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ELULS
THE ENVIRONMENTAL AND LAND USE LAW SECTION
Rachael Santana, Chair • Jacob T. Cremer, Nikki T. Williams, Derek Howard, Felicia Kitzmiller, Co-Editors • www.eluls.org

"*YOU SAY YOU WANT A REVOLUTION*" -PRESIDENT BIDEN'S EXECUTIVE ORDER ON "TACKLING THE CLIMATE CRISIS"-

By Dominick J. Graziano[1]

The Industrial Revolution was powered by nonrenewable fossil fuels. Are we on the cusp of another energy revolution? The Sustainable Energy Revolution? We likely will not know the answer for many years, but the scientific consensus that the climate is changing due to human activities appears to have finally permeated the public consciousness.[2] The political will to take action might be here after four decades of "one step forward two steps back."

In 1979, President Jimmy Carter acknowledged the need for renewable energy by installing thirty-two (32) solar panels on the roof of the White House. In 1986, President Ronald Regan removed the panels.[3] In October 1997, President Bill Clinton was the first president to clearly state that "we do know … that the industrial age has dramatically increased greenhouse gases in the atmosphere, where they take a century or more to dissipate; and that the process must be slowed, then stopped, then reduced if we want to continue our economic progress and preserve the quality of life in the United States and throughout our plant."[4] By then the National Academy of Sciences ("NAS") had issued many reports confirming that the rise in CO_2 concentrations was likely being caused by human activity. Nonetheless, in 2001, President George W. Bush appointed his own group of policy makers and scientists to study the issue, which also concluded that the scientific evidence supporting global warming can only be explained by the contribution of anthropogenic forces.[5]

In September 2016, President Barack Obama officially entered the United States into the Paris Climate Accord. In November 2019, President Donald Trump formally notified the United Nations that the US would withdraw from the Paris Climate Accord.[6]

Despite the political wrangling over the years, in 1987 the U.S. Congress passed the Global Climate Protection Act ("CPA") finding that "man-made pollution including the release of carbon-dioxide…. may be producing a long term and substantial increase in the average temperature on earth." The CPA required the U.S. Environmental Protection Agency (EPA) to formulate a "coordinated national policy on global climate change."[7] In *Massachusetts v EPA*, the U.S. Supreme Court confirmed that "carbon-dioxide and other greenhouse gas emissions constitutes air pollution covered by the Clean Air Act."[8] The EPA subsequently made an endangerment finding concluding that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare…. [and] the administrator has determined that the body of scientific evidence compellingly supports this finding."[9]

Despite these legal and regulatory developments, and the compelling scientific evidence that has been generated over the past forty-years demonstrating that the climate is being impacted by anthropogenic forces, there has not been any sustained concerted federal policy to address climate change. However, President Joe Biden's January 27, 2021, "*Executive Order on Tackling the Climate Crisis at Home and Abroad*" ("Order") could be the spark that finally lights a sustainable energy revolution by marshalling federal action to address climate change through broad public policy initiatives.[10] The twenty-page Order consists of two main parts: Part I – "Putting the climate crisis at the center of the United State foreign policy and national security," and Part II – "Taking a government wide approach to the climate crisis."

PUTTING THE CLIMATE CRISIS AT THE CENTER OF THE UNITED STATES FOREIGN POLICY AND NATIONAL SECURITY

Since the late 1980s, various governmental departments have determined climate change presents significant national security challenges.

See "You Say You Want " page 22

INSIDE:

From the Chair

by Rachael Bruce Santana

Dear ELUL Section Member,

Another year has come and gone and I hope everyone is staying well and enjoying what 2021 has to offer despite all of the unknowns that we are continuing to navigate. While the beginning of my Chair year started with a sprint to organize and implement ideas, I am happy to report that the ELULS Executive Council and our Committees have begun to find their momentum and we have now entered the marathon phase, continuing to push forward and making notes on how to do so successfully for years to come. One to ever reflect, I am reminded of this year's theme, "Looking Backwards, Looking Forwards", and feel confident that where we came from, even so recently as where we were at the beginning of my Chair year, will continue to help us build a better ELULS for the future. I would like to thank the ELULS Officers and Executive Council members who have helped to implement our collective goals, and past ELULS leaders who have shared their experiences, ideas, and memories to help us get back to our roots. While, again, I mention the marathon phase, I recognize that change does not happen overnight. However, I continue to feel that what we are doing as Section leaders now will continue to help us achieve the vision we have for ELULS looking forwards.

Some of the "marathon" work our Committee leaders and members are continuing to press forward with include the revision of the ELULS Treatise and goal towards publishing the Treatise on legal research platforms, continued work towards a completely revamped and reenvisioned ELULS website and a revised and improved Section Reporter, new ideas for virtual networking events, a steady and consistent CLE calendar affording quality, affordable CLEs to Section members, and new strategies for garnering Section membership and feedback from our current members.

In "looking forwards" to the rest of my Chair year, I feel sure that our Committees will continue to perform the work of our Section with enthusiasm and that our Section will continue to grow and press forwards despite the obstacles we all are currently facing. Please remember to visit The Florida Bar's COVID-19 Information and Resources page for announcements and information to assist attorneys during this unprecedented time.

As always, warm regards and stay safe.

Rachael Bruce Santana

20-21 ELUL Section Chair

From the Chair – Historical Messages from Past ELULS Chairs

This year the Section Reporter will be highlighting historical Chair's Messages as part of the "Looking Backwards" element of our theme. We want to give a special thanks to Irene Quincy for providing the compilation of documents. This issue's message comes from Section Chair Silvia Alderman during the 1986-1987 fiscal year.

By **Silvia Morrell Alderman**, Chair, 1986-1987

The Environmental and Land Use Law Section topped 1,200 members this year. As we enter our 10th year, the Section can look upon its accomplishments with great pride. The Section recently embarked upon a unique new program by approving a bylaws amendment to allow affiliate membership status for engineers, biologists, planners, and other professionals who practice in the environmental and land use law fields. The response from the professional community has been very encouraging. This process opens significant new avenues of interchange and communication between the professions.

The Section is continuing its extensive CLE seminar and workshop program. A workshop or seminar has been scheduled for practically every month covering everything from hazardous waste to sewage to land use. Work has progressed on Volume II of the Florida Environmental and Land Use Law Treatise which will focus on land use issues. The Bar staff informs us that the volumes will be available for distribution this summer. Work is also underway to publish an update to Volume I of the Treatise, which was published last year.

The Section has continued its Dean Maloney law student writing contest and is publishing a directory for law school and law student use listing attorneys in our practice area.

Committees of the Section have been working with professional organizations and the members of the judiciary to organize informational seminars. The Public Interest Practice Committee has been studying means of assisting practitioners who provide those types of services.

The Section newsletter, *The Reporter,* was expanded in format this year and is a major source of case law and legislation updates, news, and information of benefit to the membership.

In order to serve the Section better, a new organizational structure was developed this year. Committees were placed under the leadership of three divisions under the direction of Executive Council members. The divisions are: Education (CLE seminars, CLE workshops, CLE Manual – Volume I, CLE manual – Volume II, midyear meeting, annual meeting, Maloney writing contest, law school liaison, and CLE Committee liaison); Special Services (special master, legislative review, judicial liaison, and public interest representation); and Planning and Membership (Florida Bar *Journal* column, membership and planning, public information and awareness, and Section *Reporter*). The planning function continues to receive greater attention as we begin to focus on the needs of the Section for the next 10 years.

Members who served on the Executive Council or as Committee Chairs this year are Silvia Alderman, Tom Cloud, Roger Sims, Terry Lewis, Sam Owens, J.J. Brown, Paul Gougleman, Bill Green, Doug Halsey, Richard Hamann, Mary Smallwood, Lee Choras, Richard Lee, Al Malefatto, Tom Pelham, Irene Quincey, Bob Wells, Dan Thompson, Gary Stephens, Valerie Settles, Debbie Orshefsky, Marty Dix, Cari Roth, Vance Kidder, Jim Brindell, Mary Hansen, Richard Brightman, and Bill Hyde. Their efforts are sincerely appreciated as are those of countless others who serve the Section. Special thanks go to Peggy Griffin, our Bar staff liaison.

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

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On Appeal

by Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of March 2, 2021. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

The City of West Palm Beach, Inc., v. Haver, et al., Case No. SC20-1284. Notice to invoke discretionary jurisdiction to review the 4th DCA decision in *Haver v. City of West Palm Beach*, 45 Fla. L. Weekly D1406c (Jun. 10, 2020), in which the court certified direct conflict with decisions of other district courts of appeal in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3rd DCA 2013), and *Chapman v. Town of Redington Beach,* 202 So. 3d 979 (Fla. 2nd DCA 2019). The case presents the question of whether a private party may bring an equitable action against a municipality to compel a local government to enforce municipal zoning regulations. Status: Oral argument set for April 7, 2021.

FIRST DCA

Kent v. Scheffler, Davis, Fussell and Ergle and BTIITF and DEP, Case No. 1D20-3428. Appeal from final order denying the environmental resource permit and the letter of consent or other form of state lands authorization for Lot 18 dock and directing DEP's district office to take action, including any necessary enforcement action, to reestablish the boat access channel and the petitioners' rights of navigation consistent with the final order. Status: Voluntarily dismissed on January 25, 2021.

Palafox, LLC v. Carmen Diaz, Case No. 1D20-3415. Appeal from ALJ's final order denying motion for attorney's fees pursuant to Section 120.569(2)(e), F.S. The ALJ concluded that Diaz and her attorney filed the amended petition for an improper purpose, but the motion for fees and sanctions was not timely filed. Note: The ALJ also entered a supplemental recommended order granting the motion for attorney's fees pursuant to Section 120.595, F.S., because Diaz participated in the proceeding for an improper purpose. See DOAH Case No. 19-5831 (Supplemental Recommended Order entered October 30, 2020). Status: Notice of appeal filed November 25, 2020.

City of Destin v. Wilson, et al., Case No. 1D20-2585. Appeal from final order denying motion for attorney's fees pursuant to Section 120.569(2)(e), F.S., related to litigation involving a challenge to the modification of a DEP permit in connection with the dredging of East Pass in Destin, Florida. Status: Notice of appeal filed September 3, 2020.

The Board of County Commissioners, Santa Rosa County, Florida and The School Board of Santa Rosa County, Florida v. Homebuilders Association of West Florida, Inc., et al., Case No. 1D20-2227. Appeal from order granting plaintiffs' verified motion for temporary injunction determining that challenged educational facilities impact fees are invalid and unenforceable as contrary to the requirements of Section 163.31801, F.S., and the Florida Constitution and enjoining their collection. Status: Oral argument held on February 9, 2021.

1000 Friends of Florida, Inc., et al., v. State of Florida, et al., Case No 1D20-2135. Appeal from final order of dismissal, dismissing amended complaint challenging section 7, subsection (8)(c), Chapter 2019-165, *Laws of Florida,* that provides for prevailing party attorney's fees and costs in certain land development litigation, as unconstitutional. (This provision is now codified in section 163.3215(8)(c), *Florida Statutes* (2020).) Status: Notice of appeal filed July 17, 2020.

Neely Paul Towe as Trustee v. Fish and Wildlife Conservation Commission, Case No. 1D20-2066. Appeal from FWC final order dismissing amended petition for hearing seeking to challenge the renewal of a marine turtle permit. Status: Notice of appeal filed July 13, 2020.

Delaney Reynolds, et al. v. State of Florida, et al., Case No. 1D20-2036. Appeal from order granting motions to dismiss with prejudice the first amended complaint by which eight young Floridians seek declaratory and injunctive relief, asserting injury because of "defendants' deliberate indifference to the fundamental rights of life, liberty and property, and the pursuit of happiness, which includes a stable climate system in violation of Florida common-law and the Florida Constitution." The complaint further asserts that the "fossil fuel energy system" created and operated by the defendants does not, and cannot, ensure that the plaintiffs will grow to adulthood safely, enjoying the same rights, benefits and privileges of earlier-born generations of Floridians. The complaint sought declaratory relief and an injunction compelling defendants to develop and implement a comprehensive plan to bring its energy system into constitutional compliance. Status: Oral argument denied January 27, 2021.

Wilson, Donovan, Sherry & Sherry v. S. Army Corps of Engineers and DEP, City of Destin and Okaloosa County, Case No. 1D20-1434. Appeal from final order adopting a recommended order and approving the issuance of the proposed permit modification for maintenance dredging of East Pass. Status: Notice of appeal filed May 6, 2020; consolidated with Case No. 1D19-4101 for purposes of travel and for assignment to the same panel of judges for disposition on the merits on June 11, 2020.

Uhlfelder v. DeSantis, Case No. 1D20-1178. Appeal from trial court order granting motion to dismiss with prejudice plaintiff's amended complaint for emergency injunctive relief, which sought to compel Governor DeSantis to close all of Florida's beaches. Status: Summarily affirmed on November 13, 2020.

Edgewater Beach Owners Association, Inc. v. Walton County, Case No. 1D20-0257. Appeal from order denying appellant's motion to show cause and for contempt, based on the county's alleged violation of the terms of a final judgment and an injunction included therein, as a result of the county's filing of a complaint for declaration of recreational customary use with respect to appellant's private beachfront property. Status: Affirmed *per curiam* on December 2, 2020.

Blue Water Holdings SRC, Inc. v. Santa Rosa County, Case No. 1D19-4387. Appeal from final summary

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ON APPEAL
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judgment denying Harris Act claim for failure to comply with the Act's procedural requirements to submit a valid appraisal relating to the denial of a permit for a construction and demolition debris landfill. Status: Oral argument held on September 15, 2020.

Vickery v. City of Pensacola, Case No. 1D19-4344. Appeal from trial court order denying motion to dissolve a temporary injunction to prevent a property owner from removing a live oak tree located in the Northern Hill Preservation District, part of Pensacola governed by specific ordinances to protect Heritage trees, notwithstanding s. 163.045(1), F.S. Status: Notice of appeal filed December 3, 2019.

John S. Donavan, et al., v. DEP and City of Destin, Case No. 1D19-4101. Appeal from DEP final order issuing consolidated joint coastal permit and sovereign submerged land authorization to the City authorizing periodic maintenance dredging of the federally-authorized East Pass in Destin Harbor navigation channels. Status: Notice of appeal filed November 13, 2019.

GI Shavings, LLC v. Arlington Ridge Community Association, Inc. and Florida Department of Environmental Protection, Case No 1D19-3711. Petition for review of DEP final order approving a consent order between GI Shavings and DEP but denying the application for revisions to its air permit for a wood chip dryer. Status: Notice of appeal filed October 14, 2019; motion for oral argument denied August 20, 2020.

City of Jacksonville v. Dames Point Workboats, LLC and Florida Department of Environmental Protection, Case No. 1D19-1728. Petition to review DEP final order granting consolidated ERP and sovereign submerged lands lease for a commercial/industrial tugboat and marine barge loading facility on the St. Johns River. Status: Oral argument held on October 12, 2020.

Imhof, et al. v. Walton County, et al., Case No. 1D19-980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the 2d DCA's decision in *Heine v. Lee County,* 221 So.3d 1254 (Fla. 2nd DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. Note: Regular readers will recall that the 3d DCA recently affirmed *per curiam* a similar ruling in *Cruz v City of Miami*, Case No. 3D17-2708. Status: Oral argument held January 15, 2020.

SECOND DCA

Fetzer B R S, LLC v. DEP, Case No. 2D20-2457. Appeal from final order on petition for declaratory statement seeking a declaratory statement on the question of whether the petitioner may apply for an environmental resource permit and sovereign submerged lands authorization to allow for the reconstruction of the Quednau Ice House, which the petitioner maintains is "grandfathered-in to use sovereignty lands" under Section 253.03(7)(c), F.S. The final order grants the request for a declaratory statement in part and dismisses it in part with leave to file an application for regulatory and proprietary authorization pursuant to Section 253.03, F.S., and Rule 18-21.004, F.A.C., and Section 373.417, F.S. Status: Notice of appeal filed August 17, 2020.

FOURTH DCA

Alex Larson and Fane Lozman v. Palm Beach County, Case No. 4D19-3338. Appeal from final summary judgment on plaintiff's amended complaint. Appellants ask the court "to determine that the County's practice of packing numerous propositions into a consent agenda, and then affording merely [3] minutes to speak on the entirety of the items runs afoul of the statutory guarantee of a 'reasonable opportunity to be heard on a proposition before a board or commission' as established in § 286.0114(2), Fla. Stat." Status: Affirmed *per curiam* on January 14, 2021.

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Waterfront ICW Properties, LLC and Wellington Arms, A Condominium, Inc., Case No. 4D19-3240. Petition to review final judgment quieting title in the name of the appellee and against the Trustees as to certain submerged lands constituting a part of Spanish Creek located in the Town of Ocean Ridge. Status: Affirmed *per curiam* on January 20, 2021.

FIFTH DCA

Glenda Mahaney v. Garber Housing Resorts, LLC and DEP, Case No. 5D19-3517. Appeal from DEP final order denying appellant's petition for administrative hearing with prejudice and approving a site rehabilitation completion order. Status: Affirmed *per curiam* on January 12, 2021.

11th CIRCUIT COURT OF APPEAL

Florida Defenders of the Environment, et al., v. U.S. Forest Service, Case No. 20-12046. Appeal from order granting the federal defendant's motion to dismiss a complaint alleging that the state has operated the Rodman Dam without a permit. Status: Notice of appeal filed June 3, 2020.

UNITED STATES SUPREME COURT

Maggie Hurchalla v. Lake Point Phase I, LLC., et al., Case No. 20-332. Petition for writ of certiorari to review decision by the Florida Fourth DCA upholding jury verdict finding Ms. Hurchalla liable for $4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments in opposition to the project. 44 Fla. L. Weekly D1564a (Fla. 4th DCA 2019), *rev. denied* Case No. SC19-1729 (Fla. Apr. 13, 2020). Status: Petition for writ of certiorari denied January 11, 2021.

PennEast Pipeline Co. LLC v. New Jersey, Case No. 19-1039. Petition to review decision by the Third Circuit ruling that developers of the $1 billion PennEast pipeline cannot seize land owned by the state of New Jersey because the Natural Gas Act does not trump the state's Eleventh Amendment immunity from condemnation suits by private companies. Status: Review granted on February 3, 2021.

U.S. Fish and Wildlife Service v. Sierra Club, Case No. 19-547. Petition to review decision by Ninth Circuit. Issue: Whether Exemption 5 of the Freedom of Information Act, by incorporating the deliberative process privilege, protects against compelled disclosure of a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973 and concern proposed agency action that was later modified in the consultation process. Status: Oral argument held on November 2, 2020.

OP-ED: Possibilities Outweigh Challenges of Microgrids

By Cindy Miller and Ernest Leaf[1]

Microgrids are being considered as a possible solution for many reliability and resiliency problems. A microgrid is a group of interconnected loads and distributed energy resources within clearly defined electrical boundaries that acts as a single controllable entity with respect to the grid. It can connect and disconnect from the grid to enable it to operate in both grid-connected or island-mode.

There are thought-provoking possible uses: military bases, which are exempt from state regulation and have their own generator to use; public purpose microgrids; and use for disaster-prone areas. This last area is one that seems especially worth considering in states like hurricane-prone Florida and wildfire-prone California.

In areas where natural disasters are common, microgrids make a lot of sense. When the generation of electricity is moved closer to the end user, the risk to the end users losing power is less. A centralized system with large power plants, main transmission lines and then the distribution feeders means the risk to the overall system is centralized. One large event can take out all the users downstream of the event. Without microgrids and distributed energy, all the system eggs are in a few baskets, so to speak. More end users will stay online with more microgrids distributed throughout the system.

Regulatory issues are surfacing, primarily focused on the principle of the cost-causer paying for a benefit, rather than the entire body of ratepayers. In our opinion, the advantages of the microgrid should be considered. Where there are benefits to the grid, these benefits should be recognized and compensated accordingly. We recognize that this is not a simple matter. Legislatures in disaster-prone areas may want to consider special treatment where utilities provide microgrids. Also regulatory clarity generally is needed.

Utilities are in a position to thrive in the microgrid trend. A host of advantages comes with this involvement, including corporate responsibility for fostering low-carbon renewable energy generation and improved system reliability. Distributed energy and associated microgrids are at a competitive price point, leading a powerful trend driven by utility stakeholders, electric vehicle development, environmental pressures, smart cities initiatives, and smart devices. Utility partial or complete ownership of microgrids rose 400 percent between 2014 and 2018.[2]

A microgrid is a distributed energy resource – powered by a local generation source, be it a renewable source such as solar or wind or by a diesel generator, natural gas microturbines, or a biomass turbine and generators – that can be islanded or operated without the energy grid.

Microgrids are of special interest in Florida for power recovery of critical facilities after major storm events. There are a few solar plus storage systems, such as the SunSmart E-Shelters program at the University of Central Florida. Resiliency is a driving force behind microgrid development. Some primary benefits are: solutions for system bottlenecks; resiliency/reliability of power to customers; grid voltage and frequency support; and reduced system losses by providing generation closer to loads.

The addition of distributed energy to the grid may lead to uncontrollable step loads, harmonics, power imbalances, and other issues. Thus, a loss of stability to the grid as the percentage of inverter-based sources increases is an issue. Also, the financial picture of microgrids is cloudy. Who pays for them? Who owns them? How can utilities negotiate the complex regulatory environment to include them into the rate base? What is the benefit to ratepayers if a utility builds a microgrid for a small number of customers?

There are also a few regulatory hurdles. Regulations are a key determining factor on how quickly the opportunities can be realized. Microgrids can be defined as generation. But the regulations regarding how distribution utilities can interact with them may need to be revised. They need to define how energy storage, which can be classified as both energy load and generation, should be treated. How can distributed energy assets be included in the rate base? If there is a system balancing aspect to them, does it alter their classification?

It appears worthwhile to explore microgrids and how utilities could use their access to customers to creatively employ microgrid solutions. For example, they could combine multiple customers to supply resiliency on a larger scale that customers could not build for themselves and gain the benefits of economy of scale.[3]

TALLAHASSEE MUNICIPAL UTILITY EXAMPLE

Municipal electric utilities are not subject to the same regulations as investor-owned utilities, and therefore may have more flexibility with using microgrids. In a May 2020 interview with one of the authors, David Byrne, Assistant General Manager of the City of Tallahassee electric utility, described how the power station near Tallahassee Memorial Hospital was designed to be back-up supply for the services there. There is a substation and distribution line. Station #12 only has one transmission line along the adjacent road. The area was subject to interruptions, but building another transmission line in the area was daunting – there was no room, lots of trees, and a high cost.

The solution was to produce power at the substation. The generator provides power directly to the substation and can provide power to all of the customers in the area under most conditions, which include Tallahassee Memorial Hospital and the Tallahassee Police Department. The decision goes back about five years. The City worked with Tallahassee

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Memorial Hospital as the primary beneficiary. It was put in service in 2018. It has been very efficient with fast start-up in less than five minutes. It is designed by Wartsila, a Finnish company. It is operated remotely from one of the other power plants.

It appears to be a microgrid because it can be separated from the rest of the system. If transmission goes down, the substation can operate on its own. It can be switched to "island mode." It can be disconnected from the transmission if there is a good reason to do so. It can increase local reliability.

Byrne concludes that "wherever you have a back-up generator, you have the potential of a micro-grid and to be able to 'island off.'" He said it is a better economic choice. The power supply would have been built elsewhere – so there are "two benefits for the price of one." There is the reliability benefit and the power supply benefit.

REGULATORY CONSIDERATIONS

In talking with people in the industry at a recent National Association of Regulatory Utility Commissioners (NARUC) conference, it became clear that there is a concern whether all ratepayers of an investor-owned utility can be charged for a microgrid that some may argue only affects a segment of the ratepayers.

The Smart Electric Power Alliance (SEPA) issued a 2019 report, "Microgrids: The Role of Microgrids in the Regulatory Compact."[4] The 16-page report states, "Given the lack of both regulatory familiarity and utility experience with microgrids, understanding how to justify them as a grid asset can be challenging." They said few business case examples exist that clearly demonstrate value to both participants and non-participants from a regulatory perspective. The key distinguishing feature of a microgrid versus other integrated distributed energy resources (DERs) is its ability to island from the grid and provide resiliency.

Microgrids are often used to provide back-up power to community resiliency hubs or critical infrastructure. These applications are often seen as a public good, contributing benefits to all ratepayers. However, valuing these benefits is difficult. The NARUC, in partnership with Converge Strategies LLC, concluded that resilience benefits are acknowledged but quantifying the benefits is challenging.[5]

The SEPA report says that this inability to effectively value resilience has already impacted the success of microgrid development in several utility rate cases. In 2018, three utilities proposed multi-customer microgrid projects to their state regulators. The projects would have cost around $105 million to ratepayers, but would have added resilience benefits to the grid.

According to the SEPA Report, the Maryland Public Service Commission considered two multi-customer microgrid proposals but rejected them on the grounds of unequal distribution of benefits to ratepayers and the inability to quantify resilience benefits.

However, the Illinois Commerce Commission (ICC) approved the Bronzeville Community Microgrid, a $25 million project that demonstrated a shared utility multi-customer microgrid business model in the U.S. The ICC noted community learning benefits as grounds for its approval. The remaining cost to ComEd after a $5 million grant from the U.S. Department of Energy "is being socialized across all ratepayers," according to the Smart Electric Power Alliance article.

Jurisdictions are just beginning to consider this topic. In 2018, California enacted legislation calling for the California Public Utilities Commission to develop microgrid regulations. In 2019, Hawaii state regulators, the Hawaiian Electric Company (HECO) and other stakeholders began investigating a tariff for third-party microgrids to reduce regulatory barriers while helping on reliability. The tariff includes provisions for microgrid owner compensation and requirements to streamline the interconnection process. [6]

MARYLAND PUBLIC SERVICE COMMISSION ORDERS

As stated above, there are examples of microgrid proposals being rejected by state commissions. In 2016, the Maryland Public Service Commission rejected a proposal by Baltimore Gas and Electric for a public purpose microgrid. Order No. 87669 was issued on July 19, 2016.[7] The Commission noted the potential of public purpose microgrids to improve reliability and resiliency and to facilitate the incorporation of new, sustainable technologies into the distribution network. However, the Commission found it not in the public interest in several aspects, including the site selection process, cost recovery and associated ratepayer impacts.

In 2018, "In the Matter of the Merger of Exelon Corporation and Pepco Holdings,"[8] the Commission again rejected a proposal for a microgrid. In particular, the Commission was concerned that the proposal would recover all microgrid costs solely from its Maryland customer base. The Commission noted the benefits of microgrids to connect to and disconnect from the larger distribution system, to operate as part of the larger grid or independently – in "island mode" mode – without sustained loss of service to customers when there is an interruption or other grid disturbance.

The microgrid participants included multiple grocery stores, gas stations, a pharmacy, a fire station, a police station, a hotel, a Metro station, and several local government and community facilities which can act as secondary locations to accommodate the public during periods of prolonged outages. Pepco anticipated that the uninterrupted operations of these participants would enable the microgrids to offer essential services to approximately 280,000 individuals.

Each microgrid would feature a DER mix of solar photovoltaic arrays, natural gas-fired generation, and battery energy storage systems to individuals within a five-mile radius. The Company did not identify any additional sources of funding, private or public. Instead, Pepco would seek to recover costs, net of any available grant monies, in a future base distribution rate case, subject to a prudency review. The monthly bill impact on a typical residential customer using 81 kWh per month was not expected to exceed $0.36 per month, when levelized over 20 years.

The lack of microgrid participant contribution was a main concern of

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the Maryland Commission. Under the cost causation principle, a principle widely used in public utility ratemaking, the concept of "beneficiary pays" requires that rates for service reflect the costs actually caused by the customer who must pay those rates. The Commission found that the proposal was not in the public interest with regard to cost recovery and ratepayer impacts and cost effectiveness. Therefore, the Commission denied the proposal.

CALIFORNIA PUBLIC SERVICE COMMISSION ORDER

The California Public Utilities Commission, on the other hand, is doing all it can to expedite the use of microgrids.[9] The Commission (CPUC) ordered large investor-owned utilities to engage in multiple planning exercises in order to accelerate the deployment of microgrids within their service areas.

Southern California Edison was ordered to submit a series of reports and plans tied to their progress toward adopting new resiliency programs and supporting microgrid deployment. They must report to the CPUC their progress toward establishing pre-approved templates for microgrid interconnection, specify when a virtual inspection may suffice in place of a field inspection, and plan semi-annual public workshops to help residents better understand grid operations. [10]

This CPUC "Decision Adopting Short-Term Actions to Accelerate Microgrid Deployment and Related Resiliency Solutions" adopted solutions to accelerate interconnection of resiliency projects due to the wildfire season. The large investor-owned utilities must: (a) develop and implement standardized pre-approved system designs for interconnection of resiliency projects to deliver energy services during grid outages; (b) develop and implement methods to increase simplicity and transparency of the processes by which the utilities inspect and approve a project; and (c) prioritize interconnection of resiliency projects for key locations, facilities, and/or customers.

The California decision required the large investor-owned utilities to modify their net energy metering tariffs to allow storage devices to charge from the grid during the pre-public safety power shut off window. Also, the utilities were required to modify their net energy metering tariffs to remove storage sizing limits.

The California Commission also emphasized collaborative engagement between large investor-owned utilities and stakeholders.

A part of the Commission's staff proposal was aimed at reducing the amount of time required to interconnect distributed energy resources including microgrids. The purpose was to increase resiliency of electric service during widespread outages while maintaining the safety and reliability of the grid.

ARE MICROGRIDS AN ANSWER TO RELIABILITY ISSUES IN DISASTER-PRONE STATES?

A key question remains as to how to encourage microgrid deployments without shifting costs between ratepayers. If this regulatory consideration can be overcome, does it make sense for disaster-prone states to pursue microgrids as swiftly as possible? In our opinion, it does.

Endnotes

1 Cindy Miller worked as an attorney at the Florida Public Service Commission for 30 years, and now consults for Cindy Miller LLC. Ernie Leaf is a PE electrical engineer for 25 years. He works for Stanley Consultants, an engineering consultant. He is passionate about microgrids and the new era of energy that we are entering.

2 "Utilities Should Consider the Emerging Microgrid Market," Relay Magazine. Florida Municipal Electric Association, Volume 52, Issue 3, Spring 2020.

3 On October 27, 2020, Tampa Electric Company filed a petition for approval at the Florida Public Service Commission of a direct current microgrid pilot program and for a rule variance. The "Block Box Energy System" would provide power to approximately 37 homes. The system interconnects the Block Box at each home into a network of neighborhood Block Boxes, each built by Lennar Homes Inc. as part of a housing development. Each home is also equipped with rooftop photovoltaic solar panels. The solar panels are directly connected to the Block Box and do not serve only that home. Tampa Electric requests that the assets installed for the systems be afforded rate base treatment and that O&M expenses incurred by Tampa Electric be recoverable as base rate revenue requirements.

4 "Microgrids: The Role of Microgrids in the Regulatory Compact." Smart Electric Power Alliance. 2019. https://sepapower.org/resource/microgrids-the-role-of-microgrids-in-the-regulatory-compact/

5 "The Value of Resilience for Distributed Energy Resources: An Overview of Current Analytical Practices." Prepared for The National Association of Regulatory Utility Commissioners by Converge Strategies LLC. April 2019. https://pubs.naruc.org/pub/531AD059-9CC0-BAF6-127B-99BCB5F02198

6 https://microgridknowledge.com/microgrid-tariff-hawaii/

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8 In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc. Public Service Commission of Maryland. Case No. 9361. Order No. 88836. September 17, 2018. https://www.psc.state.md.us/wp- content/uploads/Order-No.-88836-Case-No.-9361-Pepco-Microgrid-Order.pdf

9 The California Legislature enacted legislation in 2018 relating to microgrids. See, e.g., Chapter 4.5 added by Stats. 2018, Ch. 566, Sec. 2. https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC&sectionNum=8372.&highlight=true&keyword=microgrid

10 Decision Adopting Short-term Actions to Accelerate Microgrid Deployment and Related Resiliency Solutions." Order Instituting Rulemaking Regarding Microgrids Pursuant to Senate Bill 1339 and Resiliency Strategies. Rulemaking 19-09-009. June 17, 2020. https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M340/K748/340748922.PDF

Climate Policy Update: The New Federal Administration and Resiliency in Florida

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Climate-related policies and programming are likely going to be a hallmark with the new Biden Administration. But recent announcements from the Florida Governor's Office have also signaled additional programming and funding opportunities related to the State's Office of Resilience should they prevail in the Legislative session and budgetary process. While resilience and climate planning for local governments have become prolific, these new initiatives provide huge opportunities for local governments to gain resources for planning, and for capital improvements to implement projects from those planning efforts.

This article will focus on new directions with regard to resilience, climate change, and sea level rise (SLR) planning. It remains important to acknowledge that this type of planning is not just a coastal issue. Local governments can be impacted by flooding in low areas and changing precipitation patterns as well. While there are new programming and funding opportunities to plan ahead for these impacts, mitigating the root causes of climate change that necessitate adaptation and resiliency planning is also critical.

IT STARTS AT THE TOP

With every administration change, roll outs of high priority items occur quickly, but in the case of federal climate policy, the previous and new initiatives are significant. Goals include clean energy transitions and investments that achieve a "carbon pollution-free power sector by 2035 and puts the United States on an irreversible path to a net-zero economy by 2050."[1] Executive Orders signed in President Joe Biden's initial days in office include the following actions:

- Recognizing climate as a component of U.S. foreign policy and national security;[2]
- Resigning the Paris Climate Agreement and developing the U.S.'s "nationally determined contribution" as a commitment in that agreement (with a financial plan);
- Integrating climate considerations into the work of federal agencies on international and domestic policy;[3]
- Establishing new positions, including a National Climate Advisor[4] and the Special Presidential Envoy for Climate (with a seat on the National Security Council)[5];
- Creating a National Climate Task Force;[6]
- Directing federal procurement of carbon pollution-free electricity and zero emission vehicles as part of the economic recovery / "Build Back Better" initiative;[7] and
- Increasing the resilience of federal facilities and operations to the impacts of climate change and directing relevant agencies to report on ways to expand and improve climate forecast capabilities.[8]

While rejoining the Paris Climate Agreement is one portion of the strategy to join nearly every other country in an effort to keep global warming to less than 2 degrees Celsius above pre-industrial times, this is not the only strategy. The process of rejoining the Paris Agreement is already underway with a letter sent to the United Nations requesting U.S. membership. It will take 30 days for the U.S. to formally reenter the nonbinding global agreement to reduce emissions. Numerous other initiatives are part of the new administration's climate agenda with core programming including environmental justice, greenhouse gas management and reductions[9], scientific transparency, National Environmental Policy Act (NEPA) application with regard to climate impacts, and connecting climate planning to public health. Pauses on oil and gas leasing and pipeline permitting, regulatory freezes, fuel, energy and appliance efficiency standards, renewable energy incentives, and new funding opportunities demonstrate that the Biden Administration sees clean energy and climate resiliency both comprising a centerpiece of its economic development and job creation strategy, much like what occurred with the American Recovery and Reinvestment Act of 2009.[10] Opportunities are likely to increase for local governments and private sector development related to climate and energy issues.

FUNDING DRIVES PLANNING

Local governments have learned one thing with regard to climate and energy planning: where programs are being developed and implemented, it pays to be ready. Whether it is disaster recovery funding, new energy infrastructure, or SLR adaptation projects, when programs open up, being prepared to submit applications and draw down funds yields considerable benefit to cities and counties. A few examples of projects that will likely be eligible for new federal funding are as follows:

- Climate vulnerability assessments;
- Infrastructure project adaptation;
- Renewable energy and clean energy job creation and innovation;
- Flood resiliency for private property owners and critical buildings; and
- Projects to assist the socially vulnerable.

There has never been a better time to start climate vulnerability,

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sustainability, and energy planning. Experience shows having plans and knowing how to leverage funding opportunities provides an early start on securing such funds.

One of the Biden Administration plans creates a new framework that will shape U.S. policy to address climate impacts by allocating about $10 billion to the Federal Emergency Management Agency (FEMA) to proactively address natural disasters related to climate change. Building Resilient Infrastructure and Communities (BRIC) is an existing program within FEMA that supports states, local communities, tribes and territories as they undertake hazard mitigation projects, reducing the risks they face from natural disasters. The Biden Administration's proposal for BRIC will expand the program and redirect billions of dollars towards climate resilience projects. It is likely there will be a matching funds requirement, but it is unclear what the final funding allocation may be and what match may be required.[11]

Through BRIC, any state that has had a major disaster declaration in the seven years prior to the application start date is eligible to apply. A total of $500 million was available in FY2020 in three categories: 1. State/territory allocation: $33.6 million; 2. Tribal set-aside: $20 million; and 3. National competition: $446.4 million. Incorporation of nature-based solutions attracts technical points, as does mitigating risk to one or more community lifelines, such as safety and security, health and medical, energy,

communications, transportation, hazardous material management, and food, water, and shelter. The priorities for BRIC in FY2020 are to incentivize:

- public infrastructure projects;
- projects that mitigate risk to one or more lifelines;
- projects that incorporate nature-based solutions; and
- adoption and enforcement of the latest published editions of building codes.[12]

LINKAGES BETWEEN SEA LEVEL RISE AND THE COMMUNITY RATING SYSTEM

FEMA's Community Rating System (CRS) is a program that provides lowered National Flood Insurance Program (NFIP) premiums for meeting certain floodplain management activities. There are 19 creditable activities, organized under four categories including (1) public information, (2) mapping and regulations, (3) flood damage reduction, and (4) warning and response. The *Coordinator's Manual* spells out the credits and credit criteria for community activities and programs that go above and beyond the minimum requirements for participation in the NFIP. The lower the score the larger the discounts for NFIP premiums in a community. SLR analysis is incorporated into several activities in the NFIP *Community Rating System Coordinator's Manual* (2017). An Addendum to the 2017 CRS Coordinator's Manual[13] was released at the beginning of 2021. The CRS incorporates the consideration of SLR into a number of elements, including:

- Credit for higher study standards under Activity 410 (Flood Hazard Mapping);
- Credit for coastal erosion open space under Activity 420 (Open Space Preservation);
- Credit for Coastal A Zones under Activity 430 (Higher Regulatory Standards); and
- Credit for a watershed master plan (WMP) under Activity 450 (Stormwater Management). Including SLR in WMP is required for coastal communities to meet the Class 4 prerequisite, and future-conditions hydrology is a Class 1 prerequisite.

Recognizing that there is uncertainty inherent in estimating future sea levels, and the accuracy of the models continues to improve, CRS has adopted a "best available data" baseline for crediting community efforts to address SLR. In alignment with 13 federal agencies, CRS defers to the Congressionally-mandated National Climate Assessments produced by the U.S. Global Change Research Program to determine a SLR baseline.[14]

A local government can be strategic in its climate planning efforts and potentially develop a data, evaluation and policy approach that not only informs future decision-making, but also delivers reduced premium rates to residents and business owners. While many Florida communities participate in CRS, very few have combined these efforts in a way to effectively achieve enhanced class rating utilizing SLR planning strategies. In Florida, this is a very overlooked benefit of vulnerability planning.

CLIMATE RESPONSE: TORTS AND TAKINGS

Some local governments may initiate planning activities because there is political or financial support to do so, or because the impacts of SLR are already felt through flooded streets or overwhelmed stormwater infrastructure. Residents and business owners may be thrilled the local government is taking steps to plan and respond, others not so much. Some people may want to compel local government response, while others may want to curtail it due to perceived adverse impacts to property values.

One inquiry for local governments when undertaking climate and resiliency response is whether a private property owner has a claim for a tort or inverse condemnation when a private property is impacted by SLR or the local government fails to respond. Torts and takings are parallel yet separate inquiries, and courts distinguish between which of the two treatments is appropriate based upon a review of the facts of each case.[15]

In order for a local government to be held liable in tort, a court must first determine whether the local government owed a plaintiff a common law duty of care.[16] In the case of SLR and tidal flooding, local governments are primarily responsible for the design, construction, and maintenance of stormwater and roadway infrastructure within their control.[17] This is important, because in coastal local governments, this is usually where the first visible signs of SLR become evident. Florida courts have held that maintaining a road means doing so "as it exists."[18] A local government does not have a duty to upgrade roadways to prevent obsolescence, even if newer designs or features would make the road safer.[19] If a local government does not undertake "upgrades"[20] that

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would make a road better able to withstand SLR, it has not breached its duty to repair under Florida law. Local governments are protected from tort liability if they determine they cannot afford "upgrades" because these are planning decisions squarely within the purview of local government discretion.[21] Such a policy is precisely the example of legislative behavior protected by sovereign immunity.

But does a local government have to adapt to climate change and SLR? What if it does not upgrade or modify infrastructure to address those impacts? The decision in the *Neilson* case explicitly provides that failure to upgrade an existing road or intersection is a planning-level decision to which immunity attaches.[22] Such activities are basic capital improvements and are judgmental, planning-level functions. "We also hold that the decision to build or change a road, and all the determinations inherent in such a decision, are of the judgmental, planning-level type. To hold otherwise… would supplant the wisdom of the judicial branch for that of the governmental entities whose job it is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of powers doctrine."[23]

Takings cases may arise in the context of climate adaptation primarily related to situations where either the local government undertakes a project to address climate change or the local government is not taking action to respond - both of which lead to perceived impacts of a property owner's use of his or her property. As more and more climate response actions are undertaken (or local governments are alleged to not have acted to address the impacts), it is likely that this will be a growing area of law. A taking does not necessarily have to exclude the property owner to be compensable,[24] and the occupation does not have to be continuous.[25] The takings jurisprudence related to generalized flooding issues demonstrates that unless a substantial act on the part of the local government caused such flooding, there will not be a finding of a taking.

Torts and takings may be used as theories to either challenge local government conduct or compel it. Torts and takings can also explore whether government inaction can rise to the level of a cause of action. In the climate adaptation response context, these theories can be used in numerous instances, including:

1. Compelling a climate adaptation or SLR response (project implementation) from local government; and

2. Challenging a local government adaptation response to climate change or SLR that is objectionable to a stakeholder.

Courts use a two-part test to decide whether an injury is caused by a taking or a tort, with a takings determination reflecting a more significant government action than one which could compel a tort.[26] First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."[27] Second, the nature and magnitude of government action is considered. Even where the effects of a government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.[28] SLR or tidal flooding is not always evidenced by a substantial act on the part of the local government because the impacts may occur in areas the government is unaware of it, or it is not necessarily the operation of infrastructure that results in the flooding.

LEVELS OF SERVICE FOR INFRASTRUCTURE

Across the country, states and cities use "Level of Service" (LOS) provisions to manage expectations for infrastructure delivery. LOS programs typically set thresholds for tolerated impacts and use those benchmarks to prioritize service or funding. What is clear as we consider SLR, tidal flooding impacts and climate change, is that local governments may not be able to offer the same levels of service for infrastructure as in the past. It just may not be physically possible due to low land elevations or already strained environmental conditions.

Climate-induced flooding and differing levels of service are similar to what one might expect in jurisdictions with winter climates and snow plowing for road access. LOS programs in other jurisdictions across the country can provide guidance and context for Florida's local governments as they contemplate adapting this concept to the navigability of roads and managing expectations around flooding. Alaska, for example, experiences heavy snowstorms throughout the year. The state has a system that classifies roads in five levels of priority, expecting road closures for shorter or longer periods of time. Priority 1 roads, the roads with the highest priority, may stay closed for up to 12 hours after a winter storm. Whereas, Priority 5 roads, the roads with the lowest priority, may stay closed for months, as they are cleared only at the end of the winter season in preparation for the summer months.[29]

Several Arizona jurisdictions are also illustrative. Apache County

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divides its roads into four levels of priority (A-D, with A being the highest priority and D being the lowest). Apache County expressly states that in cases of heavy snow, Priority D roads will not be plowed until Priority A, B, and C roads are plowed.[30] The City of Flagstaff has two levels of priority and sets time frames and the amount of snowfall required to trigger plowing operations. In particular, if the amount of snowfall received is less than 4 inches (or 3 during the winter) the city will only clear first priority roads. If the amount of snowfall received is more than 4 (or 3) inches, plowing operations are initiated and, depending on the actual amount of snowfall received, the time frame in which the city will clear second priority roads goes from 12 to 36 hours.[31] Lastly, the Town of Pinetop Lakeside follows the same strategy set by the City of Flagstaff, but, on its website, the town further disclaims that, in challenging situations, first priority roads may stay closed for up to 12 hours.[32] Whether it is through priorities, classifications such as arterial and secondary, or other mechanisms, most jurisdictions that experience snow have a policy in place to address plowing that provides different levels of service to different areas. What is consistent across all of these local systems is the existence of a publicly-communicated policy available to property owners.

AT THE STATE LEVEL

To date, the State of Florida's Office of Resilience within the Florida Department of Environmental Protection (DEP) has led the state's resilience granting efforts for coastal communities. Multiple grant programs, including Resilience Planning and Implementation Grants, have helped launch many local government resilience planning efforts. Three cycles of funding have been awarded so far and a fourth cycle of applications is currently under review. A focus of these programs has been to fund initial vulnerability assessments, but another goal is for local governments to either comply with requirements for Comprehensive Plans (known as Peril of Flood) or use a voluntary tool to establish Adaptation Action Areas. Both concepts are discussed below.

SEA LEVEL IMPACT PROJECTION (SLIP) STUDIES

The DEP Office of Resilience is also leading the rulemaking[33] effort to implement SB 178 or Section 161.551, F.S. which requires a sea level impact projection (SLIP) study for entities implementing construction projects with state financing over the expected life of the project or 50 years, whichever is less. The study must be noticed on DEP's website for at least 30 days and remedies for not completing the study could include injunctive relief or financial recovery of the state funds. The projects that must meet this requirement include: (1) "major structures"[34] (meaning houses, mobile homes, apartment buildings, condominiums, motels, hotels, restaurants, towers, other types of residential, commercial, or public buildings, and other construction having the potential for substantial impact on coastal zones); (2) "nonhabitable major structures"[35] (meaning swimming pools, parking garages, pipelines, piers, canals, lakes, ditches, drainage structures, and other water retention structures); and (3) water and sewage treatment plants, electrical power plants, and all related structures or facilities, transmission lines, distribution lines, transformer pads, vaults, and substations, roads, bridges, streets, and highways, and underground storage tanks. Given the amount and types of projects covered by the rule, and the fact that many local governments will seek some state assistance in funding adaptation projects likely covered by the rule, it is important to engage in the rulemaking process. Final adoption is slated for this summer with the rule being effective one year from adoption.

STORMWATER RULEMAKING

The Clean Waterways Act was signed into law on June 30, 2020.[36] Section 5 of the Clean Waterways Act directs DEP to initiate rulemaking by January 1, 2021 to strengthen the water quality provisions of the ERP rules for stormwater design and operation regulations (ERP Stormwater). Language in the Clean Waterways Act, now incorporated as Section 373.4131(6)(a), F.S. provides that as part of its rule development, DEP shall "consider and address low-impact design best management practices and design criteria that increase the removal of nutrients from stormwater discharges, and measures for consistent application of the net improvement performance standard to ensure significant reductions of any pollutant loadings into a waterbody." DEP and the state's five water management districts have convened a Technical Advisory Committee to inform the rulemaking process, and that committee has had two public meetings. Rulemaking workshops and a draft rule are forthcoming, but several local governments have already submitted public comments.

USING ADAPTATION ACTION AREAS AS A TOOL

"Adaptation Action Areas"[37] (AAAs) are a voluntary comprehensive plan future land use designation for local governments to address areas for which (a) the land elevations are below, at, or near mean higher high water; (b) areas with a hydrologic connection to coastal waters; (c) areas that are designated as evacuation zones for storm surge; and (c) other areas impacted by stormwater and flood control issues.[38] Local governments utilize this tool to create goals, objectives and policies in the Coastal Element of their comprehensive plans and potentially also adopt maps of these vulnerable areas into the comprehensive plan.

Several local governments have already identified AAAs ranging from specific stormwater projects,[39] to inlet management,[40] or natural resource protections.[41] Policies for planning within the AAAs can include: utilization of best available data and resources, regional collaboration, vulnerability of at-risk geographic areas,[42] public infrastructure and investments, and assets that could be impacted by rising sea levels. Some local governments that are not required to complete a Coastal Management Element of their comprehensive plans have even utilized the AAA concept. AAAs are a tool that local governments can utilize to prioritize funding adaptation projects or to focus planning efforts in a certain location.

THE COMPREHENSIVE PLAN TO GUIDE POLICY

Section 163.3178, F.S. requires local governments that must develop a

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coastal management element of their comprehensive plan to include a "redevelopment component that outlines the principles that must be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise"[43] known also as "Peril of Flood" amendments. Unlike AAAs, this is a mandatory requirement for local governments updating their comprehensive plans to address new statutory requirements since their last update. The following requirements must be addressed pursuant to the statute:

1. Development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas that result from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of SLR;
2. Encouraging the use of best practices in development and redevelopment principles, strategies, and engineering solutions that will result in the removal of coastal real property from flood zone designations established by the Federal Emergency Management Agency (FEMA);
3. Identifying site development techniques and best practices that may reduce losses due to flooding and claims made under flood insurance policies issued in Florida;
4. Being consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and applicable floodplain management regulations set forth in 44 C.F.R. part 60;
5. Requiring construction activities seaward of the coastal construction control lines established pursuant to Section 161.053, F.S. be consistent with Chapter 161, F.S.; and
6. Encouraging local governments to participate in the CRS program to achieve flood insurance premium discounts for their residents.

Two key issues are important about the "Peril of Flood" requirements. First, they only apply to local governments that must have a coastal management element. Second, they can be considered a minimum in terms of a local government tool to address climate change and SLR. While several local governments have come into compliance with these requirements through updates to their coastal management elements, others have taken a broad approach incorporating these issues into multiple comprehensive plan elements. This may include incorporating climate or SLR issues into infrastructure, public facilities[44], future land use[45] or conservation elements.[46] Some local governments have even developed stand-alone optional elements dedicated to climate[47] and adaptation policies.

Addressing climate mitigation strategies related to energy (such as Alachua County's Energy Element)[48] or greenhouse gas (GHG) emissions, as a component of climate change (such as Monroe County), is another approach. "Expansion" of broader environmental initiatives to include climate change, adaptation, and GHG management is also a strategy.[49] A result of compelling coastal local governments to address these issues in comprehensive plans is that it starts a broader conversation within the local government as to how it will approach climate issues overall.

SEAWALL ORDINANCES AND FLOODING DISCLOSURES

There are several examples of seawall height and maintenance requirements becoming a resiliency tool. For example, in 2018, the Broward County Commission approved the initiation of a land use plan amendment to establish a seawall and top-of-bank elevation for tidally-influenced waterways, in accordance with SLR predicted through 2070. The regional resilience standard includes requiring a minimum elevation of 4 feet NAVD88 by 2035, and 5 feet NAVD88 by 2050 for seawalls and shorelines.[50] On August 22, 2019, following a public hearing, the Broward County Planning Council recommended approval of a text amendment to the Broward County Land Use Plan Policies. Adopted by the Broward County Board of Commissioners on January 7th, 2020, as a part of the land use plan, Policy 2.21.7 applies to all tidally-influenced properties within the county.

Tidally-influenced municipalities in Broward must adopt the standard within 24-months of the effective date (by February 13, 2022) for regionally consistent top elevations for seawalls, banks and berms, and other appurtenant infrastructure (e.g., boat ramps) consistent with the findings and recommendations of the United States Army Corps of Engineers/Broward County Flood Risk Management Study for Tidally Influenced Coastal Areas. These standards must be consistent with Chapter 39, Article XXV – Resiliency Standards for Flood Protection - of the Broward County Code of Ordinances, which serves as a model ordinance.

The City of Ft. Lauderdale has also modified its Unified Land Development Regulations (ULDR) (City of Fort Lauderdale Section 47-19.3 Boat Slips, Docks, Boat Davits, Hoists, and Similar Mooring Structures) with a minimum of 3.9' NAVD and a maximum seawall elevation based on the elevation of the property in the context of the property's Base Flood Elevation (BFE). These maximum elevations were used to ensure that new seawalls are lower than the finished flood elevation and will not result in flooding into the home. The standards are:

1. Property in a floodplain where BFE is greater than 5' NAVD, the maximum seawall or dock elevation is the BFE of the property;
2. Property in a floodplain where the BFE is equal to 4' NAVD, the maximum seawall or dock elevation is 5' NAVD; and
3. In an X zone, not in a floodplain, the maximum seawall or dock elevation must meet the definition of grade.

The City of Miami Beach recently approved an ordinance to require the raising of seawall heights in certain situations. The city now requires that new private and public seawalls be constructed to a minimum elevation of 5.7 feet NAVD (from 3.2 feet previously). Existing seawalls that are not being repaired or replaced are permitted to remain so long as they meet the minimum 4.0 feet NAVD with the structural design to accommodate

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extension to 5.7 feet NAVD in the future. This new height is informed by SLR projections, design storm events, and coincides with the typical lifespan of a seawall.

Some local governments are also considering tightening up real estate disclosures about flood risk. Obligations of realtors vary across states based on state law or other influences. It is important to look beyond the standard real estate contract to understand disclosures related to flooding, which are not necessarily limited to situations where a flood insurance claim has been filed. Because of the different types of flooding events, their duration, causes and exhibited characteristics, there may be different types of flood information that can or should be disclosed. This is more confusing if the flooding is on a road and not on the property itself. Because knowledge is more widespread about these flooding issues, there may be a benefit to disclosing more information about known flooding conditions.

In a Florida case, *Johnson vs. Davis*, the Florida Supreme Court ruled "where the seller of a home knows the facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer".[51] It is unclear how much road flooding that limits access to a property affects its value or if such a disclosure standard would apply only to flooding on the actual property. The cause or origin of the flood as well as whether or not there was damage are not specified.

Can there be local flood disclosure requirements? Yes. Leon County, which is not a coastal jurisdiction, has a local ordinance specifically on flood-related disclosures (Leon County Code of Laws, Section 12-8(b)). It states that a seller cannot knowingly fail to disclose facts when a property has experienced flooding or is flood-prone when such flood conditions are not readily observable and are not known to the buyer. That failure to disclose creates a rebuttable presumption that the seller has failed to disclose facts that materially affect the property's value and which entitle the purchaser to seek recovery from the seller. While the legal standard in the case law is broader, the local ordinance specifically requires flood-related facts to be disclosed.

Finally, other resiliency-based zoning strategies are becoming more visible, and include many different aspects of land use or design criteria. Some communities have adopted "project specific" resilience elements such as with the Gentilly Resilience District in New Orleans, Louisiana or the Meadowlands Resilient District in New Jersey. Others have taken steps to adopt overlays or more formalized zoning requirements that address resiliency such as Norfolk, VA (combining overlays and a point-based resiliency quotient) or South Kingstown, RI (overlays and design criteria). This concept more narrowly focuses on enhancing resiliency through zoning-based outcomes, much like green building codes previously did.

ADAPTATION AND RESILIENCY FUNDING STRATEGIES FOR LOCAL GOVERNMENTS.

Funding for resiliency will be a "multi-layered" approach of traditional and new sources of revenue. Disaster recovery funding that encourages resiliency and planning for future conditions, including climate adaptation, are available and too numerous to summarize here. Communities are also employing general obligation or revenue bonding, user fees, other grants, State Revolving Loan Funds and incentive-based funding strategies to achieve resilience outcomes.

Assessments are being increasingly investigated as a financing tool, because in some instances, they allow a proportionate rate to be charged for the benefit accrued. This flexibility can address issues such as localized differences in LOS. Assessments can already be used for neighborhood improvements[52] and business improvement districts. Municipal Service Benefit Units (MSBUs) are a non-ad valorem assessment established to provide for funding for improvements also in a specific geographic area. An MSBU is a group of properties that share in the cost and benefit of that improvement. MSBUs provide a process by which communities may secure quality construction and installation of essential improvements as well as a financing mechanism to pay for the improvements. Tax increment financing can be another tool especially in the redevelopment context. Tax-increment financing allows collection of property tax revenue based on increases in property values that result from a particular enhancement or improvement. Resilience projects that will increase a property's value are a good opportunity for tax-increment financing.

Impact fees are widely used by local governments as a tool to help reduce the economic burden of the infrastructure costs that new developments incur due to the expansion of the public service network. Generally, impact fees are assessed to generate revenue to meet local infrastructure and public facility demands arising as the result of new development. But impact fees, in some instances, can also be used to incorporate resiliency-related attributes into such projects. Examples include stormwater system upgrades, flood control improvements, road elevation, green infrastructure, or open space features that have resiliency co-benefits.

Finally, individual property owners can also utilize financing strategies to incorporate resilient elements into their homes or businesses. Mortgage-related products such as Fannie Mae's HomeStyle Energy Mortgage fund flood, fire and seismic improvements.[53] Property Assessed Clean Energy (PACE) loans can currently fund energy efficiency, renewable energy and wind resistance improvements and can be used as a financing tool for both residential and commercial property owners to fund these types of qualifying improvements.[54] PACE typically allows financing for such improvements to be repaid on the property owner's tax bill. But other states have added resilient features allowing PACE to be utilized to achieve broader resiliency goals such as water conservation, flood mitigation or tornado resiliency in Alabama.[55] HB 387 has been proposed in the 2021 Legislative Session to update PACE consumer protections, as well as to add flood mitigation, resiliency, and septic to sewer conversions, all providing some level of resiliency benefit.[56] Particularly relevant in Florida, the flood mitigation improvements include, but are not limited to:

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CLIMATE POLICY UPDATE:
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1. The raising of a structure above the base flood elevation to eliminate flood damage;
2. Installation of a flood diversion apparatus;
3. Electrical, mechanical, plumbing, or other system improvements that reduce flood damage; and
4. Improvements to mitigate or eliminate the potential for microbial growth, or reduce flood insurance premiums.

Conclusion

The timing is ideal for launching or expanding a resilience planning effort at the local government level. Grant funding is likely to continue and expand at the state and federal levels with political support to begin to address climate-induced flooding from either SLR or new precipitation patterns from a changing climate. So, while there is momentum to enhance resiliency planning efforts, the future of energy policy as a mitigation strategy to combat the worst effects of climate change is less certain.

That said, while new initiatives are being unveiled quickly and all the details are not yet known, it is clear that new funding and other opportunities (such as agency collaborations and new data or tools) will be available to local governments to further their resiliency planning objectives. Local governments are going to need plans and partners as they begin to understand what the cost of climate adaptation will look like. And now is the time to get started if progress to date has been slow. Knowing where vulnerabilities exist, developing "shovel ready" projects and evaluating how a community can become more energy efficient and resilient are all probably valuable ways to advance or start the planning process. As Rahul Ghandi once said, "A rising tide doesn't raise people who don't have a boat. We have to build the boat for them. We have to give them the basic infrastructure to rise with the tide." And with some planning and commitment, we can start building those boats, because we are going to need them.

continued...

Endnotes

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2 Presidential Executive Order on Tackling the Climate Crisis at Home and Abroad, January 27, 2021.
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6 Section 203, Presidential Executive Order on Tackling the Climate Crisis at Home and Abroad, January 27, 2021.

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13 National Flood Insurance Program Community Rating System, Addendum to the 2017 CRS Coordinator's Manual (Edition: 2021), https://www.fema.gov/sites/default/files/documents/fema_community-rating-system_coordinator-manual_addendum-2021.pdf

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15 *Ridge Line, Inc.* v. *United States*, 346 F.3d 1346, 1355-1356 (US District Court 2003).

16 *Wallace v. Dean*, 3 So.3d 1035, 1046 (Fla. 2009).

17 *See, e.g.*, Fla. Stat. § 336.02(1)(a) (2019), providing that county commissioners are responsible for the county road system, and that commissioners are invested with the general superintendence and control of county roads and structures such that they may establish new roads, change and discontinue old roads, and keep the roads in good repair. They are responsible for establishing the width and grade of such roads and structures in their respective counties.

18 Fla. Dept. of Transp. v. Neilson, 419 So. 2d 1071, 1078 (Fla. 1982).

19 *Id.*

20 *Id.* at 1073.

21 See *Id.* at 1078 (finding that the allegations in the complaint concerned upgrading the intersection, which the county had no affirmative duty to do).

22 *Id.* at 1073.

23 *Id.* at 1077.

24 *See, e.g., Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-438, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (holding that a compulsory installation of cables on apartment buildings pursuant to a state statute constituted a taking).

25 See *Ridge Line, Inc.* v. *United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003).

26 *Id.* at 1355-1356.

27 *Columbia Basin Orchard* v. *United States*, 132 Ct. Cl. 445, 132 F. Supp. 707, 709 (Ct. Cl. 1955) (holding that a loss of fruit trees resulting from spring contamination from the government's discharge of water into a nearby lake and unprecedented rainfall was compensable as a tort, not a taking); Owen v. United States, 851 F.2d 1404, 1418 (Fed. Cir. 1988) (en banc) (remanding for a determination of whether the claimant's property loss flowed from an "intention to do an act the natural consequence of which was to take [the] property" or "was such an indirect consequence [of the government's action] as not to be a compensable taking").

28 *Ridge Line* at 1356-57 (internal quotations omitted).

29 *See, The Great State of Alaska, Winter Road Maintenance Priority Map*, http://dot.alaska.gov/stwdmno/wintermap/

30 *See*, Apache County State of Arizona, https://www.co.apache.az.us/wp-content/uploads/2015/10/Engineering-Policy.pdf.

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34 § 161.54(6)(a), Fla. Stat.

35 § 161.54(6)(c), Fla. Stat.

36 *See* Fla. Stat. §373.4131(6) as modified by Section 5 of Chapter 2020-150, Laws of Florida.

37 "…a designation in the coastal management element of a local government's comprehensive plan which identifies one or more areas that experience coastal flooding due to extreme high tides and storm surge, and that are vulnerable to the related impacts of rising sea levels for the purposes of prioritizing funding for infrastructure needs and adaptation planning." See Fla. Stat. Ann. § 163.3164(1), F.S. (2017).

38 *See* Fla. Stat. Ann. § 163.3177(6)(g)10, F.S. (2017).

39 *See* City of Ft. Lauderdale, Comprehensive Plan, https://www.fortlauderdale.gov/home/showdocument?id=882.

40 Broward County, Priority Planning Areas 2015, (Adopted December 8, 2015), http://www.broward.org/PlanningCouncil/Documents/PriorityPlanningAreas.pdf, and updated December 2020, https://broward.legistar.com/LegislationDetail.aspx?ID=4681569&GUID=4C4760E8-2E8A-4020-ACF1-5FE5618E22AE&Options=&Search=.

41 Town of Yankeetown, Comprehensive Plan, Chapter 5 – Conservation and Coastal Management Element, amended April 25, 2016.

42 City of Satellite Beach, Comprehensive Plan, *Coastal Management / Conservation Element*, amended May 4, 2016.

43 *See* Fla. Stat. Ann. § 163.3178(2)(f), F.S. (2017).

44 City of Delray Beach, Comprehensive Plan, *Public Facilities and Services Element*, amended February 25, 2020.

45 City of Punta Gorda, Comprehensive Plan, *Future Land Use Element*, amended April 5, 2017.

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47 Monroe County, Comprehensive Plan, *Energy and Climate Element*, amended August 30, 2019.

48 Alachua County, Comprehensive Plan 2011-2030, *Energy Element*, effective July 22, 2011.

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51 *Johnson v. Davis*, 480 So.2d 625, 629 (Fla.1985).

52 § 163.511, Fla. Stat.

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55 Ala. Code 2016, § 11-81.

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Environmental Case Law Update

by Gary Hunter, Hopping Green & Sams

***Riverside Heights Development, LLC v. City of Tampa and Ulele, Inc.*, 46 Fla. L. Weekly D 35 (Fla. 2d DCA 2020)**

The Appellant, Riverside Heights Development ("Riverside"), appealed the 13th Circuit Court's denial of declaratory relief after the trial court held that the notice requirements for the disposal of real property under section 163.380(3)(a) of the *Florida Statutes* only apply to real property acquired for community development purposes. The trial court concluded that since the property at issue was acquired prior to the creation of the City's Community Redevelopment Agency (CRA), the property was acquired for purposes other than community redevelopment.

In 1923, the City of Tampa acquired the Water Works Building and Cable Office. These two adjacent buildings are now located in the City's CRA, which was created in 1999. On September 13, 2011, the City issued a Request for Proposals (RFP) for the acquisition and redevelopment of the Water Works Building, but the RFP did not include the Cable Office.

Thereafter, the City and a developer (Ulele) entered into a lease agreement for the purpose of redeveloping the Water Works Building and operating a restaurant inside the building. Even though the RFP did not include the Cable Office, the two parties also included an option to purchase the Cable Office in the lease agreement. This option was based on whether Ulele will propose a use for the Cable Office. If Ulele proposed a use, the City would amend the lease agreement to include the Cable Office.

Riverside sought declaratory judgement arguing that due to the City's failure to provide public notice of its intent to dispose of the Cable Office, it was denied an opportunity to submit a proposal for the Cable Office pursuant to section 163.380(3)(a) of the *Florida Statutes*. Thus, Riverside argued, the option to purchase the Cable Office should be void. The City raised an affirmative defense, stating that the City was not obligated to comply with the notice requirements under section 163.380(3)(a) of the *Florida Statutes* because the City acquired the Cable Office prior to the creation of the CRA in 1999.

The Second Circuit held that the plain language of the statute requires the City to provide notice and solicit proposals before transferring *any* property located in the CRA. The unqualified title of the statute ("Disposal of property in a community development area"), the explicit narrow standard explained in subsection 163.380(1) of the *Florida Statutes*, and the deliberate wider language used in subsection 3 ("any" property "in a CRA") suggests that the Legislature intended for a literal meaning of "any" real property in subsection 3. Therefore, even though the City acquired the Cable Office prior to the creation of the CRA in 1999, the City is obligated to comply with the notice requirements for the disposal of any real property located in a CRA pursuant to section 163.380(3)(a) of the *Florida Statutes*.

***Indian River Cty. v. Ocean Concrete, Inc. and George Miab*, 2020 WL 6937854 (Fla. 4th DCA 2020)**

The Appellant, Indian River County Board of County Commissioners ("County"), appealed the trial court's entry of a final judgment in favor of George Maib ("Landowner"), stemming from a jury trial under the Bert Harris Act. The County initially prevailed at the trial court, but a reversal and remand by the Fourth DCA led to a favorable outcome for the landowner in the second trial. The County is appealing the trial court's decision regarding experts and testimony from the second trial.

The Landowner purchased approximately 8.5 acres of real estate in Indian River County, intending to build a concrete batch plant. After the landowner took steps to improve the land to build the concrete batch plant, the County amended the zoning regulations to exclude concrete batch plants as an allowable use. Due to the loss of his ability to construct the concrete batch plant, the landowner sued under the Bert Harris Act, seeking compensation pursuant to section 70.001(4)(a) of the *Florida Statutes*.

The County is primarily appealing (1) the trial court's decision to exclude the County's economist and appraiser and (2) the allowance of the testimony from the Landowner with regard to the Landowner's property value. With respect to the exclusion of the

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County's economist and appraiser, the County argued that the trial court misinterpreted the "as though the owner had the ability to attain the reasonable investment-backed expectation" language as an instruction on *how* to value the property, not *when* to value the property. Because of this, the County argued that the language required the jury to determine the property's fair market value when the Landowner had the ability to use the property for its intended use (concrete batch plant), rather than, as the trial court ruled, an instruction that the property must be valued with the landowner's intended use as a concrete batch plant as the highest and best use. Since the County argues that the concrete batch plant is not the property's highest and best use before it was inordinately burdened, there was no diminution of value. The Fourth DCA held that since the County's economist and appraiser sought to value the property as something other than a concrete batch plant to demonstrate that this use was not the property's highest and best use, the trial court properly excluded this testimony pursuant to the Bert Harris Act.

Second, the County argued the Landowner's testimony regarding the value of the property should have been disallowed by the trial court. The County argued that since the Bert Harris Act only explicitly requires a property owner to submit a valid appraisal in support of the claim demonstrating the loss in fair market value, the landowner is forbidden from testifying as to this appraisal. The Fourth DCA held that the County's position is ridiculous, as the County's position conflicts with the entire purpose of the Bert Harris Act. The Fourth DCA noted that there is nothing in the Bert Harris Act that precludes or overrides existing legal precedent which allows a landowner to testify to personal knowledge of the property. The Landowner also demonstrated familiarity with and knowledge of the property that qualified him to testify as to the property's value, and the county cross-examined him. Thus, the trial court did not abuse its discretion.

***Persaud Properties FL Investments, LLC v. Town of Fort Myers Beach*, 2020 WL 7310765 (Fla. 2d DCA 2020)**

The Appellant, Persaud Properties FL Investments, LLC ("landowner"), appealed a denial of declaratory relief after the 20th Circuit Court entered a judgment that the Town of Fort Myers Beach ("Town") had properly determined that the landowner abandoned the nonconforming use (permitting alcohol sales) of the property. The landowner's appeal focused on whether the trial court properly determined the landowner abandoned the nonconforming use pursuant to the Town's building code.

The landowner's property is located in two zoning districts. Both districts permitted the sale and consumption of alcohol prior to 1995. Then, the Town adopted an ordinance which prohibited the sale and consumption of alcohol in one of the districts on which the landowner's property sits. By virtue of its ability to sell and consume alcohol in one of the districts, the property had been a valid nonconforming use under the Town's ordinances. The landowner closed the property in October 2014 for extensive renovations, of which the Town was aware. Upon completion of the renovations in October 2015, the landowner sought the necessary approval to reopen and to sell alcohol on its premises, including in the district that prohibits the sale and consumption of alcohol. However, due to a 2019 determination by the town that the landowner had abandoned the nonconforming use of the property, the property lost its grandfathered nonconforming use status and was thus required to comply with the alcohol sale and consumption prohibition.

The landowner argued the Town's land development code, which states that "nonconforming uses may continue until there is an abandonment of the permitted location for a continuous nine-month period," and defines abandonment as a "failure to use the location for consumption on the premises purposes as authorized by the special exemption," requires an intent to have abandoned the nonconforming use. The Fourth DCA agreed, citing extensive legal precedent. The Fourth DCA noted that abandonment of a nonconforming use requires more than the passage of nine months while the property was closed for renovations. Abandonment requires voluntary cessation of the nonconforming use, with the intent that the cessation of such use be permanent. Thus, the Fourth DCA reversed and remanded for entry of a judgment in favor of the landowner.

***Jacqueline Lane v. International Paper Company and Department of Environmental Protection*, 2020 WL 7624587 (Fla. Div. Admin. Hrgs. 2020)**

The Petitioner filed a challenge to a Consent Order entered between International Paper Company ("IPC") and the Department of Environmental Protection. The Consent Order required IPC undertake a series of studies to establish the cause of 19 documented occasions from 2015 to 2020 in which IPC failed to meet its wastewater treatment plant permit limits for chronic whole effluent toxicity for the *Ceriodaphnia dubia* species. The Petitioner alleged that the Consent Order did not go far enough to address what Petitioner believes to be potential causes of toxicity related to IPC's mill.

IPC has a National Pollutant Discharge Elimination System permit for its wastewater treatment plant which requires monitoring, reporting, and compliance for approximately 70 parameters. Thus, pursuant to this permit IPC discovered that split compliance samples of its effluent were resulting in different results in chronic whole effluent toxicity. To address this, the Consent Order required the implementation of a Salt Ion Composition Work Plan to evaluate whether the salt ion composition of IPC's mill effluent is causing or contributing to violations. If this plan proved to be inconclusive, then the contribution of reclaimed water from the Emerald Coast Utility Authority (from which IPC receives up to 20% of IPC's total process input water) is to be evaluated. If both the salt ion plan and the study from Emerald Coast Utility Authority fail to identify the cause of the chronic toxicity failure, the Consent Order mandated that IPC must implement a Toxicity Identification Plan, by which specific constituents of the mill effluent are to be removed one-by-one with an

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assessment of each on *Ceriodaphnia dubia*.

In its final order, DOAH states that even if Petitioner's concerns have merit, the Consent Order addressing all existing or potential violations at the mill is not subject to review. The appropriate standard of review is whether DEP abused its enforcement discretion in agreeing to the Consent Order. DOAH notes that even if a better settlement could have been reached, the petitioner's challenge only has legal merit if DEP cannot show that the Consent Order was reasonable given the circumstances.

DOAH held that DEP demonstrated that the sequential investigative measurers required by the Consent Order were indeed reasonable under the circumstances. However, DOAH noted that the petitioner may have a remedy under the citizen suit provisions in section 403.412(2) of the *Florida Statutes*, which authorizes any citizen to maintain an action for injunctive relief for a violation of the state's environmental laws.

***MW Horticulture Recycling Facility, Inc. v. Department of Environmental Protection*, 2020 WL 5665302 (Fla. Div. Admin. Hrgs. 2020)**

The Petitioner, MW Horticulture Recycling Facility ("MW"), filed a challenge to the Department of Environmental Protection's finding that (1) MW is an irresponsible applicant and (2) MW was not entitled to registration renewals related to MW's Yard Trash Transfer Station or Solid Waste Organics Recycling Facility due to continual non-compliance with orders for corrective action in a Consent Order between MW and DEP. The non-compliance included unauthorized open burning, unauthorized mechanical compaction of processed and unprocessed material, yard trash received being stored or disposed within 50 feet of a body of water, and yard trash received not being size-reduced or removed, as most of the yard trash has been on site for at least six months.

MW did not deny the violations. Rather MW justified the violations as resulting from the catastrophic damage perpetrated on Lee County from Hurricane Irma. The petitioners argued that because Hurricane Irma caused such extensive damage to Southwest Florida, a massive amount of debris accumulated in Lee County, where MW is located. The debris stacked up and had to be managed over time at different facilities, including MW's facility. The massive increase in debris overwhelmed MW's system, which forced MW into non-compliance.

DOAH held that DEP presented enough evidence to establish the non-compliance justified denial of a Yard Trash Transfer Station and Solid Waste Organics Recycling Facility registration. However, DOAH found that due to the impacts of Hurricane Irma with the massive increase in debris that had to be managed, MW could not have reasonably prevented the violations. Thus, the totality of the facts and circumstances do not justify labeling MW as irresponsible applicants.

Spring 2021 Update from the Florida State University College of Law

by Erin Ryan, Associate Dean for Environmental Programs

This column highlights the activities and events of the **FSU Environmental Law Certificate Program**.

Student Activities for Spring 2021

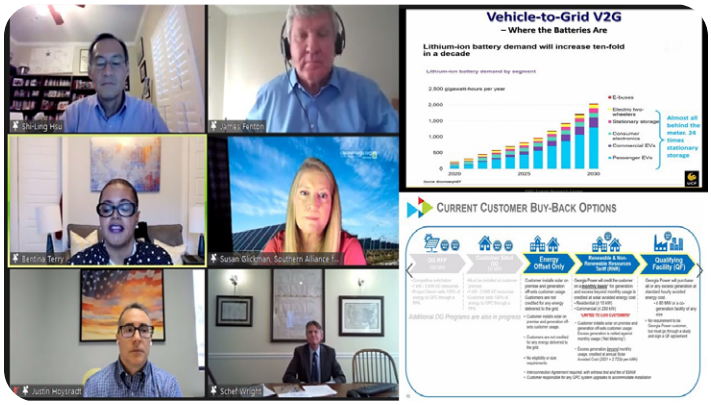
- The following students will be participating in environmental law externships this spring
  - **Katherine Hupp** – Division of Administrative Hearings
  - **Tanner Kelsey** – Department of Environmental Protection
  - **Keirsey Carns** – Florida Fish and Wildlife Conservation Commission
  - **Megan Clouden** – Florida Fish and Wildlife Conservation Commission
  - **Kevin Kane** – NextEra Juno Beach
  - **Kamilla Yamatova** – NextEra Tallahassee
  - **Kevin Harris** – Tallahassee City Attorney's Office, Land Use Division
- **Katherine Hupp** and **Catherine Bauman** will be competing in the National Energy and Sustainability Moot Court Competition at West Virginia University College of Law in March 2021. The team will be coached by FSU Professor Nat Stern.
- The Environmental Law Society (ELS) is organizing its annual mentoring program for new members designed to connect students with professionals in their desired area of practice. **Macie Codina** is chairing the Mentor Mixer program on February 19th at 5:00 pm at The Brass Tap. ELS is looking for new mentors or guest speakers for this Mixer program. If any readers are interested, please email fsuenvironmentallawsociety@gmail.com. The event will also be offered via Zoom.
- The Sustainable Law Society (SLS) will be hosting a socially distanced on-campus cleanup and a presentation on Fast Fashion this Spring 2021 semester. This semester's events will be headed by **Brooke Boinis**.

Spring 2021 Events

The FSU Environmental, Energy, and Land Use Law Program is hosting an impressive slate of environmental and administrative law events and activities via Zoom. For more information or to register, please email us at jroxas@law.fsu.edu. We hope Section members will join us for one or more of these events.

2021 Energy Law Panel Rooftop Solar Energy in Florida: Opportunities and Obstacles

The FSU Environmental Law hosted its first panel discussion for the year on January 27, 2021 via Zoom. The panel discussion centered on the current legal and economic environment for rooftop solar energy in Florida. **James Fenton, PhD**, Director of the Solar Energy Center, University of Central Florida shared the future of rooftop solar in Florida; **Justin Hoysradt**, President of Florida Solar Energy Industries Association provided perspective of suppliers and vendors; **Bentina Terry**, Senior Vice President of Georgia Power Company shared rooftop solar integration into utility power supplies; and **Susan Glickman**, Florida Director of Southern Alliance for Clean discussed the importance of rooftop solar in pursuing sustainability and addressing climate change. The Panel was moderated by FSU Law Alumnus **Robert Schef Wright** and FSU Law Professor **Shi-Ling Hsu**. Section members interested in watching the video recording are invited to email us and we can provide the link and CLE credit details.



Spring 2021 Distinguished Lecture Mapping the New Urban Commons: Law and Resource Stewardship in the City

Wednesday, February 24, 2021 via Zoom

Sheila Foster, Scott K. Ginsburg Professor of Urban Law and Policy and Professor of Public Policy, Georgetown Law will present the College of Law's Spring 2021 Environmental Distinguished Lecture on Wednesday, February 24 at 3:30 PM to 4:30 PM. Professor Foster will discuss her research on the urban and commons, and the idea of the city as a *commons*, meaning that the city is a collaborative space in which urban inhabitants are central actors in managing and governing city life and urban resources.

FSU COLLEGE OF LAW

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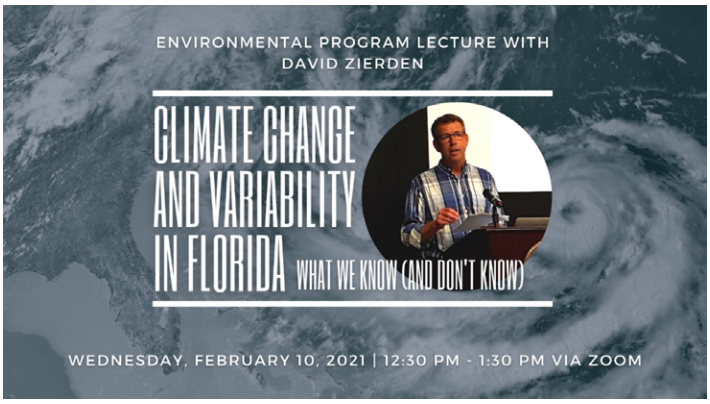
Enrichment Lectures

David Zierden, State Climatologist, Florida State University will present a guest lecture entitled "Climate Change and Variability in Florida" on Wednesday, February 10 from 12:30 PM to 1:30 PM via Zoom.



Bob Inglis, Executive Director of Citizen's Climate Lobby will present a guest lecture entitled "How Conservatives are Positioned to Lead on Climate Change" on Wednesday, March 10 from 12:30 PM to 1:30 PM via Zoom.

The Fall 2020 speaker series bridges oceanographic science and oil spills (Ian MacDonald), administrative law and climate justice (Richard Murphy), conceptual divisibility and resource management (Lee Fennell), and sea turtle conservation (Mariana Fuentes). Please email us should you be interested in watching the lectures.

Faculty Achievements

- Professor **Shi-Ling Hsu** published *Prices Versus Quantities*, in POLICY INSTRUMENTS IN ENVIRONMENTAL LAW (Richards, K.R. & J. can Zeben eds., 2020). Forthcoming publication entitled *Capitalism and the Environment: A Proposal to Save the Plant* (Cambridge Univ. Press, 2021).
- Professor Emeritus **David Markell** published *An Empirical Assessment of Agency Mechanism Choice*, in 71 ALABAMA L. REV 1039 (2020) with R. Glickman & J. Sevier.
- Associate Dean **Erin Ryan** published *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 VIRGINIA ENVTL. L.J. 135 (2020) as well as *Rationing the Constitution vs. Negotiating It: Coan, Mud, and Crystals in the Context of Dual Sovereignty*, 2020 WISC, L. REV. 165 (2020). Forthcoming publications include *The Twin Environmental Law Problems of Preemption and Political Scale*, in ENVIRONMENTAL LAW, DISRUPTED (Keith Hirokawa & Jessica Owley, eds., 2021).
- Professor **Mark Seidenfeld** forthcoming book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, 199 MICH. L. REV. __ (2021), and publication *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, 100 B.U. L. REV. __ (2021).
- *Assistant Professor* **Sarah Swan** *has two forthcoming publications: Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. LAND USE & ENVTL. L. __ (2021) and *Exclusion Diffusion*, 70 EMORY L.J. __ (2021).
- Dean Emeritus **Don Weidner** has a forthcoming publication in the Winter 2020 Issue of THE BUSINESS LAWYER entitled *LLC Default Rules Are Hazardous to Member Liquidity*. He also published *The Revised Uniform Partnership Act* (Thomson Reuters 2020) with R. Hillman & A. Donn.

"YOU SAY YOU WANT..."
from page 1

In 1990, a U.S. Naval War College report stated, "Naval operations in the coming half-century may be drastically affected by the impact of global climate change. For the Navy to be fully prepared for operations in this future climate environment, resources of both mind and money must be committed to the problem." In 1991, President George H. W. Bush's national security strategy identified climate change as a security threat. A 2003 report commissioned by the Pentagon warned: "an abrupt climate change scenario could potentially destabilize the geo-political environment, leading to skirmishes, battles and even war…. violence and disruptions stemming from the stresses created by abrupt changes in the climate pose a different type of threat to national security than we are accustomed to today; …. security risks from climate change should be addressed now because they will almost certainly get worse if we delay." The 2010 Quadrennial Defense Review warned:

> Assessments conducted by the intelligence community indicate that climate change could have significant geopolitical impacts around the world, contributing to poverty, environmental degradation, and a further weakening of fragile governments. Climate change will contribute to food and water scarcity, will increase the spread of disease, and may spur or exacerbate mass migration.[11]

In response to these challenges, the Order states that "climate considerations shall be an essential element of United States foreign policy and national security."[12] In addition to reengaging with the world toward reducing heat trapping gases, the Executive Order proposes aligning financial flows with the objectives of the Paris Accord away from fossil fuel financing and towards nature-based solutions.[13] These financial efforts will include "identifying steps through which the United States can promote ending international financing of carbon-intensive fossil fuel-based energy while simultaneously advancing sustainable development and a green recovery…."[14]

TAKING A GOVERNMENT WIDE APPROACH TO THE CLIMATE CRISIS

A significant part of the Order outlines policy initiatives directing virtually all aspects of the Federal government towards promoting sustainable energy while creating "good paying union jobs" with the goal of achieving "net-zero emissions, economy-wide, by no later than 2050."[15] The enormity of this effort should cause pause and consideration. It took 150 years for the United States to build out its electricity infrastructure network, and this objective requires a complete overhaul in thirty years. According to the University of Princeton, the United States will have to expend more than $9 trillion to achieve this goal.[16]

The Order enlists all arms of the federal government to implement this policy, while also creating a positive economic impact through developing expansive sustainable energy industries that will "employ union workers at good paying rates." The pervasive nature of this directive is underscored by the fact that it creates a task force that is made up of every cabinet secretary as well as the directors of various federal policy offices. The Task Force is directed to deploy a:

> [Go]vernment wide approach to combat the climate crisis and shall facilitate planning and implementation of key federal actions to reduce climate pollution; increase resilience to the impact to climate change; protect public health; conserve our lands, waters, oceans, and provide biodiversity; deliver environmental justice; and spur well-paying union jobs and economic growth.[17]

The Order directs government expenditure, procurement, and financial programs "to support robust climate action."[18] This is perhaps the most ambitious policy, and the one that is most in the government's control. The Order directs the Council on Environmental Quality, the General Services Administration, Office of Management and Budget, the Secretaries of Commerce, Labor, and Energy, as well as other "relevant agencies" to deliver a plan to the Task Force within 90 days that shall:

> Aim to use, as appropriate and consistent with applicable law, all available procurement authorities to achieve or facilitate: i) a carbon pollution free electricity sector no later than 2035; and ii) clean and zero-emission vehicles for federal, state, local, and tribal government fleets, including vehicles of the United States Postal service…. [And] shall also aim to ensure that the United States retains the union jobs integral to and involved in running and maintaining clean and zero-emission fleets while spurring the creation of union jobs in the manufacturing of those new vehicles.[19]

Consistent with its financial objectives in the international arena, the Order directs the Interior Department to pause all new oil and natural gas leases on public lands or waters and to consider adjusting royalties on coal, oil and gas resources extracted on public lands and waters to account for climate costs.[20] Moreover, the Director of the OMB is asked to eliminate fossil fuel subsidies from the fiscal year 2022 budget request and thereafter.[21] The automobile industry has been aware of the move away from combustion engines as evidenced by General Motors recent announcement that it will phase out all fossil fuel powered vehicles by 2035.[22]

Sections 212-215 of the Order establish polices to create millions of construction, manufacturing, engineering, and skilled-trade jobs to "build a new American infrastructure and clean energy economy." Reminiscent of President Franklin D. Roosevelt's Civilian Conservation Corps that put thousands of Americans to work during the Great Depression on projects with environmental benefits, the Order proposes creating a Civilian Climate Corps to "mobilize the next generation of conservation and resilience workers and maximize the creation of accessible training opportunities and good jobs."[23]

To soften the potential impact of the move away from fossil fuels on communities, the Order proposes establishing an Interagency Working Group on coal and power plant communities and economic revitalization.[24]

continued...

The Working Group's goal is to deliver "federal resources to revitalize the economies of coal, oil and gas, and power plant communities" and orders a report within 60 days on how to further these goals.[25]

The Order also seeks to invigorate the federal government's efforts toward "securing environmental justice and spurring economic opportunity in those areas." President Biden's policy amends President Clinton's order of February 11, 1994, addressing environmental justice by creating an Environmental Justice Interagency Council which must submit a report with recommendations within 120 days on further upgrading the environmental justice initiative.[26] Specifically, the CEQ is to create the "geospatial climate and economic justice screening tool and shall annually publish interactive maps highlighting disadvantaged communities."[27] Part of this initiative will also require the Office of Science and Technology to publish a report within 100 days identifying the "climate strategies and technologies that will result in most air and water quality improvements which shall be and published on the Office's website."[28] Finally, to underscore the importance of this program, Section 223 establishes a "Justice40 Initiative." This initiative directs the development and publication of recommendations on how federal investments "might be made toward a goal that 40 percent of the overall benefits flow to disadvantaged communities."[29]

CONCLUSION

Over the past four decades there have been many stops and starts by the federal government in addressing climate change and working towards a sustainable energy future. While the federal government has dawdled, the private sector has slowly moved forward driven by changes in consumer demand. In recent years, we have seen the acceptance of electric vehicles, solar farms, energy efficient electronic devices, etc.[30] President Biden's Order could be the catalyst that finally moves the United States forward towards a long-term sustainable energy future, and perhaps even reduce our impact on the climate. We could be at the start of a "new energy revolution" that rivals what took place over a hundred years ago. For those of us that practice in this area, there will be much be a part of and learn. In the immediate future we can expect at least a dozen new government reports designed to drive the "revolution" forward.

Endnotes

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2 According to a recent report about 60% of Americans now believe that climate change is mainly caused by human activity. https://climatecommunication.yale.edu/publications/climate-change-in-the-american-mind-november-2019/2/.

3 https://www.sullivansolarpower.com/about/blog/famous-solar-powered-buildings/white-house.

4 https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1842&context=ggulrev;US.

5 Graziano, D., Global Warming: An Introduction to the State of the Science and a Survey of some Legal Responses. Florida Bar Journal , October (2005) , https://www.floridabar.org/the-florida-bar-journal/global-warming-an-introduction-to-the-state-of-the-science-and-a-survey-of-some-legal-responses/.

6 https://www.npr.org/2019/11/04/773474657/u-s-formally-begins-to-leave-the-paris-climate-agreement.

7 15 USC Section 2901, Note. *Id. at* Section 1103 (b). As cited in *American Lung Association v EPA and AEP Generating,* (D.C. Cir., Jan. 2021), Case number 19-1140, p. 24.

8 *Id*. at 25.

9 *Id*. at 25.

10 Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 01, 2021). https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/. This Order follows President Biden's action on his first day in office to have the United States rejoin the Paris Climate Accord. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 29, 2021).

11 "Climate change poses security risks, according to decades of intelligence reports," https://yaleclimatemediaforum.org/2019/04/the-long-history-of-climate-change-security-risks/ *See also* "Climate change is a worldwide threat", Inside Climate News, January 30 at https://insideclimatenews.org/news/30012019/worldwide-threat-assessment-climate-change-intelligence-agencies-national-security/?amp.

12 Executive Order, p. 1.

13 *Id*. at Sec. 102 (b).

14 *Id*. at Sec. 102 (h). Importantly, phasing out funding for fossil fuels is consistent with other sections of the Order as discussed in the next section.

15 *Id*. at Sec. 201.

16 Net Zero America: Potential Pathways, Infrastructure, and Impacts (Dec. 2020) at https://www.princeton.edu/news/2020/12/15/big-affordable-effort-needed-america-reach-net-zero-emissions-2050-princeton-study. It is interesting to note, that, the American electrical grid has been referred to as "the supreme engineering achievement of the twentieth century." The Future Of the Electrical Grid, An MIT Interdisciplinary Study (2011), Foreword; https://energy.mit.edu/wp-content/uploads/2011/12/MITEI-The-Future-of-the-Electric-Grid.pdf.

17 Order at Sec. 203 (a) and (b).

18 *Id*. at Sec. 204.

19 *Id*. at Sec. 205.

20 *Id*. at Sec. 208.

21 *Id*. at Sec. 209.

22 https://www.nytimes.com/2021/01/28/business/gm-zero-emission-vehicles.html?referringSource=articleShare

23 *Id*. at Sec. 215.

24 *Id*. at Sec. 218.

25 *Id*. at Sec. 218 (a) and (d).

26 *Id*. at Sec. 220.

27 *Id*. at Sec. 222 (a).

28 *Id*. at Sec. 223.

29 *Id.* at Sec. 223.

30 The US Underwent a Quiet Clean Energy Revolution Last Year, World Resources Institute (2019), https://www.wri.org/blog/2019/01/us-underwent-quiet-clean-energy-revolution-last-year.

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