substance. Ordinances are subject to their own review process under Chapter 163, Florida Statutes. Accordingly, the Tribe was entitled to challenge the Ordinance under Chapter 163, Florida Statutes. The Second DCA reversed and remanded for further proceedings.

The implied warranties of fitness and merchantability apply to structures in common areas of a subdivision that immediately support the residence as essential services and a Florida Statute that limits the scope of the warranties cannot be applied retroactively. *Maronda Homes v. Lakeview Reserve Homeowners Ass'n*, No. SC10-2292, No. SC10-2336, WL 3466814 (Fla. July 11, 2013).

Lakeview Reserve Homeowners Association (Lakeview) brought an action against developer Maronda Homes for breach of the implied warranties of fitness and merchantability arising from alleged defective construction of drainage systems, retention ponds, underground pipes, and private roads in the subdivision. Maronda Homes impleaded T.D. Thompson Company, the contractor. Circuit Court Judge Cynthia Z. Mackinnon granted summary judgment for the defendants, holding that the common law implied warranties of fitness and merchantability do not extend to the construction and design of infrastructure, drainage systems, retention ponds, private roads, underground

continued...

CASELAW UPDATE

from page 9

pipes, or other common areas in a residential subdivision that do not immediately support the homes. On appeal, the Fifth DCA reversed and remanded, holding instead that the warranty of habitability applied, and certified conflict with the Fourth DCA in *Port Sewall Harbor & Tennis Club Owners Association, Inc. v. First Federal Savings & Loan Association of Martin County*, 463 So.2d 530 (Fla. 4th DCA 1985). The Supreme Court of Florida granted both parties' petitions for discretionary review.

Implied warranties of habitability are breached if the residence is not reasonably fit for the ordinary or general purposes intended. The Supreme Court of Florida focused on the difference in expertise, position, and vantage point between a home owner and a builder/developer rather than the structure of the residential area. The Court reasoned that a home is the largest economic investment the average citizen makes in a lifetime and common sense dictates that he/she should be able to use it. However, the Court only considered facilities affected by or shared by groups of homeowners and cited cases involving facilities shared by homeowners in structured groups, such as

subdivisions and condominiums.

The law of implied warranties of fitness and merchantability applies to improvements that provide essential services to the habitability of a home, including the drainage systems, retention ponds, infrastructure, and underground pipes of the subdivision. Although not located under the home, the services do directly impact the home's habitability. Essential services do not include convenient or aesthetic improvements such as sprinkler systems, security systems, or landscaping. Failing to comply with the numerous building and zoning requirements for residential purposes prevents residents from using their homes, endangers residents (particularly children), and is unsanitary. The Court observed that the burden of correcting latent defects should not fall on innocent purchasers. While sellers have the ability to discover and prevent defects, buyers usually lack such expertise. The homeowners' association has standing to bring the action against the developer on behalf of its members for matters that concern members' common interests.

Article I, Section 2 and 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution prohibit the retroactive application of substantive laws that destroy or adversely affect a vested right, impose new penalties, or create new duties related to

a previous transaction or consideration. Only remedial or procedural laws may be applied retroactively. Remedial laws further a remedy or confirm an existing right. Procedural laws provide methods for applying and enforcing existing duties and rights. Once a cause of action accrues, it is a vested right that cannot be retroactively eliminated or curtailed.

Section 553.835, Florida Statutes, (enacted in 2012) cannot be applied retroactively to limit the scope of the implied warranties of fitness and merchantability. The statute is substantive because it attempts to eliminate the common law cause of action for breach of the implied warranties for injury to property. Eliminating a cause of action without providing a reasonable alternative for redress impedes the right to access the courts and violates Article I, Section 21 of the Florida Constitution. The Supreme Court has the power to determine the constitutional validity of retroactive statutes and the separation of powers prevents the Legislature from supervising appellate courts. The Court affirmed the Fifth DCA's holding.

UPDATE: On July 16, 2013, the Florida Supreme Court granted review in *Clipper Bay Investments, LLC v. State*, an opinion which was previously reported in the May 2013 edition of this Update.

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On Appeal

by Lawrence E. Sellers, Jr.

Note: Status of cases is as of August 13, 2013. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

SFWMD v. RLI Live Oak, LLC, Case No. SC12-2336. Petition for review of 5th DCA decision reversing declaratory judgment determining that RLI participated in unauthorized dredging, construction activity, grading, diking, culvert installation and filling of wetlands without first obtaining SFWMD's approval and awarding the District \$81,900 in civil penalties. The appellate court determined that the trial court improperly based its finding on a preponderance of the evidence standard and not on the clear and convincing evidence standard. 37 Fla. L. Weekly D2089a (5th DCA, Aug. 31, 2012). Subsequently, the district court of appeal granted SFWMD's request and certified the following question: "Under the holding of *Department of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), is a state governmental agency which brings a civil action in circuit court required to prove the alleged regulatory violation by clear and convincing evidence before the court may assess monetary penalties." 37 Fla. L. Weekly D2528a (5th DCA, Oct. 26, 2012). Status: On March 7, 2013, the Florida Supreme Court accepted jurisdiction and dispensed with oral argument.

FIRST DCA

CRP/HLV Highlands Ranch, LLC v. DEP, Case No. 1D13-3302. Petition to review DEP final order denying appellant's application for an environmental resource/mitigation bank permit and petition for variance. Status: Notice of appeal filed July 12, 2013.

Putnam County Environmental Council v. SJRWMD, Case No. 1D13-2559. Petition for review of FLWAC final order denying the Council's request for review pursuant to s. 373.114, F.S., of the Fourth Addendum to SJRWMD's Water Supply Plan, relating to identification of withdrawals from the St Johns and

Ocklawaha Rivers as alternative water supplies. Status: Notice of Appeal Filed June 4, 2013.

Zagame v. DACS, Case No. 1D13-2651 Petition for review of FDACS final order rejecting the ALJ's recommended order in part, and concluding that Zagame was entitled to an exemption pursuant to s. 373.406(2), F.S., for the dredging portion of the activities (comprising approximately 1.12 acres), but was not entitled to an exemption for the filling portion of the activities (comprising approximately 1.3 acres). Status: Zagame filed a notice of appeal on May 30, 2013; SWFWMD filed a notice of cross appeal; referred to mediation.

State of Florida v. Basford, Case No. 1D12-4106. Appeal from order of partial taking in claim for inverse condemnation against the State of Florida as a result of the passage of Article X, Section 21, Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy. Status: Affirmed on July 24, 2013. 38 Fla. L. Weekly D1567a.

FINR, II, Inc. v. CF Industries, Inc. and DEP, Case No. 1D12-3309. Petition for review of final DEP order granting CF's applications for various approvals, including environmental resource permit, conceptual reclamation plan, wetland resource permit

modification and conceptual reclamation plan modification. Status: Affirmed per curiam on July 19, 2013; motion for rehearing and rehearing *en banc* filed August 2, 2013.

FOURTH DCA

Archstone Palmetto Park LCC v. Kennedy, et al, Case No. 4D12-4554. Appeal from trial court's order granting final summary judgment determining that the 2012 amendment to section 163.3167(8), Florida Statutes, does not prohibit the referendum process described in the City charter prior to June 1, 2011. Status: Oral argument set for October 1, 2013.

Author's Note: Legislation enacted during the 2013 Regular Session may moot this appeal. See Chapters 2013-115 and 2013-213, *Laws of Florida*.

U.S. SUPREME COURT

Koontz v. SJRWMD, Case No. 11-1447. Petition for writ of certiorari to review the decision by the Florida Supreme Court in *SJRWMD v. Koontz*, 36 Fla. L. Weekly S623a, in which the Court quashed the decision of the 5th DCA affirming the trial court order that SJRWMD had effected a taking of Koontz's property and awarding damages. Status: On June 25, 2013, the Court reversed the Florida Supreme Court's decision.



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Law School Liaisons

Florida International University

by Jessica Weinstock, President, Environmental Law Society

The Environmental Law Program continues to flourish and attract statewide attention and recognition for Florida International University College of Law! From a new and exciting curriculum, to clinical opportunities and special events, this young law school features an environmental law component that has spurred student and faculty interest and advocacy in current critical Environmental law issues. The past season's most talked about events are highlighted below:

ELS Update

In late February, the Environmental Law Society attended via web conference "A Conversation with the Governors," an event concerning current environmental and land use issues. Three former Florida governors were paneled, including Charlie Crist, Bob Graham, and Buddy Mackay. The St. Thomas University School of Law, where students from the law schools of Nova and Ave Maria were in attendance, hosted the event. Attendees from FIU were video-conferenced in from the main mock courtroom on campus. Student representatives from each law school asked questions relating to South Florida environmental and land use issues. The discussion covered topics such as Everglades protection and restoration, natural disaster protocol, and legislative hardships in mandating environmental law. In just under two hours each governor shared the challenging environmental issues they each encountered while in office. ELS president Shannon Caplan represented FIU College of Law by asking Governor Crist about legislative remedies to protect coastline cities in the wake of Hurricanes Katrina and Sandy. Each governor responded with a different approach to the issue. The varied and complicated answers to this question left many attendees concerned about the future viability of our coastal cities.

One month later, in March, the

Environmental Law Society partnered with the Student Animal Legal Defense Fund to host Metro-Miami Zoological Park wildlife expert Ron Magill, who gave a presentation and Q&A session on his background and experiences. Mr. Magill discussed his experiences leading numerous successful grass-roots conservation efforts around the world. In promoting the work of Zoo Miami, and other zoos around the world, Mr. Magill gave students an insider's perspective of the benevolent role zoos can play in the conservation of wildlife, and the protection of endangered species in general. As a TV and radio personality, appearing on numerous documentaries and talk shows, Mr. Magill has raised awareness and promoted education about wild animals, and mankind's affect on their future. He spoke to law students about the financing, politics, and regulations that often impact his work, and encouraged everyone to think critically about their own views of zoos; namely a zoo's potential to have a positive impact on wildlife, and on how this generation can support and protect wildlife in our own lifetimes. The event turnout was great and everyone was delighted to have such an inspirational individual at FIU College of Law.

Finally, the current and rising Environmental Law Society's executive board hosted an Earth Day event raising awareness for the organization. The booth was set up to attract foot traffic from the student body on the cliff of their Spring exam season in order to expose them to the organization, its mission, and the significance and meaning of the holiday. Students walked away with Environmental Law t-shirts and tumblers and the organization was able to increase their membership by nearly twenty percent!

Clinical work at FIU

The Environmental Law Clinic at

FIU Law provides students the opportunity to engage in advocacy on a very hands-on level. Led by adjunct professor Jim Porter, the legal clinic program has assisted with research and litigation preparation for several South Florida initiatives.

The ELC represents Biscayne Bay Waterkeeper (BBWK) in litigation with the U.S. Environmental Protection Agency, the Florida Department of Environmental Protection and Miami-Dade County. Over the past 5 years, the Water and Sewer Department has violated its state and federal Clean Water Act permits and discharged approximately 47 million gallons of raw sewage into the Miami River, Biscayne Bay and other locations. During this same time, the condition of the wastewater treatment plants have deteriorated to the point the Virginia Key plant was literally falling apart and had been cited as operating "significantly out of compliance" with applicable state and federal laws. Acting under the Clean Water Act, BBWK filed a 60-day notice of its intent to sue the County. On the 59th day, the U.S. Department of Justice on behalf of U.S. EPA and the State of Florida on behalf of FDEP filed suit in federal court in the Southern District of Florida against the County alleging many of the same violations identified in the BBWK 60-day notice letter. BBWK intervened in the federal enforcement action and filed its CWA citizen's suit. Subsequently, the County and U.S. EPA entered into a consent decree that BBWK opposes. Students assisted in researching and writing the 60-day notice letter, the complaint in intervention, the citizen's suit complaint, various motions, and the comments on the proposed consent decree.

Additionally, Tropical Audubon Society (TAS) offers students the opportunity to engage in public interest advocacy in a forum other than litigation. Each semester one student is selected to work directly with TAS

Law School Liaisons continued....

on matters of interest to the organization. Students are afforded the opportunity to appear before public bodies such as the Miami-Dade County Commission and the Governing Board of the South Florida Water Management District. During the spring semester ELC student, Martin Jensen, travelled with TAS to Tallahassee to meet with legislators during the session to discuss bills of interest to TAS and its members. Jensen described his summer experience saying, "Working with Tropical Audubon was a great opportunity. I was able to see the immediate effects of my work and was able to participate in truly unique experiences. I wrote comments to the Deering Estate's Proposed management plan, we discussed our proposals with them and they agreed to incorporate all the suggested changes. Furthermore, I traveled to Tallahassee with the Everglades Coalition to lobby for greater protection for the Everglades.

I was able to speak with State Representatives and we were ultimately successful, securing \$70 million in the Budget for the Everglades!"

Another student, Jason Villamor, also held a summer internship with the non-profit organization TAS. He was tasked with creating a public comment in response to a draft environmental impact statement. The EIS was created by the Corps of Engineers for deep dredging the Port Everglades channel. Jason familiarized himself with the decision making process the agency had gone through and met with individuals from a variety of fields to gain their insight. Once the comment was drafted Jason contacted other environmental groups to establish a united voice and clearly enunciate an environmental perspective to the project.

Finally, two students were selected during the spring semester to undertake an analysis of alternatives that might be available to prompt

a local municipality to undertake a cleanup of contaminated sediments in a local waterway. The students researched the availability of state and federal funds together with other mechanisms to assist the city to undertake the work. Their analysis included a fact investigation of the city's responsibility for the contamination and a legal analysis of state and federal claims which could be brought in the event the city further delays the work. Ultimately, the students identified a claim under the federal Resource Conservation and Recovery Act that would be available to compel the city to commit to do the work.

For more information about Florida International University College of Law's Environmental Law Society, Environmental Law Clinic Program, featured courses and curriculum, and upcoming events, please visit: www.ficulawels.com

A Look Back at 2012-2013 and a Look Ahead to the 2013-2014 Academic Year at The Florida State University College of Law

by Prof. David Markell

The College of Law's Environmental Program had a very successful 2012-2013 academic year – we are pleased that *U.S. News & World Report* again ranked our Environmental Program in the nation's top 20, for the 9th consecutive year, and we are looking forward to another very productive year beginning this fall.



Florida Administrative Law Section participants, including ELULS member Francine Ffolkes.

A BRIEF SUMMARY OF THE 2012-2013 ACADEMIC YEAR

Representative Programming

Our Fall 2012 Program on Florida Administrative Law

The College of Law offered an innovative program on researching state administrative law issues, working closely with the Administrative Law Section of The Florida Bar.

The Spring 2013 Distinguished Environmental Lecture

Wendy Wagner, the Joe A. Worsham Centennial Professor of the University of Texas School

of Law, gave our Spring 2013 Distinguished Lecture on the topic, *Racing to the Top: How Regulation can be Used to Create Incentives for Industry to Improve Environmental Quality.*



Professor Wendy Wagner

Our Spring 2013 *Environmental Forum*, entitled *Effectively Governing Shale Gas Development*, featured leading national commentators on hydraulic fracturing, including Professors **Emily Collins** (Pittsburgh), **Keith Hall** (LSU), and **Bruce Kramer** (Texas Tech). College of Law Professor Hannah Wiseman, our own expert on fracturing, moderated the *Forum*.

Law School Liaisons continued....

LAW SCHOOL LIAISONS

from page 13



Emily Collins



Keith Hall



Bruce Kramer



Hannah Wiseman

Student Honors and Activities

Our students were recognized for their achievements in environmental, energy and land use law.

The Wade L. Hopping Memorial Scholarship Recipient: **Andrew Missel** ('14) was named the recipient of the 2013 Wade L. Hopping Memorial Scholarship by The Florida Bar Environmental Law and Land Use Section. Mr. Missel was recognized for his demonstrated potential to make a significant positive contribution to the practice of environmental or land use law in Florida.



Steven J. Kimpland presenting during the Colloquium

Spring 2013 Colloquium:

Several students were honored during the College of Law's first Environmental Colloquium, held in April. **Steven J. Kimpland** (LL.M. '13) presented his paper, *Spill History Substantively Informs Florida's Oil and Gas Statutes and Regulations*.

Kelly Samek (LL.M. '13) presented *Public Trust Doctrine as a Foundation for Wildlife Protection in Oil Spill Compensation*. In addition, several J.D. students were honored for their outstanding papers, including: **Kristen Franke** ('13), *The Role of Agency Threats in Pennsylvania's Natural Gas Dilemma*, **Forrest S. Pittman** ('13), *The Forgotten Quarter: How Smarter Farm Bills Can Quickly Achieve Greenhouse Gas Emission Reductions*, **James Flynn** ('13), *Misrepresentation Nation: Why the United States Allows the Reckless Distortion of Climate Science*, **Andrew R. Missel** ('14), *Uncertainty, Cost-Benefit Analysis, and Climate Change: Toward a Smarter, Safer Policymaking Framework to Address Greenhouse Gas Emissions* and **Evan J. Rosenthal** ('13), *Letting the Sunshine in: Protecting Residential Access to Solar Energy in Common Interest Developments*.

Environmental Certificate Graduates:

The following 2013 graduates earned an Environmental Certificate: **Ian B. Carnahan**, **Kristen Franke** with high honors, **David J. Henning** with honors, **Forrest S. Pittman** with honors, **Eric Poland** with high honors, **Evan Rosenthal** with high honors, **Kevin Schneider** with high honors, **Trevor Smith** with highest honors, **Joseph R. Steele**, **Andrew Thornquest** with honors, **Ian C. Walters** with honors, **Angela L. Wuerth** with high honors.

Externships and Pro Bono Work:

Our students continued to take advantage of our location in Tallahassee by completing Externships and *pro bono* work with a broad range of statewide and local environmental

and land use organizations. Students also found fascinating opportunities throughout the United States. Selected organizations with which our students worked are listed below.

Florida Department of Environmental Protection



Florida Division of Administrative Hearings
Florida Fish & Wildlife Conservation Commission
Florida Housing Finance Corporation
Environmental Protection Commission of Hillsborough County
Alachua Conservation Trust
Big Bend Conservancy
Leon County Attorney's Office
First District Court of Appeals
Humane Society of the United States (Washington, D.C.)
U.S. Attorney's Office (San Diego)
Earthjustice (Seattle)
U.S. Environmental Protection Agency Region 2 (New York City).

LOOKING AHEAD TO 2013-2014

Representative Programming

We are working on a rich set of programs for the coming academic year. The College of Law is delighted to be co-sponsoring this year's annual meeting of the **Florida Air & Waste Management Association (AWMA)**. Scheduled for September 23 and 24 in Tallahassee, the meeting will provide College of Law students a chance to interact with experts in a wide range of disciplines.

Our **Fall 2013 Distinguished Environmental Lecture** (scheduled for November 6) will feature **Professor Ann Carlson**, Vice Dean and Shapiro Professor of Environmental Law at the UCLA School of Law. Professor Carlson is also Faculty Co-Director of the Emmett Center on Climate Change and the Environment at the UCLA School of Law; her work has been at the cutting edge of climate policy.

Next Spring, on February 28, 2014, the Environmental Law Program

Law School Liaisons continued...

will be hosting an interdisciplinary conference on environmental law. Entitled **Environmental Law without Congress**, the conference will feature as a keynote speaker **Professor Richard Lazarus**, the Howard and Katherine Aibel Professor of Law at Harvard Law School, and a slate of outstanding environmental law and social science scholars. The conference will represent the beginning of a cross-disciplinary discussion of the economic, political, psychological and sociological forces that shape attitudes towards environmental regulation, with a view toward providing a holistic and comprehensive perspective on environmental law in the future.

For updates on these programs and others that are in the works, please monitor our website: http://www.law.fsu.edu/academic_programs/environmental/index.html.

Student Leaders for the 2013-2014 Academic Year

We welcome the FY 2013-14 *Journal of Land Use and Environmental Law* Board: **Nicholas Ravinet** ('14), Editor-in-Chief, **Chad Dunn** ('14), Administrative Editor, **Asad Ali** ('14) and **Brian Spahn** ('14), Executive Editors, **Cori Nowling** ('14), Associate Editor, and **Erik Woody** ('14), Senior Articles Editor.

We also congratulate the FY 2013-14 officers of the Environmental Law Society:

Lora Minicucci ('14), President, **Kelly Baker** ('15), Vice-President, **Kristen Summers** ('14), Treasurer, **Ryan McCarville** ('15), Secretary, **Sarah Spacht** ('14), Mentoring

Chair, **Beverly Haloran** ('14), Networking Chair, **Kelly Kirby** ('15), Pro Bono Chair, **Brittnie Baker** ('15), Activities Chair, and **Mackenzie Landa** ('14), Green/Sustainability Chair.

Alumni Updates and Honors

Timothy P. Atkinson ('93) has been named to *Florida Trend's* Florida Legal Elite 2013 in the area of Environmental & Land Use. He is a shareholder at Oertel, Fernandez, Bryant & Atkinson, P.A. in Tallahassee.

Jacob T. Cremer ('10), of Smolker, Bartlett, Schlosser, Loeb & Hinas, P.A., was appointed to the board of governors of Connect Florida, Leadership Florida's program for young professionals. He also co-authored an amicus brief to the U.S. Supreme Court in support of the property owner in *Koontz v. St. Johns River Water Management District*, No. 11-1447 (argued Jan. 15, 2013). The American Bar Association Constitutional Law Committee published his article about the same case in its newsletter.

Thomas Kay ('05) has been named the new Executive Director of the Alachua Conservation Trust, a non-profit land conservation organization located in Gainesville.

Brian Kenyon ('11) has joined the firm Holland & Knight in Miami as an associate focusing on land use.



Timothy Atkinson



Jacob T. Cremer



Matt Leopold



Floyd R. Self



Mary Thomas

Matt Leopold ('05) is serving as General Counsel of the Florida Department of Environmental Protection.

Floyd R. Self ('86) has joined Gonzalez Saggio & Harlan LLP, a national minority-owned law firm. He will continue to reside in Tallahassee as a partner in the firm's Energy, Communications and Utility practice group. He is a board certified state and federal government and administrative practice lawyer specializing in state regulatory utility law before various public service commissions across the country.

Chris Tanner ('10) is now working as an attorney with the Southwest Florida Water Management District.

Mary Thomas ('05) is serving as General Counsel of the Department of Elder Affairs.

We hope you will join us for one or more of our programs. For more information about the environmental, energy and land use program at the College of Law, please visit our web site at: http://www.law.fsu.edu/academic_programs/environmental/index.html or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu.



2013-2014 Environmental Law Society

Law School Liaisons continued, page 17

Section Budget/Financial Operations

	2012-2013 Budget	2012-2013 Actual	2013-2014 Budget
REVENUE			
Section Dues	66,400	59,840	61,600
Affiliate Dues	3,000	2,630	2,500
Admin Fee to TFB	(30,250)	(27,462)	(27,950)
Admin Fee Adj.	0	(628)	0
CLE Courses	2,000	(10,740)	1,000
Section Differential	5,000	4,198	5,200
Sponsorships	15,000	15,000	25,000
Retreat Registration	350	351	0
Investment Allocation	4,826	7,234	4,268
TOTAL REVENUE	66,326	50,423	71,618
EXPENSE			
Credit Card Fees	120	161	120
Staff Travel	4,045	2,264	4,036
Internet Charges	420	445	420
Postage	800	389	900
Printing	150	18	150
Membership	1,000	0	1,000
Supplies	50	0	50
Photocopying	150	139	150
Officer Travel	2,500	746	2,500
Meeting Travel	6,500	300	4,000
CLE Speaker Expense	1,000	0	1,000
Sponsorship Expense	440	0	440
Committees	500	131	500
Council Meetings	2,000	1,144	2,000
Bar Annual Meeting	2,700	1,665	2,700
Section Annual Meeting	20,000	17,436	20,000
Section Service Programs	4,500	2,035	2,250
Retreat	2,522	2,522	2,000
Land Use Law Manual	13,000	12,600	13,000
Pubic Interest Committee	500	480	500
Awards	1,700	1,116	1,700
Scholarships	4,000	0	0
Law School Liaison	33,500	22,000	23,000
Dean Maloney Contest	1,000	585	1,000
Website	12,100	11,662	5,200
Council of Sections	300	0	300
Operating Reserve	3,806	0	9,528
Miscellaneous	500	74	500
TFB Support Services	5,204	5,612	5,863
TOTAL EXPENSE	125,007	83,524	104,807
BEGINNING FUND BALANCE	165,880	176,801	142,256
PLUS REVENUE	66,326	50,423	71,618
LESS EXPENSE	(125,007)	(83,524)	(104,807)
ENDING FUND BALANCE	107,199	143,700	109,067

SECTION REIMBURSEMENT POLICIES:

General: All travel and office expense payments are in accordance with Standing Board Policy 5.61. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.

UF Law Update

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

UF Law Students Featured in BFREE Newsletter

Environmental law students who participated in UF law's Belize Spring Break Field Course, "Sustainable Development: Law, Policy and Practice", were featured in *The Bladen Review 2013*, the newsletter of the Belize Foundation for Research and Environmental Education (BFREE). The newsletter included personal testimonials and photographs from the students.

The course, held during spring break 2013, provided students with an on-site, interdisciplinary understanding of the law and policy challenges associated with "sustainable development" in a developing country. Twelve LL.M. and J.D. students and four ELULP faculty members, Mary Jane Angelo, Tom Ankersen, Richard Hamann and Christine Klein, traveled to Belize for a one week course in sustainable development. The course provided students with on-site, interdisciplinary understanding of the law and policy challenges associated with sustainable development in a developing country. The course included skills exercises based around ongoing projects of the UF Law Conservation Clinic.

Clinic students have been working with BFREE to create a private system of payments for environmental services to compensate the farmers for converting a portion of their farm to shade-grown cacao, which is used to manufacture chocolate. The farmers have entered into agreements with BFREE drafted by the Clinic. Students on the UF Law Belize Spring Break Field Course had the opportunity to visit the BFREE field station where the cacao seedlings are started, visit the farmers in Trio Village, and learn about the nexus between neo-tropical migratory birds in Belize and Massachusetts that provided the justification for the use of settlement funds.

Brazilian Summer Program in 13th Year

UF law hosted 20 Brazilians in the annual "Summer Program in American Law for Brazilian Judges, Prosecutors and Attorneys" in July. The program is coordinated by the Center for Governmental Responsibility. It is a one-week program of lectures, discussions, and site visits focused on various aspects of the American legal system. It has been ongoing since 2000 and included participants from throughout Brazil.

In addition to participating in the presentations, the attendees visit courts, judges and prosecutors, participate in discussions with governmental officials and resource management personnel, and receive detailed information on various aspects of judicial, governmental and resource administration.

All lectures are provided by UF law professors and this year's topics included: introduction to the U.S. legal system and constitutional law; civil procedure; mediation and dispute resolution; environmental justice; privacy; Brazilian environmental law; and U.S. environmental law. The Brazilian participants also visited with officials of the City of Gainesville and Alachua County; the Southwest Florida Water Management District; the Pinellas County Criminal Justice Center; and the Federal Courthouse in Tampa.

LLM Program Welcomes Five

This year's LL.M. in Environmental & Land Use Law program will welcome five new students. The members of the Class of 2014 have earned J.D. degrees from law schools in four states (Colorado, Florida, Maine, and North Carolina), and Master's degrees from the University of Arizona (Urban Planning), the University of Florida (Animal Sciences), and the University of Texas (LL.M. in Global Energy). As undergraduate

students, they majored in a wide variety of disciplines, including business law management, creative writing, interdisciplinary social sciences, microbiology, political science, and psychology. Three of the students have been admitted to the Florida Bar, and two have been practicing law in Florida (with the Center for Biological Diversity, St. Petersburg, and with the Florida Department of Transportation).

Visiting International Faculty

Professor Roberto Virzo of the University of Sannio in Benevento, Italy, will again offer his course on "International Law of Sea" this year. This marks the third year he will visit UF law.

The course provides a survey of international law of the sea and focuses on the legal regime established by both customary international law and the United Nations Convention on the Law of the Sea (UNCLOS). It covers the topics of: internal waters; territorial sea; international straits and archipelagos; contiguous zone; exclusive economic zone; continental shelf; high seas and the international seabed area; management and conservation of living resources (including fisheries); protection and preservation of marine environment; and settlement of law of the sea disputes.

At the University of Sannio Faculty of Law, Professor Virzo is a researcher of international law, assistant professor and serves on the faculty board of the doctoral program in Civil Law. He also has taught in France and throughout Italy.

Faculty Publications

MARY JANE ANGELO, University of Florida Research Foundation Professor; Director, Environmental and Land Use Law Program: *The Law and Ecology of Pesticides and Pest Management* (Ashgate, 2013) •

Law School Liaisons continued....

“Assessing Risks to Endangered and Threatened Species from Pesticides” (with Committee on Ecological Risk Assessment under FIFRA and ESA), National Research Council of the National Academy of Sciences (2013) • “Ecological Risk Assessment under FIFRA and the ESA” (with Committee on Ecological Risk Assessment under FIFRA and ESA), National Research Council of the National Academy of Sciences (2013) • Co-Editor, *Food, Agriculture, and the Environment: History, Law, and Sustainability* (with Jason J. Czarnecki and William S. Eubanks II) and contributor of five chapters “An Overview of the Modern Farm Bill” (with Joanna Reilly-Brown), “The Environmental Impacts of Industrial Fertilizers and Toxic Pesticides” (with Seth Hennes), “The Federal Insecticide, Fungicide and Rodenticide Act,” “Agriculture and the Clean Water Act” (with James F. Choate) and “Into the Future: Building a Sustainable and Resilient Agricultural System for a Changing Global Environment” (ELI Press, 2013) • “Progress Toward Restoring the Everglades: the Fourth Biennial Review, 2012,” (with Committee on Independent Scientific Review of Everglades Restoration Progress), National Research Council of the National Academy of Sciences, (forthcoming, 2012) • “Survey of Florida Water Law” in *Waters and Water Rights* (Robert E. Beck, ed.) (Matthew Bender & Co., Inc.) (2012 update) • “Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties” (with Rebecca Bratspies, David Hunter, John H. Knox, Noah Sachs, and Sandra Zellmer, Center for Progressive Reform White Paper No. 1201) (2012) • “Small, Slow and Local: Essays on Building a More Sustainable and Local Food System,” 12 *Vermont J. Environmental L.* 1 (2011) • “Water Quality Regulations and Policy Evolution” (with Kati Migliaccio) in *Water Quality, Concepts, Sampling, and Analysis* (Yuncong Li and Kati Migliaccio, eds.) (CRC Press, 2011)

THOMAS T. ANKERSEN, Director, Center for Governmental

Responsibility Conservation Clinic and Costa Rica Law Program; Legal Skills Professor: “The Tiff Over TIF: Extending Tax Increment Financing to Municipal Maritime Infrastructure,” with Samantha Culp and Marissa Faerber, XXXIV:3 *Florida Bar Environmental and Land Use Law Section Reporter* 1 (2013) • “A Multidisciplinary Review of Current Sea Level Rise Research in Florida,” with Anna Cathey Linhoss, Lisa Gardner Chambers, Kevin Wozniak, and Tom Ankersen, Technical Paper 193. *University of Florida Institute for Food and Agricultural Sciences* (2013) • “Florida’s Coastal Hazards Disclosure Law: Property Owner’s Perceptions of the Physical and Regulatory Environment, with Conclusions and Recommendations” with Kevin Wozniak, Garin Davidson & Tom Ankersen, *FLSGP-S-12-001*(TP-194) & *FLSGP-S-12-002*(TP-195)(Executive Summary)(2012) • “Comprehensive Sea Grass Restoration In Southwest Florida: Science, Law And Eco-Regional Planning,” (with A.B. Lingle Hotaling), 4 *Sea Grant Law And Policy J.*, 61 (2011) • “Large Woody Material: Science, Policy and Best Management Practices in Florida Streams,” (with Linhoss, Cameron A., Hall H., and Blair S.,) *The Florida Scientist*, (forthcoming 2012) • “Anchoring Away: Government Regulation and the Rights of Navigation in Florida,” (with R. Hamann and B. Flagg), 3rd Edition, *Sea Grant TP-180* (2011) • Special Editor and Introduction to the Special Issue: Focus on Florida, 4 *Sea Grant Law and Policy J.* ___ (2011)

MARK A. FENSTER, Cone, Wagner, Nugent, Hazouri & Roth Tort Professor: “The Implausibility of Secrecy,” 63 *Hastings L. J.* ___ (forthcoming 2013) • “Disclosure’s Effects: WikiLeaks and Transparency,” 97 *Iowa L. Rev.* 753 (2012) • Online symposium, with response essays and author response, in 97 *Iowa L. Rev. Bull.* ___ (forthcoming 2012) • “The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State,” 73 *Univ. of Pittsburgh L. Rev.* ___ (forthcoming, 2012) • “Failed Exactions,” 36 *Vermont L. Rev.* 623 (forthcoming, 2012) • “Foreword,” to Victoria Pagán, *Conspiracy Theories in Ancient Rome* (Austin: U. of Texas

Press, forthcoming, 2012) • “Teoriziranje konspirativne politke,” 47 *Dialogi: Revija Za Kulturoin Družbo* 22 (2011). Translation into Slovenian of Chapter 2, *Conspiracy Theories: Secrecy and Power in American Culture* (rev. ed.) (U. of Minnesota Press, 2009)

ALYSON CRAIG FLOURNOY, Senior Associate Dean for Academic Affairs; UF Research Foundation Professor; Alumni Research Scholar: “Incorporating Resilience and Innovation into Law and Policy: A case for preserving a natural resource legacy and promoting a sustainable future” (with Tarsha Eason, Heriberto Cabezas and Michael Gonzalez) in *Social-Ecological Resilience and Law* (Ahjond S. Gamestani and Craig R. Allen, eds.)(Columbia Univ. Press forthcoming, 2014) • “Wetlands Regulation in an Era of Climate Change: Can Section 404 Meet the Challenge?” 4 *G.W. J. of Energy & Env’tl L.* ___ (co-authored with Allison Fischman) (forthcoming, 2013) • “Three Meta-Lessons Government and Industry Should Learn from the BP Deepwater Horizon Disaster and Why They Won’t,” 38 *B.C. Env’tl. Aff. L. Rev.* 281 (2011)

CHRISTINE A. KLEIN, Chesterfield Smith Professor; Director, LL.M. in Environmental & Land Use Law Program: “The Lesson of Tarrant Regional Water District v. Herrmann: Water Conservation, not Water Commerce,” in *Center for Progressive Reform Blog*, <http://goog.gl/PabFC2> (2013) • *A History of Unnatural Disaster: Mississippi River Tragedies* (with Sandra B. Zellmer) (NYU Press) (2013) • *Natural Resources Law: A Place-Based Book of Problems and Cases* (3d ed.)(Aspen Publishers)(2013) • “Water Bankruptcy,” 97 *Minnesota L. Rev.* 560 (2012) • “Compartmentalized Thinking and the Clean Water Act,” 4 *George Washington J. Energy & Environmental L.* 38 (2013) • *Sustainable Water and Environmental Management in the California Bay-Delta* (co-author as member of National Research Council Committee on Sustainable Water and Environmental Management in the California Bay-Delta)(2012) • “Survey of Florida Water Law” in *Waters and Water Rights* (Robert E. Beck, ed.) (Matthew Bender & Co., Inc.) (entry and annual updates, 2005-2011)

Law School Liaisons continued....

• *A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan* (co-author as member of Panel to Review California's Draft Bay Delta Conservation Plan), (National Research Council of the National Academy of Sciences, 2011) • "The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm," 35 *Harvard Environmental L. Rev.* 131 (2011)

MICHAEL ALLAN WOLF, Richard E. Nelson Chair in Local Government Law; Professor: "Conservation Easements and the Nomenclature Problem," *Utah Law Review* (forthcoming, 2013) • "Strategies for Making Sea-level Rise Adaptation Tools Takings-Proof," 28 *Journal of Land Use and Environmental Law* (forthcoming, 2013) • "The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects," *Fordham Urban Law Journal* (forthcoming, 2013) • *The Supreme Court and the Environment: The Reluctant Protector* (CQ Press/Sage, 2012) • "A Yellow Light for 'Green Zoning': Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law," 43 *Urban Lawyer* 949 (2011) • General Editor, *Powell on Real Property* (quarterly updates) (Matthew Bender-LexisNexis, 2000-present)

DANAYA C. WRIGHT, Clarence J. TeSelle Endowed Professor: *The Law of Succession: Wills, Trusts, and Estates* (with Lee-ford Tritt and Patricia Stallwood-Kendall) (Foundation Press, forthcoming, 2013) • *Estates and Future Interests for the Twenty-First Century* (Foundation

Press, forthcoming, 2013) • "Policing Sexual Morality: Percy Shelley and the Expansive Scope of the *Parens Patriae*," in *The Law of Custody of Children*, 8.2 *Nineteenth Century Gender Studies* (2012; available at <http://www.ncgsjournal.com/issue82/wright.htm>) • "Theorizing History: Separate Spheres, the Public/Private Binary and a New Analytic for Family Law History," ___ *Australia & New Zealand Law and History E-Journal* (forthcoming, 2012) • Florida Probate Code and Related Provisions (with Lee-ford Tritt & D. Kelly Weisberg) (Aspen, 2010-11)

Student Accomplishments, Publications and Awards

Alexis Segal (LL.M. 2013) and **Chelsea Sims** (J.D. 2013) were chosen as finalists for Knauss Marine Policy Fellowships in Washington, D.C.

Alexis Segal (LL.M. 2013) and **Caitlin Pomerance** (rising 3L) were awarded a 2013 Guy Harvey Ocean Foundation student scholarship in the amount of \$5,000 for their Conservation Clinic project assisting the Ocean Crest Alliance with the creation of a marine protected area in the Bahamas on Long Island.

Jesse Reiblich (LL.M. 2013) will publish *Addressing Climate Change in the United States: Have the Political Winds Shifted in Favor of a Carbon Tax?*, 2 *LSU J. Energy L. & Resources* (forthcoming 2013) and *Climate Change and Water Transfers* (with Christine A. Klein), 41 *Pepperdine L. Rev.* (forthcoming 2014).

Peter H. Morris (LL.M. 2012) published *Monumental Seascape Modification Under the Antiquities*

Act, 43 *Environmental Law* 173 (2013).

Rebecca Convery (LL.M. 2013) presented her paper, *Rough Riders to Wolf Riders: Politics Trumps Science in the Battle to Delist the Northern Rocky Mountain Wolf* at the 19th Annual Public Interest Environmental Conference.

Poster Competition, 1st Place (\$500), **James McCray**, *Sea Turtle Friendly Lighting: Law, Science and Policy, Sustaining Economies and Natural Resources in a Changing World: Key Role of Land Grant Universities*, University of Florida, Gainesville, Fl. April 2-3, 2013.

Stephen McCullers published Note, *A Dangerous Servant And a Fearful Master: Why Florida's Prescribed Fire Statute Should Be Amended*, 65 *FLORIDA LAW REVIEW* 587 (2013).

Save the Date

The 20th Annual Public Interest Environmental Conference (PIEC) is scheduled February 20-22, 2014, at the University of Florida Levin College of Law. Theme for the conference is "Feeding the Future: Shrinking Resources, Growing Population and a Warming Planet." The conference will address the challenges facing agriculture in a modern context. Topics will focus on the intersection of the political, ethical and environmental issues confronting agricultural production today and in the future. Additional information will be forthcoming. The schedule has not been announced for the **Environmental Capstone Colloquium** but the program will share a theme with the PIEC: agricultural law and policy.

KOONTZ V. SJRWMD

from page 1

what compensation was due if there was a taking.

The *Phillips* majority cited to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which reversed the Florida Supreme Court in *Beckwith v. Webb's Fabulous Pharmacies*, 374 So.2d 951 (Fla. 1979). The lower court's majority held that interest on funds in the court registry

pursuant to Florida Statute constituted public funds not subject to a takings claim. The United States Supreme Court held the Florida statute effected a taking by authorizing a clerk's fee, requiring the funds to be deposited in interpleaders and other actions, and then mandating that the clerk of court could take the interest on the required funds. The clerk could not convert private funds to public assets merely due to temporary, mandatory possession of the principal while the parties litigated the rights to the

principal.

The District in *Koontz* might take heart in *Phillips'* successor, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). Yet another 5-4 majority held in *Brown* that the transfer of client IOLTA interest to legal aid did not require compensation. They referred to this as a "technical taking," because the state rules would have generated no net income to the client. After deduction for transaction and administrative costs, no net income would have been available to

continued...

the client whose principal was in the trust account.

Real politick, however, shows that expectation might be thin gruel indeed. Justice Stevens wrote the *Brown* majority opinion, joined by Justices O'Connor, Souter, Ginsburg and Breyer. Only the last two remain today. Justice Scalia wrote a scathing dissent, and his preference for a "robust" takings clause is clearly in ascendency in the current court. A recent Texas Law Review article stated: "[T]he Court has issued more than twenty important decisions dealing with the Takings Clause in the past twenty-five years." Laura S. Underkuffler, Property and Change: The Constitutional Conundrum, 91 TEXAS L. REV. 2015 (June 2013).

As she says, however, the current Court's takings analysis creates increasingly *ad hoc* determinations. *Id.* Accordingly, one must examine the reasonable, investment-backed expectations of *Koontz* on remand, together with whether compensation is due under the Supreme Court's majority holding where no money ever changed hands. *Koontz* refused to pay or to seek alternative mitigation.

The background principles of Florida wetlands law are necessary to lay the predicate of how great an exaction must be and what kind of mitigation exaction would be proper. *See, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where Justice Scalia's majority opinion established that a property owner must establish that its property interest was unrestricted by previous "background principles" of state law to support a takings claim. *Id.* at 1029. While *Lucas* addressed a physical taking, the principle has been applied broadly to regulatory takings cases. *See, e.g.,* M. Blumm and L. Ritchie, *Lucas' Unlikely Legacy: The Rise of Background Principles as Categorical Taking Defenses*, 29 HARV. ENVTL L. REV. 321, 326 f.n. 28 (2005), and various authorities set forth therein. The analysis applies as well to determine an exaction's need and amount.

WETLANDS CONVERSION IN THE UNITED STATES

Thomas E. Dahl and Gregory Allord generated one of the best general pieces on wetlands in the United States. T. Dahl and G. Allord, *History of Wetlands in the Conterminous United States*, NATIONAL WATER SUMMARY ON WETLAND RESOURCES (U.S.G.S. Water Supply Paper 2425). Dahl and Allord state that the future conterminous United States included an estimated 221 million acres of wetlands when European settlement began. *Id.*

Dahl and Allord state that colonial settlers "regarded [wetlands] as swampy lands that bred diseases, restricted overland travel, impeded the production of food and fiber, and generally were not useful for frontier survival." *Id.* Colonial Americans, whether English, French or Spanish, saw wetlands as wastelands to be reclaimed. *Id.*

One major exception existed. Not unlike the Fenspeople of England, early settlers used marshes for grazing of livestock. Coastal towns were founded for access to "rich and goodly meadows" in the salt marshes (New Haven, Connecticut) less than good harbors. Nonetheless, salt marshes were factors in locating towns. D. Casagrande, *The Full Circle: A Historical Context for Urban Salt Marsh Restoration*.

Salt marsh grass was better than most native upland fodder in New England. Nonetheless, the English soon introduced more nutritional and palatable English upland species. *Id.* at 16. "The successful introduction of European grasses greatly reduced the economic value of salt marshes, opening the gates for salt marsh eradication." *Id.* Oddly enough, at least one geological study suggests that expansive salt marshes in colonial eighteenth century North America resulted from massive sediment delivery from upland deforestation. They ponder whether currently observed marsh degradation represents a gradual reduction to pre-colonial saltmarsh boundaries. M. Kirwin, *et al.*, *Rapid Wetland Expansion During European Settlement and Its Implication for Marsh Survival Under Modern Sediment Delivery Rates*, 39 GEOLOGY 507 (March 29, 2011).

In the Mid-Atlantic colonies, settlers claimed first lands along the

"most productive tracts of land in fertile river valleys in parts of Virginia" by 1700. Dahl and Allord. Colonists moved to the Chowan and Albemarle basins of North Carolina. Landowners used increasingly intensive technology to convert coastal wetlands for agriculture. *Id.* Similar conversion occurred soon in South Carolina and Georgia. *Id.*

Dahl and Allord emphasize the combination of national expansion, westward population migration and technical advances for dramatic wetland conversion from 1800 through the Civil War. *Id.* The steam powered dredge facilitated canal building while mechanical reapers and similar tools allowed conversion of land for agriculture that was previously unavailable. *Id.* Additionally, timbering of swamp forests occurred more frequently as a growing population required construction material and heating supplies. *Id.*

Congress passed three Swamp and Overflowed Lands Acts in 1849, 1850 and 1860, to facilitate diking and draining of perceived publicly owned wastelands for development. The United States Geological Survey (USGS) summed up the legislative purpose:

The sentiment in Congress during the middle of the 19th Century was that public domain had little value until it became settled, thereby ceasing to be public domain. Wetlands were actually considered a menace and hindrance to land development.

The original purpose of the grants was to enable the States to reclaim their wetlands by the construction of levees and drains. The States were supposed to carry out a program of reclamation that not only would lessen destruction caused by extensive inundations but would also eliminate mosquito-breeding swamps.

USGS: Northern Prairie Wildlife Research Center, *Wetlands of the United States: Their Extent and Their Value to Waterflow and Other Wildlife; A Century of Wetland Exploration*. <http://www.npwrc.usgs.gov/resource/wetlands/uswetlan/century.htm>. The report asserts agricultural drainage and flood control were and remain

“the greatest destroyers of wetland habitat” *Id.*

The Bureau of Land Management (BLM) cites case law distinguishing between Swamp Lands and Overflowed Lands. Swamp lands include marshes and similar lands “which do not have effective natural drainage, particularly where such conditions are long continued.” Conversely, overflowed lands “include essentially the lower levels within a stream flood plain” Swamp and Overflowed Lands BLM Manual § 7-95. http://blm.gov/cadastral/Manual/73man/id286_m.htm.

Dahl and Allord trace the impact of widespread western expansion on wetlands loss between the Civil War and 1900. Railroads cut through wetlands; opened up vast areas, including wetlands, to development; and consumed massive amounts of forest products for fuel and ties. *Id.* They note the Black Swamp in Ohio, virtually the size of Connecticut, disappeared by 1900. *Id.* Huge numbers of settlers combined with unprecedented massive scale farms to convert wetlands throughout the continental United States. *Id.* Technological advances assisted the conversions. *Id.*

This continued throughout the 20th century. Additionally, public works projects such as the Central Valley Project in California and the lock and dam improvements to the Mississippi opened up regions of wetlands to agricultural and municipal conversion. *Id.* Federal and state drainage associated with the New Deal further expanded the scale.

COLONIAL FLORIDA AND WETLANDS

Spanish colonial Florida treated wetlands similarly to pre-industrial England. The Crown treated swamps, marshes and other perceived “marginal” lands as common lands for all colonists to share for their benefit. S. Ansbacher and J. Knetsch, *Negotiating the Maze: Tracing Historical Title Claims in Spanish Land Grants & Swamp and Overflowed Lands Act*, 17 F.S.U.J.L.V. & Env'tl. Law 351,368 (2002) (Ansbacher and Knetsch I). The Spanish attempted to avoid locating towns in swamps, hardly easy in Florida. They did use some swamps for “forage and other agriculture, as well as access to riverine ‘highways.’”

Id. Dumas v. Garratt, 13 So. 464 (Fla. 1893), shows the difficulty of piecing together grants after the fact. The boundary on the “zacatal” was bounded by the marsh based on Floridian Spanish colonial use of the term. The losing party relied on Southwestern Spanish colonial use of the term meaning prairie.

Florida began seeking to reclaim swamps and marshes almost immediately upon statehood on March 3, 1845. The state’s first legislature asked Congress to authorize a survey of the state to determine how to conduct wide-scale drainage. Acts and Resolutions of the First General Assembly of the State of Florida 151 (1845). Government appointed surveyor Buckingham Smith’s report to Congress was consistent with what became the Florida ethos:

The Ever Glades [sic] are now suitable only for the haunt of noxious vermin or the resort of pestilent reptiles. The statesman whose exertions shall cause the millions of acres they contain, now worse than worthless, to teem with the products of agricultural industry; that man who thus adds to the resources of his country ... will merit a high place in public favor, not only with his own generation, but with posterity. He will have created a State!

U.S. Senate Doc. 242, 30th Cong., 1st Sess. at 34. Smith’s report included a letter from the U.S. Surveyor General for Florida, Colonel Robert Butler. Butler stated incorrectly that the Everglades were wholly inland and lacked navigable waters. Butler recommended conveyance of the region to Florida to facilitate the state’s reclamation.

Florida’s two U.S. Senators battled to see who could facilitate the most expansive reclamation. Senator Westcott introduced a bill to give Florida all lands and waters south of Township 36 South then remaining in United States title. That line lies just north of Lake Okeechobee. Junior Senator Yulee won out in seeking Congressional release of all wetlands in the state that remained in Federal title. Florida received almost one-third of all lands Congress ever conveyed under the three Swamp and Overflowed Acts – 20,325,013 out of 64,895,415 acres. To put this in further context, fifteen states in

all received Swamp and Overflowed Lands in the three acts.

The 1850 Florida Legislature accepted the Swamp and Overflowed grant. They established the Board of Improvement and authorized the Board members or Trustees (ultimately, and to this day, the Governor and Cabinet) to sell the lands for railroads, drainage and settlement. Letter of the Trustees of the Internal Improvement Fund to the U.S. Senate Subcommittee of the Committee on Public Lands, I.T.B., III, 508. The Civil War delayed the work, which was then further delayed by post-war economic depression in the states.

DRAINAGE AND FLOOD CONTROL IN FLORIDA

Ultimately, sales, drainage and reclamation began in the 1880s. The Trustees sold four million acres for conversion in 1881 alone. S. Ansbacher and J. Knetsch, *Negotiating the Maze: Tracing Historical Title Claims in Spanish Land Grants and [the] Swamp and Overflowed Lands Act*, 17 F.S.U.J. LAND USE & ENVTL LAW 351,356 (2002). Numerous state ditch and drain laws between 1893 and 1901 authorized the state and counties to convert wetlands. *Id.* at 357. For example, the 1901 Legislature “authorized counties to reclaim lands on private initiative based on findings, based that reclamation would benefit agriculture or public health.” *Id.* citing Act effective May 31, 1901, ch. 5035, 1901 Fla. Laws 188.

Hamilton Disston agreed to buy 4 million acres of Swamp and Overflowed Lands from Florida for \$1 million dollars in 1881. Most of the drainage attempted to convert the Everglades. W. Huber and J. Henney, *Drainage, Flood Control, and Navigation, WATER RESOURCES ATLAS OF FLORIDA* at 116 (FERNALD & PATTON, eds. 1984). He began channelizing through vast wetlands and uplands, “starting a process of wetland drainage and land reclamation that would continue to the present day.” *Id.* Between 1905 and 1927 alone, six major channelized rivers and canals were converted to Lake Okeechobee. “The most important objective of these efforts was to drain the areas immediately southwest, south, and southeast of Lake Okeechobee in order to open the thick organic soils in these areas to agriculture.” *Id.*

continued...

Governor Napoleon Bonaparte Broward was elected on his platform to drain the Everglades for agriculture and development. *Id.* While the work was done intermittently and incompletely, the Everglades Drainage District was created in 1913 as the first Florida drainage district that attempted to dike and drain the Everglades. While the District created a widespread levee system, it failed to hold back the hurricane floods of 1922, 1924, 1926 or 1928. This succession of storms devastated the region and caused whole towns to disappear. Ansbacher, ABA Constitutional Law Newsletter at 11, *et seq.*, Huber and Heaney at 116-17. Moore Haven was eviscerated. The 1928 storm killed over 2000, which was a death toll that ranked behind only "Isaac's Storm" in Galveston in 1900.

This led the Federal government to begin the Hoover Dike that we see today. The dike is 85-miles-long, and towers 34- to 38-feet-high, more than 20 feet over the mean level of the lakes. *Id.* at 117.

The drainage has created good and bad. Lowered water levels oxidated the soils causing massive soil elevation subsidence, exacerbated droughts, and increased saltwater intrusion. On the flip side, the drainage facilitated the massive scale development of South Florida and large scale agriculture throughout the region.

In 1948, Congress authorized the Central and Southern Florida Project for Flood Control and Other Purposes. This was the first regional water management act in south Florida. The project's goals have been described as follows:

The C&SF Project had three main components. First, it established a perimeter levee through the eastern portion of the Everglades, blocking sheet flow so that lands farther east would be protected from direct Everglades flooding. This levee severed the eastern 16% of the Everglades . . . Second, the C&SF Project design[ate]d a large area of northern Everglades, south of Lake Okeechobee, to be managed for agriculture. Named

the Everglades Agriculture Area (EAA), it encompassed about 27% of the historic Everglades and was a major factor in the justification of the C&SF Project. Third, water conservation became the primary designated use for most of the remaining Everglades between the EAA and Everglades National park, limited on the east by the eastern perimeter levee and on the west by an incomplete levee bordering the Big Congress Swamp.

The C&SF Project and the SFWMD, Duke University Wetland Center. <http://www.nicholas.duke.edu/wetland/csf.htm>.

The Florida Legislature began to incrementally give the Trustees general authority to protect sovereign submerged lands underlying navigable waters. While Congress originally granted Swamp and Overflowed Lands to Florida subject to Congressional mandate to drain and to develop those lands, each state took title to navigable and (originally) tidal waters, subject to the Public Trust Doctrine. Ansbacher and Knetsch, *supra*, at 357 fn. 37, citing Act effective June 5, 1913, ch. 6451, 1913 Fla. Laws 122. (The State of Florida subsequently reduced the scope of sovereign lands under tidal waters to those lying waterward of the Mean High Water Line. Art. X, s. 11 FLA. CONST.). The 1913 Act also allowed the Trustees to convey islands and other property that was not adjacent to any private riparian lands. This led to development of barrier islands. *Id.* Professor Joseph Sax's seminal public trust article expresses the Public Trust Doctrine as follows:

When a state holds a resource which is available for the free use of the general public, a case will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restrictive uses or to subject public uses to the self-interest of private parties.

J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH.L.REV. 471,490 (1970).

Florida continued to foster drainage and development or wetlands.

The 1913 General Drainage Act authorized the owner or owners of a majority of lands in an area to petition the local circuit court to declare a drainage district. Act effective June 9, 1913, ch. 6458, 1913 Florida Laws 184, 184 – 86. The only required notification to the State was filing of a plan and the circuit court declaration with the Secretary of State. No one had to notify the Trustees.

Numerous laws other than the Drainage District Laws affected wetlands and sovereign lands in Florida. One leading law was the 1957 Florida Water Resources Act, which followed the federal 1956 amendments to the Watershed protection and Flood Prevention Act of 1954. Act effective June 18, 1957, ch. 57-380, §8(1)(a), 1957 Fla. Laws 855, 858; ch. 1027, §§2-7, 70 Stat. 1090 (1956) (codified as amended at 16 U.S.C. §§1001-1012). The Florida Act created an agency within the Florida Board of Conservation to issue permits for "the capture, storage, and use" of "excess" surface and groundwater. 1957 Fla. Laws 855, 858.

WETLANDS PROTECTION REGULATION DEVELOPS

Florida took its first significant step towards restraining dredging and filling of wetlands in 1951. The legislature repealed a 1917 act that had deemed all tidelands between the riparian upland and the channel to be subject to the control of the owner of those adjacent riparian lands. MALONEY, *et al.*, FLORIDA WATER LAW 459 (1980) (citing Act effective May 29, 1951, ch. 26776, 1951 Fla. Laws 554.

The next major step was the 1957 Bulkhead Act. That act authorized the Trustees and local government to set local bulkhead lines beyond which no private riparian landowner could fill. The act further established permitting criteria for docks and other structures beyond the bulkhead lines, and required conveyances of submerged sovereignty lands to be in the public interest. MALONEY at 460, 462.

Nonetheless, until 1967, Florida did not directly regulate or protect wetlands above the high water line. Section 253.123(1), Fla. Stat., allowed the Trustees only to protect submerged sovereignty lands. The 1967 Florida Legislature created the

Department of Pollution Control. The act creating that agency delegated to it the authority to regulate wetlands. *Id.*

The 1972 Florida Resources Act was the first omnibus water resource act in Florida. It stemmed from Governor Rubin Askew's 1971 conference on water management. I. Quincy, *History of Surface Water and Wetlands Regulation, FLORIDA ENVIRONMENTAL AND LAND USE LAW SECTION TREATISE* at 9.6-1 and a-2. (2001). Dean Frank Maloney led the development of the 1972 Model Water Code which provided a template for the act. *Id.* The act, with various modifications, today regulates wetlands at ch. 373, Part IV, Fla. Stat. *Id.* At 9.6-2. The core rationale for the act was the estimated 60 percent of the State's wetlands lost, totaling 12 million acres, between 1850 and the early 1970s. *See, M. Smallwood, et al., The Warren S. Henderson Wetlands Protection Act of 1984: a Primer, 1 F.S.U.J. OF LAND USE & ENVT LAW 211 (1984).*

In 1975, the Florida Department of Pollution Control created a vegetative index that established two zones where the state would regulate dredging and filling. The first zone, submerged land, was dominated by phreatophytes, or water loving plants. The second was the "transitional zone" between submerged lands and uplands. *Id.* at 213, citing r. 17-4.02(17) and (19), F.A.C., as it then existed. The Department also adopted a related dredge and fill permitting rule for activities "to be connected in, or connected directly or indirectly to . . . lakes, rivers, streams, the Atlantic Ocean and the Gulf of Mexico." *Id.* at 213, citing r. 17-4.28, as it then existed. Immediately after these rules were adopted, the legislature dissolved the Department of Pollution Control. It split sovereign lands permitting to the Department of Natural Resources and other wetlands permitting to the Department of Environmental protection. The DER causes the legislature to codify the wetlands index at then-s. 403.817. The statute required all amendments to the rule to be authorized by the legislature. *Id.*

In 1980, Occidental Chemical and Deltona Corp. filed administrative challenges to state jurisdiction under the wetlands rules. Deltona's

challenge required DER to change the jurisdictional limit from "submerged land" and "transitional zone" to "landward extent of waters of the state" based on the jurisdictional species. *Id.* at 214, citing *Deltona Corp. v. DER*, 2 F.A.L.R. 1302-A (Oct. 22, 1980), and r. 17-4.02(17) as amended. The *Occidental* case resulted in a determination "that jurisdiction existed in the stream from its headwater to its mouth, and the fact that there was a point of intermittency in this stream below the headwater did not preclude DER from exercising its jurisdiction." *Id.*, citing *Occidental Chem. Co. v. DER*, 2 F.A.L.R. 1029-A and 3 F.A.L.R. at 3-A, 4-A.

Various issues led the regulators, regulated and environmental groups to seek a "standardized test" for wetlands jurisdiction stemming from these decisions. Mitigation was one of the central topics:

Mitigation was a significant issue to all of the special interest groups. Out of this issue, many questions arose: Should DER be allowed to consider on-site mitigation or off-site mitigation in issuing pollution permits? If mitigation was a valid consideration, what should be allowed? Would the payment of certain fee into a fund be an acceptable form of mitigation?

Id. at 216.

The result was the Warren S. Henderson Wetlands Protection Act of 1984. S. 403.91-929, Fla. Stat. Proponents of the 1984 act called it "Florida's first law aimed specifically at the preservation and protection of the state's remaining wetlands," and a "masterwork of compromise." Smallwood, *supra*, at 211 and 216, respectively.

The Henderson Act generally streamlined permitting in ch. 403, Fla. Stat. The act authorized vegetative, soil and hydrologic factors to be considered in determining jurisdiction. Another significant issue was the permit standard. The general criteria required a project would "not result in violations of applicable water standards." Smallwood at 250, citing then-s. 403.918(1), Fla. Stat.

One significant exception was that mitigation was required if existing water quality was lower than applicable DER standards. DER had

to "consider mitigation measures proposed by or acceptable to the applicant that would result in a net improvement in water quality for the parameters being violated." *Id.* citing then-s. 403.918(2), Fla. Stat. This was the first codified mitigation requirement in DER standards. *Id.* at 251. One key commentator noted:

While mitigation was recognized by DER in some circumstance[s], it could not be used to offset water quality violations. In this respect, the Act makes a major departure from previous practice. The philosophy of chapter 403 required that the quality of waters not meeting standards be improved to a point that all violations were eliminated before any new projects were permitted. In theory, it will be more difficult for DER under the Act to improve the quality of polluted waters. It should be remembered, however, that the Act allows mitigation of water quality violations only for dredge and fill activities.

Id. at 251, citing then-s. 403.918(2) (b), Fla. Stat.

Another key addition followed review under statutory water quality and public interest standards. The Henderson Act required that where the project violated one or both of these criteria, the DER must consider "measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project." *Id.* at 254, quoting then-s. 403.918(2), Fla. Stat. As Smallwood, *et al.*, emphasized: "DER does not have to make a mitigation proposal, and the permit applicant does not have to agree to any proposal made by DER." *Id.*

Smallwood, *et al.*, noted that DER had used mitigation before on many projects, even though there was no express statutory authority. "Generally, DER has been favorably disposed to mitigation proposals that improve existing stressed wetlands created new wetlands from uplands, create wetlands from areas of open water, or restore affected wetlands after use." *Id.*

DER had numerous concerns, however, about the efficacy of wetlands mitigation. Many techniques were unproven, it was difficult to ensure mitigation would be maintained long

continued...

enough to allow mitigation to take hold, and various other problems arose. *Id.* at 254-55.

The Henderson Act neither defined mitigation nor identified or quantified adequate mitigation. Smallwood stated: "This is hardly surprising since a mitigation proposal that is acceptable in one case might be entirely unacceptable in another." *Id.*

Smallwood said four general types of mitigation were possible:

1. Restoration or creation of a resource;
2. Minimization of project impacts;
3. Preservation of a resource; and
4. Payment.

Id. In turn:

Smallwood said "[restoration or creation] is the simplest." *Id.* DER commonly accepted this prior to the act. Significantly: "In the past, there has been no standard ratio required of wetlands created to wetlands destroyed. To tip the public interest in his favor, however, an applicant might be required to meet more than a one to one ratio. In some instances, a two to one or even greater ratio might be necessary." *Id.* at 255-56, citing, Memorandum: the Department of Environmental Regulation's Consideration of Mitigation in Permitting Decisions, Nov. 1, 1983. Further, long-term monitoring was almost certainly required.

Minimization is common. Nonetheless, it was almost never deemed to constitute mitigation and this remains the case today. *Id.*

Preservation likewise was, and is, less likely to constitute acceptable mitigation. *Id.* Then, as now, conservation easements provide the most common tool for this method. *See, e.g.,* s. 704.06, Fla. Stat.

Now, what you've been waiting for:

The final category of mitigation proposals involves the donation of money. The money may be unrestricted or earmarked for a special purpose. This type of proposal would seem to raise the greatest number of problems. The most common objection is that it gives the appearance that the applicant is buying the permit,

particularly where there is no indication that the money is being used to correct problems caused by the proposed project.

Smallwood, *supra.*, at 256. Boy does this create fodder for discussion!

Smallwood anticipated that DER would rely on its experience in determining what mitigation to accept. Smallwood expected applicants would pressure the agency "to consider new and untested areas of mitigation since the legislature has recognized the concept." *Id.*

One significant takings case followed. Coincidentally, Koontz's counsel, Mike Jones, figured prominently in the prior decision as well. *Vatalaro v. DER*, 601 So.2d 1223 (Fla. DCA5 1992), *rev. denied*, 613 So.2d 3 (Fla. 1992), concerned the efforts of the elderly and infirm Mrs. Billie Vatalaro to build two houses, for her caretaker daughter and herself, on Lake Rouse in Orange County. She paid \$125,000 for the eleven acre parcel in 1986. Five of the acres were submerged lakebottom. The property was zoned residential, and the sellers assured her that two houses would be permissible without any problem. (This raises a *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985), question regarding latent defects in residential sales. Her sons conducted pre-closing due diligence, and convinced themselves and her that the property was suitable. None of them contacted the DER or Water Management District, or allegedly even knew of the Henderson Act.

DER inspected after closing at the request of the Orange County Environmental protection Agency. DER stated the upland lay within a twenty-acre wetland contiguous to the lake. DER told Mrs. Vatalaro she must apply for a permit. The agency denied the permit. DER concluded the proposal did not provide reasonable assurance it was not contrary to the public interest. Further, it failed the "cumulative impact" test under the Henderson Act (requiring review of the project impact and those of similar reasonably anticipated projects in similar jurisdictional waters). DER recommended modifications, including restoring an already cleared portion of the property. The DER said an "elevated wooden boardwalk" for

viewing of the surroundings would be permissible.

Mrs. Vatalaro petitioned for an administrative hearing on the denial. The DOAH hearing officer recommended denial, which the DER adopted for its final order. She did not appeal. Rather, she sued in inverse condemnation.

The circuit court granted summary judgment for the DER. On appeal, the Fifth District Court of Appeal reversed. The court did not directly discuss the boardwalk option and held that the denial deprived her of all economically viable use of the property. The appellate court rejected the DER argument that she bought with constructive notice of the Henderson Act. It held she "purchased with future development legitimately anticipated and with no existing bar thereto." 601 So.2d at 1229. The Florida Supreme Court denied review.

The DER established mitigation rules under the Henderson Act. As the statute authorized, mitigation was considered on a case-by-case basis. R. 17-312.340, F.A.C.

The DER issued its Report on the Effectiveness of Permitted Mitigation in 1991 in response to concerns that the 1990 legislature raised. The DER concluded that mitigation was problematic for many reasons. Most significantly, 34% of all permit required mitigation never began. *Id.* The percentage of permits where complete mitigation compliance was found was shockingly low. *Id.* at 4-8, 19. The report recommended better monitoring, enforcement, and clearer guidelines, among other tools. *Id.* at 23-25. The Report also requested new staff positions and pay raises to achieve those goals. The legislature authorized 10 positions in response. V. Settles, Wetlands Mitigation: Changes in the Wind? FLA. B.J. 53,54 (July/Aug. 1991).

The 1993 Legislature passed the Florida Environmental Reorganization Act to streamline the permitting process, reorganize the agencies and to create mitigation banking as an option. Fla. CS for CS for HB 1751 (1993) (Second Engrossed), Ch. 93-213, 1993 Fla. Laws 2129. It moved the old Henderson Act to ch. 373. It merged DER and DNR into the Department of Environmental Protection (DEP), which, along with the various regional water management

districts, implemented ch. 373. Further, the 1993 act consolidated dredge and fill, stormwater and other surface water, and mangrove permits into a single environmental resource permit, or ERP.

The 1993 Legislature created a new, omnibus definition of a wetland at §21, at 20-21, codified at s. 373.019(17). The Environmental Regulatory Commission (ERC) had to establish a successor definition by 1994. The resulting Wetlands Act of 1994, ch. 94-122, 1994 Fla. Laws, established the new standards. The legislative intent was statewide use of the wetlands methodologies the various water management districts had been using under ch. 373 before the 1993 consolidation. The DER had regulated only contiguous wetlands, while the districts regulated certain

isolated wetlands as well. J. Fumero, Statewide Wetlands and Other Surface Waters Delineation Methodologies, FLA ELULS Treatise 9.7-1 and -2 (2001). The five mutually exclusive tests include visible boundaries, vegetative indices, hydric soils, and “reasonable scientific judgment” in review of indicators. *Id.* at 9.7-3. The resulting definition of “wetland” was not exclusive, but provided a broad set of indicators, at s. 373.019, Fla. Stat.

One article particularly drilled down into the details of the 1993 act. B. Weiner and D. Dagon, Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993, 8 F.S.U. J. LAND USE & ENVTL. LAW 521 (1993). They reiterated the ad hoc nature of mitigation raised by Smallwood:

A mitigation process holds no guarantees or steadfast rules. Because standardized mitigation plans are practically nonexistent, every plan must be uniquely organized for the particular site.

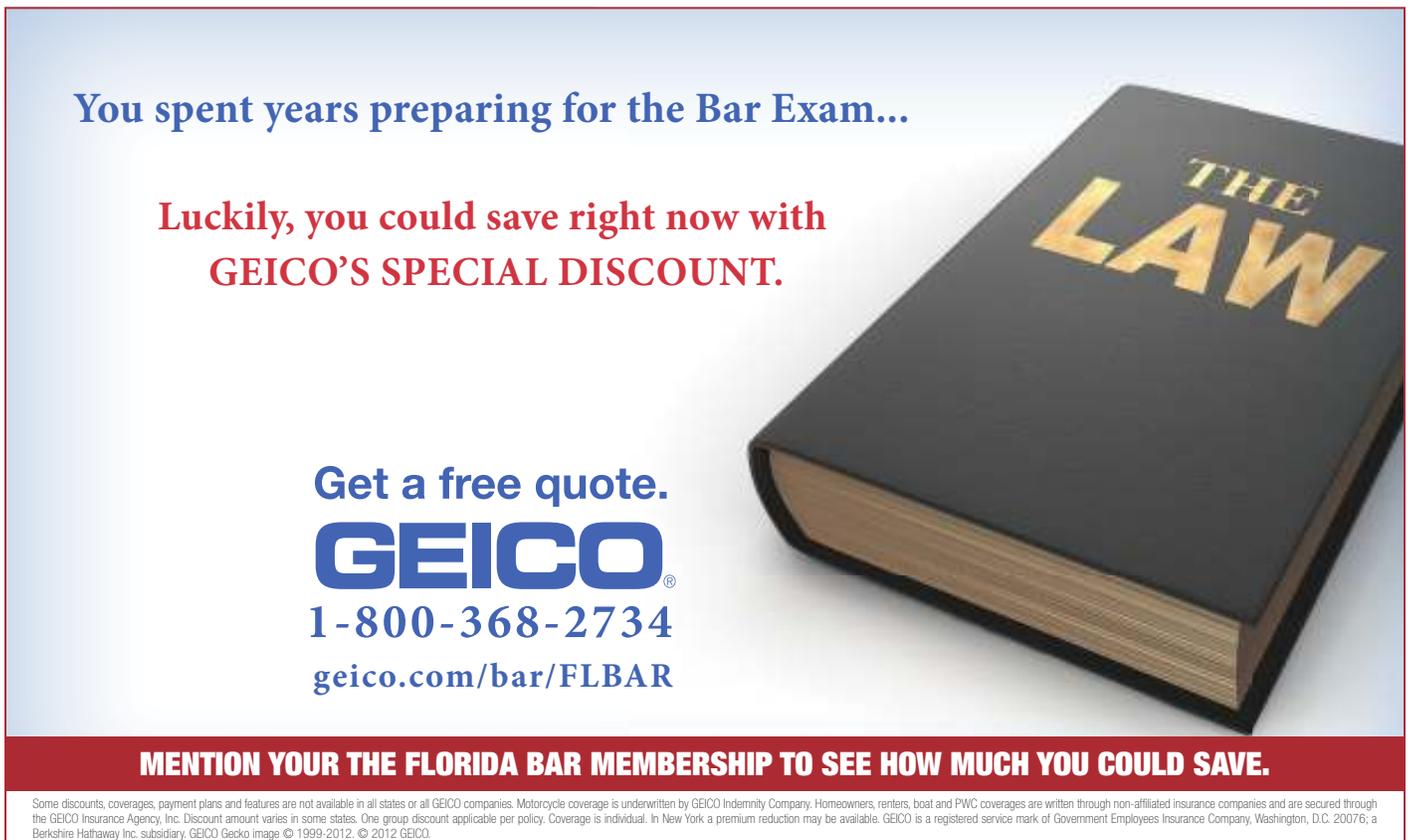
Id. at 573, citing D. SALVESON, WETLANDS: MITIGATING AND REGULATING WETLANDS IMPACTS at 105 (1990).

Weiner and Dagon discuss the mitigation banking process at great length. A mitigation bank is developed to establish credits based on mitigation performed, which the developer can convey for mitigation needs within the bank’s service area designated by permit. One major advantage is certainty. Permits do not allow credits to be released until and as the developer meets certain

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thresholds: X Credits for recording a conservation easement; Y Credits for the first control burn, and so on. As they note:

Two kinds of mitigation banks are generally recognized: (1) programs where an agency does the actual mitigation which is funded by the developer; and (2) programs where a developer funds and performs the mitigation.

Id. at 579, fn 397, citing Valerie F. Settles, *Wetlands Mitigation: Changes in the Wind?*, FLA. B.J. at 55 (July/Aug. 1991). Ms. Settles noted that Florida originally authorized the DER only to take “cash payments specified for use in a previously identified DER-endorsed” dredge and fill project.

The 1993 act changed that. The 1993 act, however, allowed both private and agency banks. §29 at 31, 1993 Fla. Sess. Law Serv. 1652, 1663, originally codified at s. 373.4135, Fla. Stat. A development applicant could add land to or buy credits from a bank for mitigation. Weiner, *supra*, at 588-89.

Florida so continued to experience uncertain wetlands mitigation results that the legislature directed its Office of Program Policy Analysis and Government Accountability (OPPAGA) to study the effectiveness and cost of then-existing wetland mitigation options. OPPAGA issued a report in March 2000. OPPAGA, *POLICY REVIEW: WETLAND MITIGATION DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE WATER MANAGEMENT DISTRICTS* (Report No. 99-40 March 2000). <http://www.oppaga.state.fl.us/reports/pdf/9940rpt.pdf>. While OPPAGA “concluded that regulatory agencies have shown improvement over the last few years in implementing state wetland mitigation policy.” *Id.* at 9. Nonetheless, better data and implementation were necessary to ensure better and more efficient mitigation. *Id.* at 10.

All this while, Stetson Law Professor Royal C. Gardner raised various objections to “fee in lieu” mitigation.

His article of 2000 pointed to ad hoc payment provisions in several states, including Florida. R. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 U.VA. ENVTL. J. 1 (2000). He pointed to § 373.414(1)(b), Fla. Stat., which expressly authorized acceptance of fees as wetlands mitigation. *Id.* at 37. The agency had to collect the fee “for a specified creation, preservation, enhancement, or restoration project,” although it could include direct and indirect costs such as overhead. *Id.*, citing § 373.414.

Professor Gardner analyzed thoroughly the benefits and detriments of fee in lieu mitigation:

[T]he popularity of fee mitigation is growing. The many federal and state wetland-protection agencies that promote fee mitigation view it as an environmentally sound option for compensatory mitigation. Developers often favor fee mitigation because of the relatively low cost and administrative ease. Even many environmental groups, especially those that are managing the fee mitigation accounts, support fee mitigation. Despite this support from disparate quarters, if fee mitigation programs are not properly structured, the environmental costs of fee mitigation (especially its impact on mitigation banking) may outweigh its benefits. Furthermore, a regulatory agency’s reliance on fee mitigation raises ethical and legal concerns.

Id. at 38-39. He further explicated: “Fee mitigation is provided after-the-fact, it is subject to less agency oversight, and it is not always used for direct restoration, enhancement, creation, or preservation efforts.” *Id.* at 56. Gardner was particularly concerned that government fee mitigation receipt fostered public mitigation that could undercut private mitigation providers. *Id.* See also, R. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L.REV. 527, 580 (1996); R. Gardner, et al., *Compensating for Wetland Losses Under the Clean Water Act (Redux): Evaluating the Federal Compensatory Mitigation Regulation*, 38 STETSON L.REV. 213 (2009) (same). Ch. 2012-174, FLA. LAWS amended § 373.4135, Fla. Stat., to address this

issue going forward. With certain exceptions, government may no longer “create or provide mitigation for a project other than its own ...”

KOONTZ

Coy A. Koontz, Jr., v. St. Johns River Water Management District, No. 11-1447, 2013 WL 3184628, 570 U.S. ___ (June 25, 2013)

Mr. Koontz applied for permits from the St. Johns River Water Management District (“the District”) to dredge and fill part of his approximately 15-acre property in the special Riparian Habitat Protection Zone of the Econlockhatchee River Hydrologic Basin. As stipulated by the parties before trial, approximately 11 acres of Mr. Koontz’s property were wetlands. Mr. Koontz sought to fill 3.4 acres of wetlands and 0.3 acres of uplands. To offset the project’s adverse impacts, Mr. Koontz proposed to preserve his remaining undeveloped property (approximately 11 acres) as mitigation. That proposal would have yielded a 3:1 ratio of preserved-to-destroyed wetlands. Measured against the state’s mitigation guidelines in place at the time, which suggested the ratio of preserved-to-destroyed wetlands should be at least 10:1, Mr. Koontz’s preservation proposal was not sufficient.

District staff suggested ways that Mr. Koontz could modify his permit applications so that they would satisfy the state’s regulatory standards. In addition to suggesting ways that Mr. Koontz could modify the design or scale of his proposed construction and thereby reduce its environmental harm, the District staff suggested alternatives for additional mitigation within the Econ Basin, such as enhancing off-site wetlands. Because Mr. Koontz had offered his remaining “on site” property for preservation, additional mitigation would necessarily be “off-site.” Mr. Koontz disagreed with the District’s conclusions about the sufficiency of his proffered mitigation. He rejected the District staff’s suggestions and declined to propose additional mitigation. Therefore, District staff recommended that the Governing Board deny the permit applications, and the Board entered final orders denying the applications.

The final orders conclude that Mr. Koontz failed to provide reasonable assurances, as required by the state’s

regulations, that his proposed development would not adversely affect the wetland functions provided by the property and would not conflict with the public interest. The final orders note that the mitigation proposed by Mr. Koontz was insufficient to allow issuance of the permit and describe the mitigation alternatives suggested by District staff. The final orders offer the use of District land for mitigation, but also emphasize that Mr. Koontz could choose the location of additional mitigation for his project: “enhancement on other properties within the basin could also be developed and proposed by Koontz.”

Under the Florida’s Administrative Procedures Act, an applicant may challenge an agency’s permit denial by requesting an administrative proceeding under section 120.57, F.S. However, Mr. Koontz chose not to administratively challenge the final order’s requirement for additional mitigation. Instead, he filed an inverse condemnation action in Circuit Court, seeking monetary compensation for the regulatory taking of his real property under the Florida Constitution.

Shortly before trial, Mr. Koontz narrowed his takings claims by stipulating that the District’s final orders did not deprive him of all of the economic or beneficial use of his real property. He thereby eliminated a total take under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). He also stipulated that the District’s final orders did not deprive him of substantially all of the economic or beneficial use of his real property, thereby eliminating the most important element of a takings claim under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

After receiving evidence, the trial court concluded that Mr. Koontz had not established an exaction taking under *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994): “Neither the government nor anybody else is going to occupy property of Mr. Koontz . . . the *Nollan* and *Dolan* cases are clearly distinguishable in fact and legal principle.” However, the trial court did find a taking under the “substantially advance” theory identified in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In *Agins*, the Court indicated that

land-use regulation could be a taking if the regulation failed to “substantially advance” a legitimate government interest. To determine whether the requirement for additional mitigation was an unreasonable exercise of the police power under *Agins*, the court applied the essential nexus and rough proportionality tests found in *Nollan* and *Dolan*. The trial court found that the approximately 11 acres of preservation proposed by Mr. Koontz was sufficient mitigation for the proposed wetland impacts and, therefore, no additional mitigation was necessary for permit issuance. Accordingly, the trial court concluded that there was no nexus between the project’s wetland impacts and additional mitigation, and that any additional mitigation would not be roughly proportional to the proposed impacts. Consequently, the court concluded that the permit denial was an unreasonable exercise of the police power and found a temporary taking of Mr. Koontz’s real property, with \$327,500 plus interest awarded as just compensation. The court based that amount on Mr. Koontz’s appraisal expert’s calculation of the present value of the lost annual rents on Mr. Koontz’s real property from the date the permits were denied.

The District appealed to the 5th DCA and the three-judge appellate panel issued a split decision, each judge writing separately. The majority upheld the taking of Mr. Koontz’s real property, but as an exaction taking under *Nollan* and *Dolan* rather than under the *Agins* takings test used by the trial court. *St. Johns River Water Management District v. Koontz*, 5 So.3d 8 (Fla. 5th DCA 2009). (Since the trial court’s decision, the *Agins* takings theory had been repudiated by the United States Supreme Court in *Lingle v. Chevron*, 544 U.S. 528 (2005)). However, the appellate court certified a question of great public importance to Florida’s Supreme Court:

. . . does Article X, section 6(a), of the Florida Constitution, recognize an exaction taking under the holdings of *Nollan* and *Dolan* where, instead of a compelled dedication of real property to public use, the exaction is a condition for a permit approval that the circuit court finds unreasonable?

After rephrasing the certified question as involving both the federal and state constitutions, Florida’s Supreme Court reversed and quashed the Fifth DCA’s decision. *St. Johns River Water Management Dist. v. Koontz*, 77 So.3d 1220 (Fla. 2011). The Florida Supreme Court surveyed existing U.S. Supreme Court decisions that expressly addressed exaction takings and determined that such precedent found an exaction taking only where the exaction involved a dedication of or over the landowner’s real property and, in exchange for the dedication, a permit is issued. Finding neither circumstance present, the Florida Supreme Court ruled against Mr. Koontz. Justices Polston and Canady concurred in the result only. They concluded that Mr. Koontz’s claim was in reality an attack on the propriety of the District’s final orders, which Mr. Koontz was required to challenge through Florida’s administrative process under Chapter 120, Florida Statutes, before he could bring a takings claim in circuit court.

Mr. Koontz then filed a Petition for Certiorari with the United States Supreme Court, which was granted. On June 25, 2013, the Court issued an opinion that expanded the applicability of the nexus and rough proportionality tests found in *Nollan* and *Dolan*. *Koontz v. St. Johns River Water Management District*, 2013 WL 3184628, 570 U.S. __ (June 25, 2013). Now, “the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.” The Court noted that its opinion “expresses no view on the merits of [Mr. Koontz’s] claim,” and remanded the case to the Florida Supreme Court for further proceedings not inconsistent with the opinion.

Remand will present an interesting conundrum. A previously final determination in state court found a temporary taking occurred, with specific damages. Does the Supreme Court decision supplant the real property takings rationale with the monetary exaction test? Does it supplement instead? This is the latest debate between the District and Koontz. We await the Florida Supreme Court’s decision.

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