

RECENT DEVELOPMENTS

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I. INTRODUCTION

Court decisions and legislative action in 2006 continued to have a large impact in the land use and environmental law arenas as they have in recent years. In a case exemplifying the clash between two popular issues, private property rights and federal environmental regulation, the United States Supreme Court issued a highly anticipated decision in *Rapanos v. United States*.¹ Since it is not possible to fairly present every legal event contributing to the land use and environmental legal fields in a single writing, this article provides a summary of notable case law and statutory developments occurring in the past year.

To further explore and keep up to date on current legal issues, there are a variety of helpful resources available. The Environmental Protection Agency (EPA),² the Florida Department of Environmental Protection (DEP),³ and the Florida Department of Community Affairs⁴ provide current news and information on their websites. The Environmental and Land Use Law Section of the Florida Bar maintains an excellent website with articles covering new Florida case law, legislation, and agency developments.⁵ The Florida Senate website is a helpful resource when researching state legislation.⁶ Finally, a handful of law firms frequently release publications providing updates on developments in the environmental law and land use fields.⁷

1. 126 S. Ct. 2208 (2006).
2. U.S Environmental Protection Agency, <http://www.epa.gov>.
3. Florida Department of Environmental Protection, <http://www.dep.state.fl.us>.
4. Florida Department of Community Affairs, <http://www.dca.state.fl.us>.
5. The Environmental and Land Use Section of the Florida Bar, <http://www.eluls.org>.
6. The Florida Senate, <http://www.flsenate.gov>.
7. Holland & Knight, LLP, <http://www.hgslaw.com>; Hopping Green & Sames, P.A., <http://www.hgslaw.com>.

II. FEDERAL CASE LAW

Rapanos v. United States, 126 S. Ct. 2208 (2006)

Rapanos directly called into question the extent of the federal government's jurisdiction to regulate wetlands under the Clean Water Act (CWA).⁸ Specifically, the issue was whether wetlands which empty into traditional navigable waterways through ditches or manmade drains could be regulated.⁹ While the case provided the Court an opportunity to clarify the Act's reach and the Army Corps of Engineers permitting authority,¹⁰ the fractured opinion seems instead to have thrown the issue into a further state of confusion.¹¹

The first of two cases consolidated in this appeal was a civil enforcement action against John Rapanos, a Michigan developer who backfilled land with "sometimes-saturated soil conditions" without obtaining the required permit.¹² While the wetlands were connected to navigable waterways through storm drains and streams, the nearest such water to the three sites in question was eleven to twenty miles away.¹³ The Sixth Circuit upheld the trial court's determination that the wetlands fell within the Corps' jurisdiction holding that "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters."¹⁴ In the second case, the Carabells challenged federal jurisdiction over a wetland on a parcel of land they owned after they were denied a fill permit.¹⁵ The wetland was separated from a man-made ditch which connected to other ditches and creeks to Lake St. Clair, a navigable waterway. Similarly, the Sixth Circuit affirmed, holding that the wetland was "'adjacent' to navigable waters."¹⁶

In a 5-4 decision, the Supreme Court vacated and remanded, holding that the district court had applied the wrong standard in determining whether the wetlands were within the Corps' jurisdiction.¹⁷ The Justices, however, were more divided on the details. The plurality opinion written by Justice Scalia held

8. Clean Water Act of 1972, 33 U.S.C. §§ 1251-2000 (2000).

9. *Rapanos*, 126 S. Ct. at 2219.

10. See 33 U.S.C. § 1344 (2000).

11. See, e.g., Andrew Giaccia, *Environmental Update*, 2006 WLNR 16599695, Sept. 25, 2006.

12. *Rapanos*, 126 S. Ct. at 2214.

13. *Id.*

14. *Id.* at 2219 (quoting *United States v. Rapanos*, 376 F.3d 629, 643 (6th Cir. 2004)).

15. *Id.*

16. *Id.*

17. *Id.* at 2235, 2252.

that for a wetland to come within the ambit of the Act's jurisdiction, it must either be a "[water] of the United States," defined as being "relatively permanent, standing or continuously flowing," or adjacent to such a water. Adjacency requires the maintenance of a "continuous surface connection."¹⁸

The dissent, led by Justice Stevens, criticized the limitations in the Corps' regulatory powers which would result from narrowly reading of the CWA. It asserted that the standards articulated by the plurality and Justice Kennedy were not aligned with Congress' expansive goal to regulate pollution, and would disregard the deference extended to the Corps to regulate issues of a complex and technical nature.¹⁹

Somewhere in between the two camps was Justice Kennedy, who, while agreeing with the plurality's conclusion, set out an entirely different standard for determining whether a wetland was regulable under the CWA. Under his analysis, the Corps would be required to establish, on a case-by-case basis, whether there is a "significant nexus between the wetlands in question and navigable waters" which the Clean Water Act sought to protect.²⁰ Kennedy dismissed the plurality's limitations as being unsupported by the Act's text and previous case law.²¹ He reasoned that, when interpreting a statute concerned with downstream water quality, it made little sense to limit it to waters that are continuously flowing or those which maintained a continuous surface connection to such waters, but must necessarily include waters affected by more infrequent events such as "flood[s]" and "inundation[s]."²² While it is unlikely that the ramifications of this decision have been completely felt, it is already apparent that it has raised questions as to what test should be applied and how the Corps' permitting program will be modified.²³

18. *Id.* at 2225-26 (plurality opinion).

19. *Id.* at 2252 (Stevens, J., dissenting).

20. *Id.* at 2248 (Kennedy, J., concurring).

21. *Id.* at 2242-49.

22. *Id.* at 2242-43.

23. *Courts Face New Challenges Over Clean Water Act Jurisdiction Tests*, 2006 WLNR 16800871, INSIDE THE EPA, Sept. 9, 2006. While there are a handful of pending cases raising jurisdictional issues under the CWA, the Ninth and Seventh Circuits recently chose to follow Justice Kennedy's test to determine whether certain waters could be regulated. The Ninth Circuit found a "significant nexus" between a rock quarry pit called Basalt Pond and the adjacent Russian River in California, holding that the Clean Water Act had been violated by the city when it discharged treated sewage into the pond. *N. Cal. River Watch v. Healdsburg*, 457 F.3d 1023, 1033 (9th Cir. 2006). Similarly, in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), the Seventh Circuit remanded the case to the district court for further fact finding pursuant to the Kennedy test. *See also* *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006). There has not yet been any significant *Rapanos* litigation in Florida.

S.D. Warren Co. v. Maine Bd. of Environmental Protection., 126 S. Ct. 1843 (2006)

The operator of a series of hydroelectric dams on the Presumpscot River in southern Maine sought review of a decision requiring it to apply for a permit from the Maine Department of Environmental Protection, because the dams had the potential to cause a “discharge” under Section 401 of the Clean Water Act.²⁴ Under Section 401, an applicant seeking a federal license (in this case a license from the Federal Energy Regulatory Commission) for an activity which could cause “any discharge into the navigable waters” of the United States must first seek state certification that environmental laws will not be violated.²⁵

In 1999, when Warren had to reapply for FERC permits, it also applied for the state water quality permits under protest, contending that state approval was unnecessary because the dams did not discharge anything into the river.²⁶ The Maine Department of Environmental Protection issued a certification requiring Warren “to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for migratory fish and eels.” When the FERC issued the federal permits subject to the conditions set by the state, Warren pursued administrative appeals to void the need to get state certification. When those measures failed, it filed in state court, and eventually made its way to the Supreme Judicial Court of Maine where the original determination was upheld.²⁷

A unanimous Court agreed that the dams did create the potential for a “discharge” both as that word is ordinarily construed and in light of congress’s broad goals in passing the Clean Water Act.²⁸ Justice Souter, writing for the Court, noted that the Environmental Protection Agency, the FERC, and the Court’s previous opinions recognized that discharges from hydroelectric dams fell within the Act.²⁹ The Court rejected Warren’s three arguments that the term “discharge” should be read in a different way. First, it dismissed an argument based on an interpretive cannon as “out of place.”³⁰ Second, Warren tried to draw a parallel between the present situation and cases interpreting section 402 of the CWA. The Court held that Sections 402 and 401 of the Clean Water Act were not interchangeable, pointing out that while they have his-

24. *S.D. Warren Co. v. Maine Bd. of Envntl. Prot.*, 126 S. Ct. 1843, 1846 (2006).

25. *Id.*

26. *Id.* at 1847.

27. *Id.*

28. *Id.* at 1847-52.

29. *Id.* at 1847.

30. *Id.* at 1849.

torical similarities Section 401 is broader because it uses the word “discharge” alone, rather than “discharge of a pollutant.”³¹ Similarly, the third argument, that congress had inadvertently left a word on the books when it edited the statute, was also unavailing.³² Finally, in affirming the need for Warren to get state approval, the Court reasoned that limiting river flow and passing water through turbines could have environmental consequences over which Section 401 clearly sought to give a state the authority to regulate.³³

San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F.3d 1016 (9th Cir 2006)

At issue was whether the environmental consequences of a terrorist attack on a nuclear facility must be considered in the environmental review required by the National Environmental Policy Act (NEPA).³⁴ The question arose after Pacific Gas & Electric Co. received a license from the Nuclear Regulatory Commission (NRC) to build an Interim Spent Fuel Storage Installation at its Diablo Canyon power plant in San Luis Obispo, California.³⁵ Two nonprofit groups, the San Luis Obispo Mothers for Peace and the Sierra Club, along with one individual, filed petitions to intervene. Among other complaints, the petitioners claimed that in approving the Diablo Canyon facility the ERC had failed to “address environmental impacts of terrorist [sic] or other acts of malice or insanity.”³⁶ The ERC relied on its own precedent stating that the possibility of terrorist attacks was so remote that it need not be considered.³⁷

NEPA places procedural requirements on federal agencies such as the NRC, requiring them to prepare an Environmental Impact Statement or a more limited Environmental Assessment to ensure that the agency has taken environmental concerns into consideration when issuing licenses.³⁸ While the court dismissed petitioners’ claims that the ERC had violated the Administrative Procedure Act and AEA in denying petitioners a hearing,³⁹ it con-

31. *Id.* at 1849-50.

32. *Id.* at 1851-52.

33. *Id.* at 1853.

34. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1019 (9th Cir 2006).

35. *Id.* at 1019-20.

36. *Id.* at 1021-22.

37. *Id.* at 1022.

38. *Id.* at 1020.

39. *Id.* at 1027.

cluded that the ERC had failed to follow NEPA requirements when submitting its Environmental Assessment.⁴⁰

First, the court rejected ERC's contention that the possibility of a terrorist attack was "too far removed from the natural or expected consequences of agency action," finding that ERC had been unreasonable in "categorically dismiss[ing]" that claim and that such action was inconsistent with other government efforts to protect nuclear facilities.⁴¹ Second, the court dismissed the contention that the risk of a terrorist attack could not be adequately calculated. Rather than determining a numeric probability, the ERC could assess the "modes of attack, weapons, and vulnerabilities of [the] facility, and the possible impact of each of these on the physical environment."⁴² Third, while the ERC was correct that it was not required to conduct a "worst -case" analysis, the petitioners were nevertheless entitled to a determination of the possible environmental consequences of a terrorist attack.⁴³ Finally, the court held ERC's fourth factor, that it could not comply with NEPA because of "security risks," was unreasonable. While NEPA standards could be modified to be consistent with other programs, sensitivity did not amount to a NEPA waiver.⁴⁴

New York v. Environmental Protection Agency, 443 F.3d 880 (D.C. Cir. 2006)

The D.C. Circuit Court of Appeals vacated the Environmental Protection Agency's Equipment Replacement Provision (ERP), finding it inconsistent with language in Section 111(a)(4) of the Clean Air Act.⁴⁵ Under the Act, when a polluting facility undergoes "any physical change" which increases emissions, it must go through the New Source Review (NSR) permitting process.⁴⁶ The ERP expanded the general exception for when this review can be bypassed, called the Routine Maintenance, Repair, and Replacement Exclusion. The ERP excluded review when replacing functionally equivalent components not exceeding twenty percent of the process unit's replacement value and not changing the unit's basic design parameters, although changes might nevertheless increase emissions.⁴⁷

40. *Id.* at 1035.

41. *Id.* at 1029-31.

42. *Id.* at 1031.

43. *Id.* at 1032-34.

44. *Id.* at 1034.

45. *New York v. Envntl. Prot. Agency*, 443 F.3d 880 (D.C. Cir. 2006).

46. *Id.* at 883.

47. *Id.*

Central to the disagreement was the meaning of the words “any” and “physical change” in the Act.⁴⁸ While EPA argued that it was accorded deference to define what a “physical change” meant under the statute, the court disagreed.⁴⁹ Applying the *Chevron* test—determining whether Congress had spoken directly to the issue—the court found that the Clean Air Act defined “physical change” in terms of emissions increases.⁵⁰ Consistent with the rest of the Act and rules of statutory interpretation, the word “any” should be given an expansive reading.⁵¹ Therefore, under Section 111(a)(4) the EPA should be required to perform a NSR whenever an emissions-increasing modification occurs which falls within one of the ordinary meanings of “physical change.”⁵²

III. FLORIDA CASE LAW

AT&T Wireless Services of Florida v. WCI Communities, Inc., 932 So. 2d 251 (Fla. 4th DCA 2005)

In 1975, Florida National Properties granted, by warranty deed, a piece of land to the City of Coral Springs. The property eventually became Sherwood Forest Park.⁵³ WCI, a major developer and landowner in the area, was the successor-in-interest to the grantor of the deed, which stated that the property would be used “solely for passive park purposes unless the express written consent of Grantor, its successors or assignees, is first obtained.”⁵⁴ In 1996, the City passed an ordinance allowing for the siting of telecommunications towers in some public parks, and in 2001, the City, over WCI’s objections, approved the leasing of 1600 square feet of park property to AT&T for construction of an equipment building.⁵⁵ And in 2002, the City approved the construction of an eighty-five foot telecommunications tower.⁵⁶

WCI sought injunctive relief claiming that the construction of the tower was not a passive use, but an active commercial use.⁵⁷ The court found no ambiguity in the deed restriction and granted WCI injunctive relief, allowing AT&T twenty-four months

48. *Id.* at 885.

49. *Id.*

50. *Id.* at 886.

51. *Id.* at 887-89.

52. *Id.* at 889-90.

53. *AT&T Wireless Servs of Fla. v. WCI Cmty., Inc.*, 932 So. 2d 251, 253 (Fla. 4th DCA 2005).

54. *Id.* at 253.

55. *Id.* at 253-54.

56. *Id.* at 254.

57. *Id.*

to find a suitable site to relocate the tower.⁵⁸ The appellate court affirmed, slightly reframing the issue and holding that the tower did not relate to the furtherance of “solely for passive park purposes” since it was used solely for AT&T’s monetary gain.⁵⁹ The court rejected the argument that the tower was only a de minimus violation, and found that it was not merely incidental to the park’s intended use.⁶⁰

Brevard County v. Stack, 932 So. 2d 1258 (Fla. 5th DCA 2006)

In this appeal of a non-final order, the 5th DCA upheld the constitutionality of the Bert J. Harris, Jr., Private Property Protection Act.⁶¹ In 2003, Charles Stack entered into a \$1.1 million contract to sell four acres of land to a developer who wanted to build a shopping center and restaurant.⁶² Since the property contained a one acre wetland and was zoned as “community commercial,” it was governed by a county ordinance prohibiting the development of wetland properties with such a zoning designation. Upon discovering the ordinance the developer opted to cancel the contract. Stack subsequently filed a claim to recover \$1 million from the county under the Act, claiming the ordinance had diminished the value of the property.⁶³

The trial court granted summary judgment in favor of Stack on the issue of liability, giving credence to his argument that he had pre-existing property rights and “reasonable investment backed expectations” when buying the land in the 1980s.⁶⁴ On appeal, the court dismissed the government’s arguments that the Act was a due process violation because it authorized local governments to contract away their police powers.⁶⁵ Similarly, it rejected claims that the Act violated the separation of powers doctrine by enlarging the judiciary in interpreting the takings clause.⁶⁶ Ultimately, however, the court remanded the case so the trial court could make certain factual findings. Namely, the trial court must determine whether there was an existing use of the property or a vested right to use it, and whether the governmental entities inordinately burdened the land.⁶⁷

58. *Id.*

59. *Id.* at 255-56.

60. *Id.* at 256.

61. FLA. STAT. § 70.001 (2006).

62. *Brevard County v. Stack*, 932 So.2d 1258, 1260 (Fla. 5th DCA 2006).

63. *Id.*

64. *Id.* at 1261.

65. *Id.* at 1261-62.

66. *Id.* at 1262.

67. *Id.* at 1262; FLA. STAT. § 70.001(6)(a) (2006).

Russo Ass'n, Inc. v. City of Dania Beach Code Enforcement Board., 920 So. 2d 716 (Fla. 4th DCA 2006)

In *Russo*, the court held that the statute of limitations to file suit under the Bert J. Harris, Jr., Private Property Rights Protection Act⁶⁸ was four years.⁶⁹ The dispute in this case arose when Dania Beach made zoning changes which resulted in Russo's current property use being incompatible with the new classification on August 31, 2000.⁷⁰ Russo presented its written claim to the government in October 10, 2002, and filed suit on February 6, 2004. The Act requires that at least 180 days prior to filing suit under the Act, the property owner seeking compensation present his/her claim to the head of the appropriate governmental entity in writing.⁷¹ Further, a cause of action may not be initiated if the claim is not presented within a year after the regulation which affects the property is first applied.⁷²

While the city contended that Russo had waited too long to file its complaint, the court disagreed.⁷³ It held that although the written claim must be sent to the government entity within a year, the four-year statute of limitations in Section 95.11(3)(f) of the *Florida Statutes*⁷⁴ applies to the filing of the complaint.⁷⁵ Therefore, Russo had filed suit about six months before the statute of limitations expired.⁷⁶

The court noted that the four-year catch-all statute of limitations⁷⁷ had been held to apply to inverse condemnation actions.⁷⁸ Since the intention of the Act was to provide additional remedies to property owners when the governmental action burdened the property's use but did not amount to a taking, it would be unreasonable and against the purposes of the Act to infer that a much "more restrictive statute of limitations, effectively that of six months" would apply.⁷⁹ The court reasoned that the statute's purpose in requiring the landowner to notify the governmental entity and wait for 180 days was to facilitate the amicable resolution of

68. FLA. STAT. § 70.001 (2006).

69. *Russo Ass'n, Inc. v. City of Dania Beach Code Enforcement Bd.*, 920 So. 2d 716, 718 (Fla. 4th DCA 2006).

70. *Id.* at 716-17.

71. FLA. STAT. § 70.001(4)(a) (2006).

72. *Id.* at § 70.001(11).

73. *Russo*, 920 So. 2d at 717.

74. "An action founded on a statutory liability." FLA. STAT. § 95.11(3)(f) (2006).

75. *Russo*, 920 So. 2d at 717.

76. *Id.* at 718.

77. FLA. STAT. § 95.11(3)(p) (2006).

78. *Russo*, 920 So. 2d at 717.

79. *Id.*

the dispute. The passage of the 180 day period simply ripens the claim and allows the claimant to proceed.⁸⁰

Sorrentino v. River Run Condominium Ass'n, 925 So.2d 1060 (Fla. 5th DCA 2006)

The dispute in this case arose when condominium owners, the Sorrentinos, installed two skylights in the ceiling of their unit without obtaining prior written approval from the condominium association.⁸¹ When the association filed suit to require the removal of the skylights, the Sorrentinos counterclaimed, seeking an injunction to disallow the association from making any such demand.⁸² The Sorrentinos argued that the skylights were "solar collectors" and "energy saving device[s] based on renewable resources" under Section 163.04 of the *Florida Statutes*.⁸³ Therefore, a deed restriction or restrictive covenant would be prohibited from requiring their removal.⁸⁴ The statute also provided for attorneys fees to be awarded to the "prevailing party."⁸⁵

The trial court enjoined the association from requiring the Sorrentinos to remove the skylights, finding that the devices fell within the meaning of the statute and that they were properly installed and posed no risk to the building. It did not, however, award the Sorrentinos attorneys' fees because it found that there was no prevailing party; rather, the dispute was the result of a "failure of communication."⁸⁶ On appeal, the 5th DCA held that the trial court had correctly applied the statute to the skylights, but awarded attorneys' fees to the Sorrentinos because they had prevailed on every significant issue raised in the litigation.⁸⁷

County of Volusia v. City of Deltona, 925 So. 2d 340 (Fla. 5th DCA 2006)

In this case, the court held that a proposed annexation by the City of Deltona was not "contiguous" where only 1.6% of the boundary bordered the city.⁸⁸ Involved were three parcels of land, measuring 4626 acres, 339 acres, and ten acres, with only western

80. *Id.*

81. *Sorrentino v. River Run Condo. Ass'n*, 925 So. 2d 1060, 1062 (Fla. 5th DCA 2006).

82. *Id.* at 1062-63.

83. *Id.* at 1063-64.

84. *Id.*; FLA. STAT. § 163.04(2) (2006).

85. FLA. STAT. § 163.04(3) (2006).

86. *Sorrentino*, 925 So. 2d at 1064.

87. *Id.* at 1066.

88. *County of Volusia v. City of Deltona*, 925 So. 2d 340, 344 (Fla. 5th DCA 2006).

boarder of the ten acre parcel (350 feet) touching the city.⁸⁹ After the three property owners filed petitions requesting that the city consider their submitted annexation applications as a whole, the Deltona City Commission adopted an ordinance voluntarily annexing the properties pursuant to Section 171.044 of the *Florida Statutes*.⁹⁰

Reviewing the circuit court's approval of the annexation, the district court examined the statute's contiguousness requirement. While annexation of the ten acre property alone would have been proper under the statute, the properties had to be considered as a whole because the owners submitted a unified application.⁹¹ Therefore, the 350 feet of the ten acre property which represented only 1.6% of the entire 22,116 foot border, failed to meet the requirement that "a substantial part of a boundary of the territory to be annexed by the municipality [be] coterminous with a part of the boundary of the municipality"⁹² Using a narrow corridor to connect the city to a noncontiguous area would defeat unity and compactness, central concepts of a municipal corporation.⁹³ In dicta, the court further stated that the city and the owner of the 4626 acre parcel had engaged in illegal contract zoning by signing their "Pre-Annexation Agreement."⁹⁴ The substantial obligations that the agreement placed on the city, specifically that it not change the parcel's zoning until the annexation was complete, were an illegal delegation of its police powers.⁹⁵

Atlantis at Perdido Ass'n, Inc. v. Warner, 932 So. 2d 1206 (Fla. 1st DCA 2006)

In *Atlantis*, two condominium associations on Perdido Key challenged the DEP's issuance of a Coastal Construction Control Line Permit for a project on a neighboring property.⁹⁶ The proposal was to demolish two one-story structures which had been damaged by Hurricane Ivan (while the permit application was pending) and build a new nine-story condominium.⁹⁷ While the new building would be eighteen feet landward of the previous structure, it nevertheless would be situated 193 feet seaward of the coastal con-

89. *Id.* at 341, 344.

90. *Id.* at 342.

91. *Id.* at 343-44.

92. *Id.* at 343 (quoting FLA. STAT. § 171.031(11) (2006)).

93. *Volusia*, 925 So. 2d at 344.

94. *See id.* at 341-47.

95. *Id.* at 345-46.

96. *Atlantis at Perdido Ass'n, Inc. v. Warner*, 932 So. 2d 1206, 1207-08 (Fla. 1st DCA 2006).

97. *Id.* at 1208-09.

struction control line and forty-five feet seaward of the other structures built on the coast—"a reasonably continuous and uniform line of buildings."⁹⁸

The issue in this case was whether the construction project could be termed a "rebuilding" of the present structure rather than "new" construction seaward of the control line.⁹⁹ Florida Statutes require a DEP permit to build any structure seaward of the coastal construction control line.¹⁰⁰ The DEP may authorize construction for the "repair or rebuilding within the confines of the original foundation" or "for a more landward relocation or rebuilding of a damaged or existing structure if [that would not] cause further harm to the beach-dune system."¹⁰¹ The advantage of being a "rebuilding" rather than new construction is that the DEP does not need to take into account the "reasonably continuous and uniform construction line."¹⁰²

While the DEP argued that the new construction project fell within the meaning of "rebuilding," the court disagreed, holding that the permit authorized something more extensive.¹⁰³ DEP misconstrued its own unambiguous definition of the term "rebuilding," which defined it as "a substantial improvement of *the existing structure*."¹⁰⁴ Further, the definition of "substantial improvement" only contemplates improving the structure "to its pre-damage condition."¹⁰⁵ The court, therefore, found that the DEP's interpretation of the statute was "implausible and unreasonable."¹⁰⁶ Since the project was not a rebuilding, and since the DEP failed to take into account the "reasonably continuous and uniform line of construction," the permit was denied.¹⁰⁷

98. *Id.*

99. *Id.* at 1210.

100. FLA. STAT. § 161.053(2)(a) (2006).

101. *Id.* at § 161.053(13)(a).

102. *Atlantis*, 932 So. 2d at 1211 (quoting FLA. STAT. § 161.053(5)(b)).

103. *Id.* at 1212.

104. FLA. ADMIN. CODE ANN. r. 62B-33.002(47) (2005).

105. FLA. STAT. § 161.54 (12) (2006).

106. *Atlantis*, 932 So. 2d at 1213 (citing *Sullivan v. Fla. Dep't of Env'tl. Prot.*, 890 So. 2d 417, 420 (Fla. 1st DCA 2004)).

107. *Id.* at 1214.

IV. FLORIDA'S 2006 LEGISLATIVE SESSION¹⁰⁸*CS/CS/CS/SB 888 Energy*

With goals such as decreasing reliance on foreign fuels, this bill provides financial incentives to achieve a greater diversity in the state economy's fuel mix and advance the development of renewable energy sources. Driving the initiative are tax breaks for purchasing energy efficient consumer products and using bio-energy fuels, along with the creation of a grant program within the Department of Environmental Protection.

The bill authorizes the Public Service Commission to require public utilities to strengthen their infrastructure, specifically to withstand the threat of hurricanes. The licensing requirements of the Florida Electrical Power Plant Siting Act and the Electrical Transmission Line Siting Act are modified and shortened. Additionally, the bill creates the Florida Energy Commission, composed of nine members, given the task of making annual recommendations for legislation on energy policy as well as a report on state greenhouse gas emissions by December 2007.

CS/CS/SB 980 Energy Reliability

This bill outlines a uniform process for the siting of electrical substations, subject to some local standards. It streamlines the permitting process by, among other things, providing that new substations are a permissible land use in all land use categories and zoning districts. Also, electric utilities are no longer required to obtain permits from local governments for tree-trimming within the right of way of a power line.

HB 7131 Brownfields Redevelopment

This bill amends the Brownfield Redevelopment Act by providing greater tax credits to entities that voluntarily cleanup contaminated brownfield and drycleaning sites. It does not, however, increase the \$2 million annual cap. To provide a greater incentive to finish the process, the credit amount available in the final year of cleanup has also been increased. Additional tax credits

108. This segment is based both on legislative summaries from the Environmental and Land Use Section of the Florida Bar and the Senate Committee on Environmental Preservation. Eric T. Olsen, 2006 Legislative Session Summary (Jul. 6, 2006), http://www.eluls.org/2006/Reporter_July_2006/july06_olsen.html; SENATE COMMITTEE ON ENVIRONMENTAL PRESERVATION, SUMMARY OF LEGISLATION PASSED, *available at* <http://www.flsenate.gov/publications/2006/senate/reports/summaries/pdf/environmental.pdf>.

are available for affordable housing built on the brownfield areas. This bill repeals the Brownfield Property Ownership Clearance Assistance Program and the Brownfield Property Ownership Clearance Assistance Revolving Loan Trust Fund because the fund was never capitalized.

HB 1347 Land Acquisition and Management

This enactment appropriates \$310 million from the Florida Forever Trust Fund for the state's purchase of the Babcock Ranch located in Lee and Charlotte counties. In addition to providing for public recreation, the bill furthers numerous environmental, agricultural, and scientific interests on the newly acquired preserve. A non-profit corporation called the Babcock Ranch, Inc. is authorized to be created and will manage the ranch with guidance from the Fish and Wildlife Conservation Commission and the Department of Agriculture and Consumer Services.

HB 1533 Petroleum Contamination

At a site where underground storage tanks will be upgraded pursuant to Rule 62-761 of the *Florida Administrative Code*, subsequently discovered discharges occurring before the upgrade has taken place will be presumed to be part of the original discharge; both will qualify for state funding. There are, however, certain conditions where this presumption does not apply. The petroleum facility operator must report all discharges and provide copies of storage tank test results according to DEP rules.

HB 1249 Funding for Oyster Management and Restoration Programs

This measure modifies funding for oyster management restoration in Apalachicola Bay and other state areas where oysters are harvested. The bill removes the fifty cents per bag surcharge paid by the wholesale dealer on oysters harvested from Apalachicola Bay and replaces it with income from the excise tax on documents. An annual transfer of \$300,000 from the General Inspection Trust Fund in the Department of Agriculture and Consumer Services to the State Treasury will now provide the necessary funding.

HB 1039 Miami-Dade County Lake Belt

This enactment adds back lands previously excluded from the Lake Belt Area, redefines boundaries for mining area subject to mitigation fees, and provides a schedule for fee increases. The current fee of five cents per ton will increase to twelve cents on January 1, 2007, eighteen cents in 2008, and twenty-four cents in 2009. For upgrades of water treatment plants which treat water coming from Northwest Wellfield in Miami-Dade County, a similar mitigation fee is imposed on mined limerock and sand. As of January 1, 2007 the fee collected will be fifteen cents per ton; it will only be collected until enough money is raised to design and construct the plant. The use of mitigation funds is expanded to now include reimbursement to the South Florida Water Management District and Miami-Dade County for certain land purchases.

HB 471 Fish and Wildlife

In an attempt to provide consistency among similar freshwater fish, saltwater fish, and hunting and wildlife violations, this bill creates a framework of proposed penalties, including a sliding scale of mandatory fines and sentences and increases for repeat offenders. Additionally, it creates the Wildlife Violators Compact, permitting Florida to take part in a national effort to ensure compliance with fish and wildlife laws. This is achieved through measures such as reciprocal recognition of license suspensions between Compact states. Further, a hunter mentoring program was created, allowing a one-year waiver for hunting licenses. The minimum number of hours for a hunter safety course has been repealed.

HB 265 Hunting Lands

The Fish and Wildlife Conservation Commission is required to open all commission managed lands to hunting except when reasons of public safety, fish and wildlife management, homeland security, and other legal prohibitions would prohibit doing so. The commission, with the aid of state agencies or water management districts owning or managing lands, must expeditiously open new hunting acreage to replace closures.

HB 1359 Hazard Mitigation for Coastal Redevelopment

This bill provides direction for local governments and their comprehensive plans to increase population densities in Coastal High Hazard Areas (CHHA), defined as an area below the eleva-

tion of a category one storm surge line. It requires the Division of Emergency Management to update hurricane evacuation studies. By July 1, 2008 local governments are required to amend their future land use map and coastal land use element to include the new CHHA definition and CHHA map. Furthermore, this bill makes the Department of Health's authority to issue a permit to construct or repair onsite sewage treatment and disposal systems seaward of the coastal construction line contingent on the receipt of a DEP permit.

HB 1015 Agricultural Economic Development

House Bill 1015 allows landowners of "agricultural enclaves" to apply for an amendment to a local government's comprehensive plan to permit land uses and intensities of use consistent with those of surrounding industrial, commercial, or residential areas. An agricultural enclave is an area which is no larger than 1000 acres, has been in agricultural production for the past five years, and meets Greenbelt criteria. Additionally, this legislation requires that water management districts enter into agreements with the Department of Agriculture and Consumer Services to allow the department to review existing or proposed activities to determine if they qualify for the agricultural exemption to the Environmental Resource Permitting Program.

HB 1299 Areas of Critical State Concern

This bill permits counties that were designated as areas of critical state concern for at least twenty consecutive years to continue to impose the previous tourist taxes and use local government surtaxes for twenty years after the designation is removed. The bill creates a new process for removing the Florida Keys as an area of critical state concern, and sets the date of removal for October 1, 2009 unless certain goals have not been achieved.

HB 7163 Environmental Resource Permitting in Northwest Florida Water Management District

The DEP and the Northwest Florida Water Management District are now authorized to enter into operating agreements and implement the Environmental Resource Permitting (ERP) Program in Florida's panhandle. The bill directs the DEP and the District to begin rulemaking to regulate stormwater management systems, surface water management, and storage within sixty days

after the bill became effective; however, the new rules will not go into effect until January 1, 2007 and 2008, respectively. The bill additionally requires the DEP and the department to streamline state and federal permitting requirements by using electronic permitting, field permitting, and certification programs for certain activities.

CS/CS/CS/HB 683 Development-of-Regional Impact (DRI) Reform

This bill makes large modifications to the DRI program. First, it exempts numerous facilities from DRI review, including marinas, hospitals, and chemical and petroleum facilities. Next, it has provisions allowing developers of now exempt properties to either continue under their existing DRI agreement or rescind the agreement. This legislation also creates more flexibility for build out dates, allowing DRI orders to reflect the date “anticipated” rather than “required” to complete the project. Further, it clarifies methods for the Department of Community Affairs and adversely affected parties to challenge a DRI development order as being inconsistent with a local comprehensive plan. House Bill 683 also provides new incentives for the development of “affordable workforce housing.”

SB 1948 Coastal Properties Disclosure Statements

This legislation requires that prospective purchasers of coastal real estate, located seaward of the coastal construction line, be provided with an additional disclosure. The statement must indicate that the property is subject to erosion and is governed by federal, state, and local regulations. However, failure to provide this statement, will not preclude enforcement of the sale of the property.

HB 1155 Contaminated Drycleaning Facilities

House Bill 1155 allows owners of drycleaning facilities where a contamination accident occurred before January 1, 1975 to take advantage of the since shut-down Drycleaning Solvent Cleanup Program. While the program originally required the filing of an application prior to 1999, this bill allows for state funded cleanup regardless of whether a timely application was filed.

HB 1567 Eminent Domain

This bill is the Florida legislature's response to last year's U.S. Supreme Court decision in *Kelo v. City of New London*. In that case, the Court found the taking of property for economic development by a private entity to be constitutional, essentially affirming an expansive reading of the Takings Clause.¹⁰⁹ Through this legislation, Florida has chosen to place limitations on its use of eminent domain law by restricting some transfers of land to certain persons and private entities. Also, it provides that the elimination of a slum or blighted area does not meet the state constitutional requirement that the taking be for a public purpose.

109. *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005).