

Hurricane Kelo Hits Florida

by Mark Bentley, Esq., AICP, GrayRobinson, P.A., Tampa, Florida

♪ “Yesterday —
If your property was in a CRA, ♪
♪ We could take it for a Circle K,
Oh, I believe in yesterday.” ♪
— *Anonymous Local Government Official*

I. Kelo Triggers New Legislation
As a result of the U.S. Supreme Court’s 2005 landmark decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), the Florida Legislature enacted radical legislation clarifying *Kelo*’s effect on Florida takings law.

These statutory amendments, contained in Chapter 200611, Laws of Florida, will severely restrict condemning authorities’ power to take private property exclusively for traditional public uses, and will expressly prohibit takings for economic development. This legislation was swiftly signed into law by Governor Bush on May 11, 2006, who commented that he “was proud to sign a law that severely limits government from abusing eminent domain to take private property against the wishes of the owner and give it to another

private property owner.” In addition, the Legislature has supported placing a constitutional amendment on this November’s ballot which, if approved by the voters, would permanently prohibit the taking of private property for private economic benefit and impose greater, more permanent restrictions on government’s ability to take private property. According to Speaker-Designate Marco Rubio, who championed this legislation, “[t]he approval of these two measures recognizes that the American
See “Hurricane Kelo” page 4

Communication Disruption By Hurricanes— What Are Your Remedies As a Cable and Telephone Subscriber?

During last hurricane season, many residents in both Florida and along the Gulf Coast lost cable and telephone services in the wake of Hurricanes Katrina, Rita and Wilma. These hurricanes caused an unprecedented disruption in communications leaving thousands of people without access to news and emergency information and without the ability to contact loved ones.¹ Every Floridian should know what remedies are available to a subscriber in the event a hurricane disrupts communications.

Emergency Preparedness Plans
In light of last year’s hurricanes,

the nation’s top cable companies have pledged to review and assess their emergency preparedness plans and continue ongoing efforts to coordinate emergency activities with first responders, government agencies and service providers.² After a comprehensive analysis of the adequacy and effectiveness of infrastructure recovery efforts, earlier this year the Federal Communications Commission (“FCC”) released recommendations on ways to improve disaster preparedness and network reliability and resiliency during emergencies.³ As a result, cable operators are working to ensure that their systems are

ready in the event of another hurricane.⁴ For example, Comcast Cable
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Chair's Report



I am very excited to serve our Section as Chair this year. I want to thank our Immediate Past Chair, Kaye Collie, for the outstanding job she did leading our Section last year. The Section

was very involved in two ethics issues that are vitally important to any lawyer who represents local government. The first issue concerned proposed amendments to the Rules Regulating The Florida Bar. I want to applaud the efforts of Marion Radson, Craig Collier (past Chairs of our section), Liz Hernandez (our section's Chair-Elect) and Ed Dion for their leadership regarding this issue. Marion did a yeoman's job representing the Section before the Florida Supreme Court when the Court was considering revisions to Rule 4-1.11. Unfortunately, the Court declined to revise the Rule as our Section requested, and instead adopted the recommendation proposed by the Florida Bar. This Rule became effective as of May 22, 2006, and I encourage all lawyers who practice local

government law to become familiar with the Rule. This issue is very important to our Section and may be revisited in the future.

The second ethics issue related to the reconsideration of Advisory Opinion 77-30, to clarify the Board of Governors' views on conflicts involving a county attorney's representation of a county commissioner charged with ethics violations. The conclusion in this Opinion was that there was an "inherent conflict and appearance of impropriety". It was our Section's belief that this opinion was overbroad, and any issue of a conflict must be decided on a case by case basis. Our Section became involved and made our concerns known to the Bar. The Board of Governor's agreed with our Section that the opinion was overbroad. The Board of Governor's has issued Proposed Advisory Opinion 77-30 (Reconsideration), and is requesting comments on the Proposed Advisory Opinion from Bar members. Any comments will be considered at a meeting to be held September 29, 2006 in Ponte Vedra. A very big thank you goes out to Liz Hernandez, who serves on the Professional Ethics Committee, along with Marion

Radson, Grant Alley, Ed Dion, and our Section's Board of Governor's liaison, Andrew Sasso, for their work on this issue.

The Certification Review Seminar and the Annual Meeting held last May in Bonita Springs was a great success. Many thanks to all the Section members and speakers who gave of their time and effort. Next year's Annual Meeting and Certification Review Course will again be held at the beautiful Hyatt in Bonita Springs. Good luck to Liz Hernandez, who will be the Program Chair for next year's Annual Meeting – I am sure she will do a fantastic job!

Finally, I wanted to say a fond "goodbye" to our Section Administrator Carol Kirkland. Carol's professionalism and service to the Section is appreciated by all of us – we wish her well and we will truly miss her. Our new Section Administrator is Ricky Libbert. Ricky has been with the Florida Bar for many years and we welcome her aboard.

I hope that the members of our Section will take advantage of the many benefits the Section has to offer. I am honored to have the opportunity to serve the Section as Chair.

2006 - 2007 Calendar of Events

EXECUTIVE COUNCIL SCHEDULE

October 19, 2006
Rosen Centre Hotel
Orlando

January 2007
Teleconference
Date TBD

May 10, 2007
Hyatt Regency Coconut Point
Bonita Springs

May 11, 2007
Section Annual Meeting
Hyatt Regency Coconut Point
Bonita Springs

SEMINAR SCHEDULE

October 19-20, 2006
PELR
Rosen Centre Hotel
Orlando

May 10, 2007
2006 Certification Review Course
Hyatt Regency Coconut Point
Bonita Springs

May 11-12, 2007
30th Annual Local Government Law in Florida
Hyatt Regency Coconut Point
Bonita Springs

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HURRICANE KELO

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dream is alive and well, and private property rights are honored in the state of Florida.”

In *Kelo*, the City of New London was experiencing severe economic decline and formed a non-profit corporation (“corporation”) to assist the City in its economic development efforts. The corporation formulated a comprehensive economic redevelopment plan and was also delegated condemnation authority by the City to implement the plan. The strategy was for this private corporation to acquire the properties and then convey them to private developers for a massive mixed use project. Several propertyowners whose properties were not affected by slum and blight refused to sell to the corporation. Consequently, the corporation exercised its eminent domain authority to acquire the holdout owners’ properties. The owners then sued the City in state court arguing that the City had misused its eminent domain authority for private redevelopment, as the Fifth Amendment limits governmental taking of private property for a public use. Specifically, the Takings Clause states that “private property [shall not] be taken for public use, without just compensation.” Furthermore, under Section 1 of the Fourteenth Amendment, this “public use” limitation is also imposed on the actions of state and local governments. The owner argued that because the stated purpose of the corporation was for economic development, the taking did not qualify as a “public use” under the Fifth Amendment. The state

court’s ruling in favor of the City was appealed to the Connecticut Supreme Court, which affirmed its decision, and the propertyowners then appealed the decision to the U.S. Supreme Court.

The Supreme Court was virtually split, ruling in a five to four decision that because the City’s development plan was authorized by a state statute that specifically sanctioned the use of eminent domain to promote economic development, and served a “public purpose” under the Fifth Amendment’s “public use” provision, the taking did not violate the Takings Clause. The Court emphasized that local governments should be afforded wide latitude in taking private property for local land use decisions. In its conclusion, however, the Court cautiously refrained from seeking preemption of additional state action, stating that “[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed many states already impose ‘public use’ requirements that are stricter than the federal baseline.”

II. Florida Legislature Seeks to “Fill the Gap”

After the *Kelo* decision’s initial shockwave hit, Florida lawmakers scurried to find a way to prevent a similar situation from occurring in Florida. Given the *Kelo* Court’s strong deference to state government’s interpretation of its own laws, it was felt that because Florida courts had not ruled on a *Kelo*-type case, determining whether the Florida Constitution allows a *Kelo*-type taking was an issue that must be decided by the

Florida Supreme Court, and not the U.S. Supreme Court. Specifically, the potential question to be resolved by the Florida Supreme Court was whether, under Florida law, the taking of private property for economic development constituted a valid public purpose for which private property may be taken and conveyed to another private owner. Notably, the Florida Legislature’s fear was well-founded, as the Legislature has statutorily declared economic development a public purpose qualifying for the disposition of public funds under Florida Statutes Chapters 125 (relating to counties) and 166 (relating to cities). Therefore, prior to this new legislation there existed a legitimate argument that local governments in Florida could lawfully exercise eminent domain authority for economic development purposes even under circumstances similar to *Kelo*, where the condemned properties were not blighted or taken under a redevelopment statute.

Florida’s first step to counter *Kelo* occurred on June 24, 2005, when House Speaker Allen Bense announced the creation of the Select Committee To Protect Private Property Rights, chaired by Representative Marco Rubio, who sponsored both the newly enacted legislation and the proposed constitutional amendment. The Committee was charged with the task of analyzing Florida eminent domain law to determine the existence of any ambiguities and to recommend necessary changes to ensure the protection of private property rights.

At this point in time, there are over 140 established community redevelopment areas (“CRAs”) in the state of Florida, and the number is rapidly increasing on an almost monthly basis. Notably, the Florida Community Redevelopment Act authorizes the use of eminent domain for the elimination of slum and blight, which Florida courts have upheld as a valid public purpose. However, the statutory definition of “blighted area” was considered by many observers to be extremely vague and provided an easy test for local governments to meet; thereby creating an opportunity to abuse their condemnation authority. For example, under Section 163.340(8), F.S. (2006), an area can be considered

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

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“blighted” and subject to condemnation and private redevelopment if it meets only two of fourteen criteria, such as “inadequate and outdated building density patterns,” a “pre-dominance of defective or inadequate street layout,” an “incidence of crime in the area higher than in the remainder of the county or municipality,” or “falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality.”

The first major step leading to the enactment of the new legislation seeking to prevent a *Kelo* situation from occurring in Florida took place on April 6, 2006, when Florida’s House of Representatives unanimously passed House Bill 1567. The Bill was enacted into law as Chapter 2006-11, Laws of Florida, and applies to all eminent domain petitions filed after its effective date, which is May 11, 2006. This law (among several things) amends Chapter 73, Florida Statutes, creating a prohibition against the transfer of property taken through eminent domain to a private entity or natural person. However, various exceptions to this “bright line” prohibition are carved out for certain unique circumstances relating primarily to governmental type functions, such as common-carrier services or systems, public infrastructure, public or private utilities for electrical service, stormwater, or telephone services, along with several others. The new law does provide local government some flexibility, as it requires that the condemned land must be retained by the condemning authority for at least ten years after acquiring title before it can be transferred to a natural person or private entity.

Most significantly, the new law

makes it crystal clear that local governments are now restricted to taking private property for uses that have traditionally had a public purpose, such as roads, utilities and government infrastructure. Local governments can no longer take private property located in or out of a Community Redevelopment Area and “flip” it to a private developer for shopping malls, movie theaters, condominiums, or other private development purposes, as it once could based on the theories of elimination of a nuisance, slum or blight. Specifically, Chapter 73, Florida Statutes, has been amended to expressly state that the taking of private property for the elimination of a nuisance or a slum and blight condition do not satisfy the “public purpose” requirement contained in Article X of the Florida Constitution.

As a result of the new legislation, the Community Redevelopment Act’s “blighted area” test can no longer be used as an “end run” around the Florida Constitution’s “public purpose” requirement. Notably, property that is acquired in a CRA is also subject to the same “cooling off” period contained in Chapter 73, Florida Statutes, which prohibits the transfer of property acquired by eminent domain to a natural person or private entity for a period of ten years. In addition, the law repeals the Legislature’s prior delegation of eminent domain authority to CRAs, and now prohibits a CRA from exercising eminent domain authority, thereby limiting the exercise of the eminent domain authority in a Community Redevelopment Area to cities and counties.

In light of the perceived gaps in Florida’s eminent domain scheme and the potential adverse affect that

Kelo could have on Florida takings jurisprudence, the Florida Legislature also passed House Joint Resolution 1569 proposing a constitutional amendment, which, if approved in a November 2006 referendum, would permanently prohibit the transfer of ownership or control of private property taken by eminent domain to any natural person or private entity, unless authorized by general law passed by a three-fifths vote of each house of the Legislature. The amendment would become effective on January 2, 2007.

III. Conclusion

Some government observers feel that the new legislation and proposed constitutional changes are a “knee-jerk” over-reaction to *Kelo* that will undoubtedly have a chilling effect on Florida’s ongoing redevelopment efforts. Many property owners, however, believe this legislation is a major step toward preventing government abuse and ensuring that the Founding Fathers’ intent to protect private propertyowners will continue to be safeguarded. Governor Bush himself aligned with those seeking protection of property rights and stated in a May 15, 2006 Tampa Tribune editorial, “Florida’s private property rights are now the toughest in the nation. I applaud the Florida Legislature for using its power to protect Floridians’ fundamental right to own property against the menacing power of eminent domain.” In any event, the Legislature’s swift and decisive enactment of these new eminent domain laws has sent a clear signal to local governments that protecting the rights of private propertyowners is an important interest in the state of Florida.

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DISRUPTION

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Communications is taking a variety of steps to prepare for natural disasters.⁵ These measures include reviewing and updating emergency plans; conducting an assessment of system needs; coordinating emergency plans with local and regional equipment vendors, public utilities, broadcasters, and wireline and wireless phone companies; and reaching out to emergency personnel.⁶ In the event such measures and those taken by other providers still leave a subscriber without communication services after a storm, subscribers may pursue specific remedies at the state and local level.

Remedies for Disrupted Communication Services due to Natural Disasters

Remedies vary depending on whether a cable or telephone disruption is involved. Pursuant to the Cable Television Subscriber Protection and Competition Act of 1992 (the "Cable Act")⁷ and FCC rules,⁸ a local franchising authority may enact and enforce subscriber protection regulations.⁹ The Cable Act and FCC regulations provide minimum requirements for cable services such as: maintaining a conveniently located business office, staying open during normal business hours, answering telephone calls from subscribers within certain time parameters, standards for installations, service interruptions and service calls, training company representatives, measuring response time to customer telephone calls, scheduling appointment windows and cancellation, communicating between cable operators and sub-

scribers, requesting refunds and issuing of credits.¹⁰ These national rules provide local governments with the ability to enforce more stringent local consumer protection laws. Many cities and counties have adopted specific consumer protection provisions to address concerns that have arisen in their communities. The adoption and enforcement of such consumer protections impact the quality of cable services and are essential for subscribers nationwide. The standards give the local government the ability to require a certain level of customer service and implement enforcement mechanisms and fines for noncompliance.

While several Florida county and municipal cable ordinances provide for service credits or refunds for outages in the event a hurricane, last year many subscribers contacted cable companies for service credits due to the unprecedented disruptions and found that none were available. In fact, many cable franchises and cable ordinances do not provide for such consumer credits. Frequently, cable franchises and ordinances and only provide for service credits or refunds for outages resulting from "normal operating conditions,"¹¹ which are only those conditions within the cable provider's control. Under these circumstances, subscribers will pay for services they did not receive. Although some cable providers remain reluctant to provide service credits or refunds for "acts of god" disruptions and incorporate "Force Majeure" clauses in franchise agreements, a recent trend has emerged where cable providers seem more willing to automatically credit a subscriber's bill for cable outages. Cable providers are even offering automatic credits for outages as an incentive for

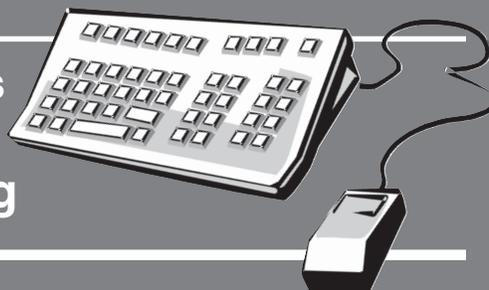
homeowners' associations and condominium associations to enter into a "bulk" service agreement. However, for those cable providers that remain reluctant to voluntarily provide service credits, local cable ordinances should be amended to mandate these credits.

Many Floridians were without power for more than a week in the aftermath of Hurricanes Katrina, Rita and Wilma and without cable services for even longer. Additionally, just two years ago, Hurricanes Charley, Frances, Ivan and Jeanne caused substantial damage to Florida homes. Thousands of residents lost electricity and cable service for extended periods of time. Despite being without cable services in the aftermath of these disasters, subscribers still had to pay their normal cable fees as some local cable ordinances did not provide for service credits. Because there are also thunderstorms, windstorms, floods, tornadoes and other natural disasters in Florida and forecasters predict 12 to 15 named storms this hurricane season,¹² county and municipal authorities should revise their codes to require submission of emergency preparedness plans, as mentioned above, that provide an ascertainment of a cable operator's policy on service credits or refunds in the event of outages after major service interruptions.

In addition to cable outages, many Florida residents lost telephone services due to the destruction caused by last year's hurricanes. While BellSouth Communications, Inc., has stated publicly that it would provide service credits for lack of telephone service caused by hurricanes, their good faith promise was not the only remedy available. Pursuant to §25-4.110(6) of the Florida Administrative Code, telephone companies must make appropriate adjustments or refunds where a subscriber's service is interrupted by anything other than the subscriber's negligence or willful acts and remains interrupted for over 24 hours *after* they notify the company. The refund is the pro rata part of the month's charge for the period of days and the portion of the service and facilities rendered useless or inoperative.¹³

In the likely event of a telephone outage this hurricane season, residents should keep track of the num-

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ber of days without service and immediately notify their telephone operators after power is restored. If the telephone company fails to provide a service credit on the following month's bill, then residents should notify the Florida Public Service Commission, which regulates telephone companies.

Proposed State and Federal Legislation and its Effect on Subscriber Remedies

Proposed state franchising legislation, HB1199, that would have eliminated local franchising authority and the local government's ability to enforce customer service standards was passed by the Florida House of Representatives but failed in the Senate. Congress is also considering legislation to rewrite the nation's telecommunication laws. The proposed federal legislation, the "Advanced Telecommunications and Opportunities Reform Act," H.R. 5252, formerly titled the "Communications, Consumers and Broadband Deployment Act of 2006," S. 2686, would strip local governments of their authority to franchise their public rights-of-way for cable services and impose a national franchising scheme.¹⁴ The FCC would have the authority to oversee and review all local rights-of-way management practices and customer service issues,¹⁵ thus restricting the flexibility local governments have enjoyed in the past in enacting service credit provisions within their cable ordinances. On June 8th, the U.S. House of Representatives approved its version of the bill by a 321-101 vote,¹⁶ while the U.S. Senate is currently considering its own version.

Being left uninformed and without the ability to communicate with family and friends can be extremely frustrating. However, in the absence of pre-emption by a national franchising scheme, local and state remedies are available for time spent without cable and telephone services. Those remedies are in the form of service credits or refunds and can be found in a local government's cable ordinance and in the Florida Administrative Code.

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ments in cable television and communications matters including drafting ordinances and negotiating cable television franchises, renewals and transfers, and lease agreements for placement of wireless towers and antennas. Mr. Robin graduated from the University of Miami School of Law, received his M.B.A. with a concentration in Marketing from Florida International University and his B.S.B.A. in Finance from the University of Florida.

Diane P. Perez was a 2006 summer associate at the law firm of Weiss Serota Helfman Pastoriza Cole Boniske, P.A. She is currently a third-year law student at the University of Miami School of Law, where she is an Associate Editor of the International and Comparative Law Review. Ms. Perez graduated cum laude with a B.S. in Magazine Journalism from the University of Florida, where she published numerous articles in local publications.

Endnotes:

¹ Press Release, National Cable & Telecommunications Association, Cable Commits to Readiness Plan for Hurricane Season (May 17, 2006), available at <http://www.ncta.com/ContentView.aspx?hiddenavlink=true&type=reltypl&contentId=3191>.

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ 47 U.S.C. § 552.

⁸ 47 C.F.R. § 76.309.

⁹ Id.

¹⁰ Id.

¹¹ 47 C.F.R. §76.309(c)(4)(ii) defines "normal operating conditions" as those service conditions which are within the control of the cable operator. Those conditions which are not within the control of the cable operator include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions.

¹² NOAA Continues to Predict Above-Normal Hurricane Season, NOAA News Online, Aug. 8, 2006, available at <http://www.noaanews.noaa.gov/stories2006/s2678.htm>.

¹³ The refund is not applicable for the time the company stands ready to repair the service and the subscriber does not provide access to the company for such restoration work. Fla. Admin. Code Ann. R 25-4.110.

¹⁴ Alexander Ponder, Telecom Bill Moves From House to Senate, Nation's Cities Weekly, June 19, 2006 (Newspaper), available at http://www.nlc.org/newsroom/nation_s_cities_weekly_ncw/2006/06/19/10844.cfm.

¹⁵ Id.

¹⁶ Id.

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Schedule of Events

This two-day course on public employment labor relations will discuss free speech and privacy concerns; libel and slander in the public workspace; public records issues; benefits and retirement; PERA; PERC; Family Medical Leave Update; wage and hour developments; sovereign immunity and 768.28 caps; ethics and professionalism; FCRA; retaliation claims; and FMCS services.

Thursday, October 19, 2006

12:00 noon – 1:00 p.m.

Late Registration

1:00 p.m. – 1:10 p.m.

Opening Remarks

Michael K. Grogan, Jacksonville

1:10 p.m. – 2:00 p.m.

Free Speech and Privacy Concerns

Jeffrey E. Mandel, Orlando

2:00 p.m. – 2:40 p.m.

Libel and Slander in Public Workplace

Thomas J. Pilacek, Winter Springs

2:40 p.m. – 3:20 p.m.

Public Employment/Public Records Issues

Herbert W. Thiele, Tallahassee

3:20 p.m. – 3:35 p.m.

Break

3:35 p.m. – 4:20 p.m.

Benefits and Retirement Update

James W. Linn, Tallahassee

4:20 p.m. – 4:50 p.m.

A Year in Review: PERA and PERC

*Stephen A. Meck, General Counsel, PERC,
Tallahassee*

4:50 p.m. – 5:00 p.m.

Questions and Answers: Ask the Experts

5:00 p.m. – 5:15 p.m.

Joint Executive Council Meetings of The Florida Bar: City, County and Local Government Law and Labor and Employment Law Sections

5:15 p.m. – 6:00 p.m.

Section Meetings (all invited)

- **City, County and Local Government Law Section**

- **Labor and Employment Section**

6:00 p.m. – 7:30 p.m.

All Member Reception (included in registration)

Friday, October 20, 2006

8:45 a.m. – 10:00 a.m.

Family Medical Leave Update

John M. Hament, Sarasota

10:00 a.m. – 10:15 a.m.

Break

10:15 a.m. – 11:15 a.m.

Wage and Hour Developments

Tony B. Griffin, Tampa

Shane T. Munoz, Tampa

11:15 a.m. – 12:10 p.m.

Sovereign Immunity and 768.28 Caps

Darren Schwartz, Tallahassee

12:10 p.m. – 1:30 p.m.

Lunch (included in registration fee)

1:30 p.m. – 2:20 p.m.

Ethics and Professionalism

Hon. J. Donna McIntosh, Seminole Circuit Court

2:20 p.m. – 3:00 p.m.

Developments Under FCRA: Report From FCHR

*Cecil Howard, General Counsel, FCHR,
Tallahassee*

3:00 p.m. – 3:15 p.m.

Break

3:15 p.m. – 4:15 p.m.

Retaliation Claims in Public Sector

Thomas M. Gonzalez, Tampa

4:15 p.m. – 4:50 p.m.

FMCS Services Available to Florida Public Employers

Sue Putman, FMCS, Commissioner, Orlando

4:50 p.m. – 5:00 p.m.

Questions and Answers – Closing Remarks

Michael K. Grogan, Jacksonville

continued...

Registration

Register me for the "32nd Annual Public Employment Labor Relations Forum" Seminar

(018) (ROSEN CENTRE HOTEL, ORLANDO) (OCTOBER 19-20, 2006)

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City, County and Local Government Law Annual Meeting 2005-2006



The Chip Rice
Award presented to
Grant Alley by Chair
Kaye Collie



Kaye Collie presents
Chair's Award to Joseph Jarret



Chip Rice presents Professor
J. J. Brown with the Marsicano
Award with wife Millie looking on



Student Award presented to
Neil DeSpirito by Ken
Tinkler



Incoming Chair
Mary Helen Farris
presenting Kaye Collie
with Chair's plaque



2005-2006 Award Winners

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