MUNICIPAL AUTHORITY

Municipal Authority: Code Enforcement

***Khan v. City of Orlando*,**
16 Fla. L. Weekly Supp. 608b (Fla. 9th Cir. Mar. 30, 2009)

A Code Enforcement Board (CEB) may adopt local procedural rules that allow code enforcement officers to submit written responses to requests for reductions in fines. In adjudicating a request for reduction in fines, a CEB may consider the same statutory factors used to set fines.

FACTS AND PROCEDURAL HISTORY

On May 11, 2005, Appellant Shakeed Khan was cited for city zoning and commercial code violations. Orders issued by the City of Orlando CEB gave Khan 60 days to correct the two violations, after which a $250 daily penalty would be assessed on each violation. The property was not brought into compliance until May 19, 2006, and penalties of $77,750 and $78,000 accrued. The CEB issued an order imposing the penalties and placing a lien on the property.

Khan requested a reduction of the penalties based upon his filing for Chapter 13 bankruptcy, and the CEB held a hearing on the request. Unsworn letters arguing against the reduction were submitted by the code enforcement officer and her supervisor. The letters, which included statements regarding Khan's past code violations, were considered by the board. The board denied the request for reduction and Khan appealed.

ANALYSIS

The Ninth Judicial Circuit, sitting in its appellate capacity, first noted that its review of the CEB's decision must be limited to a review of the record and focused on determining whether due process requirements were met, the essential requirements of the law were followed, and the board's findings were supported by substantial evidence.

The court then considered the three issues Khan raised on appeal. First, Khan argued that the CEB's consideration of the

unsworn letters from the code enforcement officers violated his due process rights. The court found, however, that Florida Statutes Section 162.08 empowers each board to establish local rules for the conduct of hearings. Fla. Stat. § 162.08 (2006). The Orlando CEB's Rules of Procedure allow a code enforcement officer to submit a written response to a request for reduction in fines. Nothing in the provision requires that the response be made under oath. Thus, the court concluded that the CEB's consideration of the letters was proper.

Second, Khan asserted that the CEB improperly considered the factors listed in Florida Statutes Section 162.09(2)(b), arguing that those factors apply only to the initial determination of a fine and not to a later request for reduction. The court disagreed, noting that a previous decision by the same court, *Compton v. City of Kissimmee*, 16 Fla. L. Weekly Supp. 230B (Fla. 9th Cir. Apr. 17, 2007), found that the CEB may consider the Section 162.09(2)(b) factors during reduction hearings. Therefore, the court found that "it does not appear that the CEB is necessarily precluded from considering these factors when deciding whether to grant a reduction." *Khan*, 16 Fla. L. Weekly Supp. at 609.

Finally, Khan argued that the CEB should not have focused on his inability to pay any amount due to bankruptcy. The court found that the CEB complied with the essential elements of the law by also examining other extenuating circumstances that might also affect Khan's ability to pay.

The court closed by emphasizing the fact-specific nature of the opinion. CEBs may not create unfair rules or procedures, and code enforcement officers should submit only relevant, material, and truthful statements for consideration by the board.

SIGNIFICANCE

Khan establishes a CEB's authority to conduct hearings according to its own procedural rules and allow written responses by code enforcement officers to become part of the record to be considered in a fine-reduction request. In determining whether to reduce a fine, the board may consider the factors listed in Section 162.09(2)(b) of the Florida Statutes.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties, Etc.* § 81 (2009).

Cheryl Cooper

Municipal Authority: Code Enforcement

***Las Balmeras, Inc. v. Town of Golden Beach*,**
16 Fla. L. Weekly Supp. 818a (Fla. 11th Cir. July 16, 2009)

When an ambiguous ordinance is susceptible to more than one interpretation, rules of statutory construction should be applied to prevent an absurd result.

FACTS AND PROCEDURAL HISTORY

Las Balmeras, Inc. owned a private residence in the Town of Golden Beach (Town). It was cited for several code violations, and it corrected all but one violation related to the residence's roof. The Town penalized Las Balmeras $250 for each day the roof was not repaired. Because Las Balmeras could not remedy the roofing issue, it sold the property. The residence was demolished, at which time the penalties stopped accruing. Las Balmeras paid the Town $161,393.72 of the proceeds from the sale to satisfy its civil penalties and to be released from the code enforcement lien. Las Balmeras then filed a Motion for Abatement of Civil Penalties.

Section 2-208(d) of the Town Code provides that reductions of penalties for code violations are available upon request after the code violator has corrected all violations except payment of outstanding civil penalties. At an administrative hearing on Las Balmeras' motion, the Special Magistrate ruled that he lacked jurisdiction over the matter and that the civil penalties could not be reduced because Las Balmeras had already settled its civil fines with the Town. Las Balmeras appealed, and the Eleventh Judicial Circuit reversed and remanded.

ANALYSIS

The Eleventh Judicial Circuit began its analysis by acknowledging the principle that legislative intent should be derived from the plain language of the statute. However, the court noted that when a literal interpretation leads "'to an unreasonable or absurd

conclusion, plainly at variance with the purpose of the legislation as a whole,'" analysis beyond the plain language of the statute is necessary. *Las Balmeras, Inc.*, 16 Fla. L. Weekly Supp. at 819 (quoting *Castillo v. de Castillo*, 771 So. 2d 609, 611 (Fla. 3d Dist App. 2000)).

The Town argued, based on a plain reading of the ordinance, that abatement of a civil penalty must be requested before payment of that penalty is made. The court held that the Town's interpretation led to an absurd result. A code violator who promptly paid the fine would be ineligible for a reduction of his or her penalties even though, by paying in a timely fashion, the violator intended willingly to comply with the law. Conversely, a violator who refused to pay the penalties and held out for abatement is rewarded. The court held the ordinance should be read to permit a code violator who has complied fully by remedying the violation and paying the fine to seek a reduction in his or her total civil penalty.

Under the "voluntary payment" rule, the Town argued, a code violator who pays the penalties levied waives his or her ability to recover a portion of that payment later. The court rejected that argument and compared the "voluntary payment" rule to "a voluntary payment of a disputed amount during the pendency of a lawsuit"—in which case the party making the payment concedes judgment. *Id.* The "voluntary payment" rule was inapplicable to the situation before the court for two reasons. First, the ordinance's language did not clearly and obviously prevent a later request for abatement after the fine was paid. Second, the "voluntary payment" rule relates to a party avoiding admissions of guilt; in the context of the ordinance, however, a party who has admitted to violating the code is still eligible for a reduction in his or her fines.

The court found Las Balmeras acted in good faith by remedying its code violations and by settling its fines with the Town. Thus, it reversed the ruling that Las Balmeras was ineligible for abatement of its civil penalties and that the Special Magistrate lacked jurisdiction over the matter. It remanded with instructions that the Special Magistrate conduct a hearing to determine whether Las Balmeras was entitled to abatement.

SIGNIFICANCE

Las Balmeras eliminates a seemingly ill-conceived and misguided policy of penalizing Town of Golden Beach residents for promptly paying civil fines derived from code violations. Rules of statutory construction will be applied to prevent an absurd result.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties and Municipal Corporations to Courts and Judges* § 81 (2005).

Jennifer Morris McPheeters

Municipal Authority: Code Enforcement

***Monroe County Code Enforcement v. Carter*,**
14 So. 3d 1019 (Fla. 3d Dist. App. 2009)

In administrative proceedings, distinct from civil court actions, county inspectors are not required to list the precise date and time the code infractions occurred on notices of violation issued to property owners.

FACTS AND PROCEDURAL HISTORY

A Monroe County property inspector issued a six-count notice of violation to property owner Sandra L. Carter alleging, inter alia, that she maintained a prohibited habitable downstairs enclosure. Carter then sought a variance and a hearing before the special magistrate. The magistrate held that Carter committed the six violations and ordered her to take corrective action within a reasonable time.

Carter sought review by the circuit court, which ruled in her favor. The court held that Florida law required the inspector to list the date and time Carter actually committed the infractions on the notice of violation but had failed to do so. The County then sought certiorari in the Third District.

ANALYSIS

In certiorari proceedings, a District Court of Appeal limits its review to whether the circuit court (a) afforded due process and (b) complied with the essential requirements of law. There is no

dispute that the court afforded due process in this matter. Rather, the parties disagree as to whether the circuit court complied with the essential requirements of law.

Chapter 162, Florida Statutes, governs code enforcement procedures. Part I of Chapter 162, Sections 162.01–162.13, establishes the pleading and proof requirements for an administrative proceeding, while Part II, Sections 162.21–162.30, establishes pleading and proof requirements for civil court proceedings. Part II includes a provision requiring that citations list the date and time the infractions occur. Fla. Stat. § 162.21(3)(c)(3) (2005). However, Part I, governing administrative proceedings, does not require inspectors to list the precise time and date the infractions occur on the notice of violation. Instead, Part I requires only that the notice list the date the inspector found the violation. Fla. Stat. § 162.06(2) (2005).

Here, the district court held the circuit court improperly applied Part II to a Part I administrative proceeding. "By applying 162.21(3)(c)(3) to a notice of violation in an administrative enforcement proceeding, the circuit court created an additional non-required pleading and proof requirement for the County." *Monroe Co. Code Enforcement*, 14 So. 3d at 1021. The district court noted that such a requirement would "unduly burden" the County because violations often occur without the County's knowledge and are discovered only after the fact.

Carter argued that inspectors should be required to list the inception date of the code violation in order to adequately assert defenses, such as laches, estoppel, or statute of limitations. But the district court disagreed, holding that there is no such requirement in Part I of the statute, and thus the circuit court deviated from the essential requirements of law by imposing Part II's pleading requirements to an administrative proceeding.

Accordingly, the district court granted the County's petition for a writ of certiorari and quashed the circuit court's order dismissing the notice of violation against Carter.

SIGNIFICANCE

Florida law provides for similar but often different technical requirements when local officials seek to enforce municipal codes. Trial courts should recognize the statutory dissimilarities when reviewing matters brought by citizens pursuant to administrative

enforcement actions as opposed to civil court proceedings, or risk reversal.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* § 181 (2007).

Mark Johnson

Municipal Authority: County Expenditures

***Brock v. Board of County Commissioners of Collier County*,** 21 So. 3d 844 (Fla. 2d Dist. App. 2009)

The powers of a county clerk include both the ability to investigate the status of funds not under his control and the ability to conduct post-payment internal audits of county expenditures. However, the county clerk lacks independent authority to prepare county financial statements—that authority lies with the Board of County Commissioners, and the board can delegate such power as it deems appropriate.

FACTS AND PROCEDURAL HISTORY

Dwight E. Brock, the Clerk of the Circuit Court of Collier County (Clerk), discovered that certain county employees controlled a fire-district checking account. The funds in this account were not in the Clerk's custody nor were the funds subjected to the normal financial controls of the county.

The Clerk sought a declaratory judgment in the circuit court to determine whether he could make inquiries regarding accounts such as the fire-district account in question, as well as whether he could obtain custody of the funds contained in such an account. The Clerk additionally sought a determination as to whether certain other actions were within the scope of his powers as they related to the County's fiscal affairs. Collier County (County) requested a writ of quo warranto limiting the Clerk's powers over the County's fiscal affairs. The circuit court entered summary judgment in favor of the County. The Clerk appealed the judgment as to three issues: whether the clerk had the authority to investigate the status of funds that were not in his actual custody;

whether he was authorized to conduct post-payment internal audits regarding county expenditures; and whether the clerk had independent authority to prepare the financial statements of the county.

The appellate court reversed the trial court's ruling on the first two issues and affirmed the ruling on the third issue.

ANALYSIS

The appellate court first looked to the source of the Clerk's power, specifically the language within Article 8, Section 1(d) of the Florida Constitution. This language specifies the duties of the clerk. The court pointed out that there is no specific limitation within the Florida Constitution regarding the power of the clerk, only that such powers must be fixed by law. However, there are numerous provisions within the Florida statutes that address the duties and responsibilities of the clerk. Such provisions include that: he is the clerk and accountant of the board; he must keep minutes and accounts; all accounts will at all times be subject to his inspection and examination; he must attest to all checks; and personal civil and criminal liability will be imposed in certain situations involving illegal or unauthorized payment of county funds. Regarding an implied versus an express grant of power, prior decisions have held that a grant of power by statute carries with it everything necessary to effectuate that power.

Addressing the issue of whether the Clerk had the authority to investigate funds not in his custody, the court held that "the trial court's ruling prohibiting the Clerk from investigating county funds that have not been placed in his custody unduly limits the Clerk's ability to carry out his responsibilities as the custodian of all county funds." *Brock*, 21 So. 3d at 847. Because the Clerk has responsibilities related to the public funds, a restriction on his ability to police those funds would prevent him from effectively exercising his responsibilities.

Similarly, concerning the issue of whether the Clerk was authorized to conduct post-payment internal audits regarding county expenditures, the court held that a prohibition against the post-payment audits is inconsistent with the power of the clerk to inspect all county accounts at any time. To guard against the illegal use of funds, the clerk must also be able to audit payments.

The court affirmed without comment the trial court's third ruling that the authority of the Clerk to prepare financial statements is not derived from the Constitution or a statute, but is rather is derived from a discretionary delegation by the Board of County Commissioners.

The combination of the Clerk's statutory responsibilities and the implied power to execute those responsibilities, led to the court's decision that the Clerk is not prohibited from investigating funds or carrying out audits.

Dissent:

The dissenting judge disagreed with the majority's extension of the Clerk's powers. While the dissent agreed that an expressly granted power may carry with it implied authority to effectuate that power, such an extension cannot result in the creation of a substantive power.

Regarding the power of the Clerk to investigate the status of funds, the dissent argued that the power to collect and deposit county funds was the responsibility of the county officers. If a county officer failed to collect funds the authority to do so would not shift to the Clerk.

Addressing the power to conduct post-payment audits, the judge concluded that while the Clerk had the power to ensure that a payment yet to be made is legal, once the payment is made, the Clerk's power expires and there is no power to conduct a post-payment audit.

Concerning the Clerk's power to independently prepare financial statements, the judge agreed with the majority that the power to prepare financial statements is a delegation of authority and within the discretion of the board to delegate as it sees fit.

SIGNIFICANCE

Brock illustrates how courts outline the scope of a government employee's power by tracing the origin of the position back to the Florida Constitution, finding rights and responsibilities in the Florida Statutes, and determining what power is necessary to effectuate those rights and responsibilities.

RESEARCH REFERENCE

- 15A Am. Jur. 2d *Clerks of Court* § 29 (2000).

Justin P. Miller

Municipal Authority: Court Costs

***Edney v. State*,**
3 So. 3d 1281 (Fla. 1st Dist. App. 2009)

City and county governments may impose $2 assessments in added court costs to fund local criminal justice education when defendants are convicted under state statutes, municipal ordinances, or county ordinances.

FACTS AND PROCEDURAL HISTORY

The circuit court in Leon County convicted Daryl Edney of sexual battery of a child less than twelve years of age by a defendant eighteen years of age or older. *See* Fla. Stat. § 794.011(2)(a) (2006). The court sentenced Edney to life in prison without the possibility of parole and imposed court costs and fines totaling $2,535, including $2 each for county and city criminal justice education. Edney filed a post-sentencing motion arguing that Florida law authorizes the $2 assessments only for violations of county and municipal ordinances, not state statutes. The trial court denied the motion. The defendant appealed his conviction and sentence, as well as the denial of his motion concerning court costs. The First District Court of Appeal affirmed Edney's conviction and sentence, including the $2 assessments, but rejected the State's reasoning on the cost issue.

ANALYSIS

Florida Statutes Section 938.01(1) (2006) requires all persons convicted of violating a state penal or criminal statute, or a municipal or county ordinance to pay $3 as a court cost. Under a separate subsection, municipalities and counties may impose an "additional" $2 assessment to cover expenditures for local criminal-justice education degree programs and training courses. Fla. Stat. § 938.15 (2006). The dispute in this case focused on whether the trial court imposed the added $2 assessments pursuant to

Section 938.15 and, if so, whether this particular provision authorizes such assessments in cases involving violation of state law.

In denying Edney's motion for correction of sentencing error, the trial court found that it did not rely on Section 938.15 as the basis for imposing the two $2 assessments as part of Edney's court costs and fines. The State supported the trial court's position on appeal, but the First District found that the trial court's written judgment expressly acknowledged Section 938.15 as authority for imposing the additional costs.

On the substantive issue regarding whether Section 938.15 authorizes added court costs for violations of state statutes, Edney argued it does not. He relied on a 2002 Attorney General opinion, which interpreted the statute restrictively. The Attorney General reasoned that since state courts already impose a $3 court cost for violations of crimes under Section 938.01(1), the Legislature "logically" intended to authorize cities and counties to impose "additional" $2 assessments under Section 938.15 for violations of local ordinances alone. Op. Atty. Gen. Fla. 02-10 (2002).

The First District disagreed. Noting that Attorney General opinions are not binding upon state courts, the First District held that "[t]he plain language of [S]ection 938.15 does not limit its reach to violations of county and municipal ordinances." *Edney*, 3 So. 3d at 1284. Thus, a Florida county or municipality—or both—may assess an additional $2 in costs for state statute violations that occur within their jurisdictions. In rejecting the Attorney General's position, the First District agreed with the Second District's view in *Kimball v. State*, 933 So. 2d 1285 (Fla. 2d Dist. App. 2006) that Section 938.15 authorizes localities to impose $2 cost assessments for violations of state law.

In short, the First District concluded that the trial court reached the right result in Edney's case but for the wrong reason. It applied the "tipsy coachman" rule to affirm the denial of Edney's motion to correct sentencing error and to leave intact the two $2 assessments under Section 938.15. *Edney*, 3 So. 3d at 1284.

SIGNIFICANCE

Two of five District Courts of Appeal have now opposed the Attorney General's view that Section 938.15 does not allow city

and county governments to impose additional court costs to fund criminal justice education as a sanction for violations of state statutes.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* §§ 257, 260 (2007).

Mark R. Johnson

Municipal Authority: Law Enforcement Investigations

***Demings v. Orange County Citizens Review Board*,**
15 So. 3d 604 (Fla. 5th Dist. App. 2009)

County governments may not grant subpoena power to "citizen committees" to investigate complaints of excessive force or abuse of power by sheriff deputies unless the constitutional office of sheriff has been abolished by county charter and replaced by a charter law enforcement agency.

FACTS AND PROCEDURAL HISTORY

Orange County is a charter county. In 1992, Orange County voters approved a charter amendment abolishing the constitutional office of sheriff and creating in its place a county charter office of sheriff. The voters also approved creation of the Citizens Review Board (CRB) to review the Sheriff's internal investigations and to conduct its own investigations. In 1996, the Orange County electorate voted to terminate the county charter sheriff's office and reestablish the Sheriff as an independent constitutional officer. However, the electorate left the CRB intact.

In 2004, a seventeen-year-old male, J.M., filed a complaint against Deputy Sheriff Steven Jenny alleging that Jenny used excessive force during his arrest for a curfew violation. The Sheriff's Professional Standards Division found the complaint baseless. The Orange County CRB then proceeded with its own investigation and subpoenaed Deputy Jenny. After Jenny refused to appear, the CRB filed an enforcement action in circuit court. The Sheriff filed a separate action contesting the subpoena. The court consolidated the two cases, and ultimately granted summary

judgment, upholding the CRB's authority to issue the subpoena. The Sheriff and Jenny appealed.

ANALYSIS

The Fifth Circuit began its analysis by noting that Florida's Constitution provides for two types of county government: non-charter counties, which are granted only those powers expressly approved by the Legislature, and charter counties, which are broadly granted "all powers of local self-government" not inconsistent with general or special state law. Fla. Const. art. VIII, § 1(f), (g). Additionally, the Florida Constitution provides that certain local responsibilities are carried out by independent constitutional offices, such as the sheriff's office, and are not accountable to county government. In charter counties, the local electorate has the option of maintaining the sheriff's office as an independent entity or abolishing it as a constitutional office and transferring its responsibilities to a local office accountable to the governing board of the county.

To aid in its analysis, the court provided three pertinent statutory provisions that provide legal structure to the issue. First, Florida law provides that a local law enforcement agency's internal investigation "'shall be *the* procedure for investigating a complaint against a law enforcement officer and for determining whether to proceed with disciplinary charges, '*notwithstanding any other law or ordinance to the contrary*.'" *Demings*, 15 So. 3d at 608 (quoting Fla. Stat. § 112.533(1)(a) (2003)) (emphasis added by the court). Second, the title of the amendment designates internal investigations as the "exclusive procedure" for investigating such complaints. 2003 Fla. Laws ch. 149. Third, an amendment to Section 112.533 requires any complaints against law enforcement received or initiated by a municipal entity to be forwarded directly to the employing agency for investigation.

In light of these constitutional and statutory provisions, the Fifth District determined that Orange County's decision to create and authorize a separate body, the CRB, to investigate citizen complaints against deputy sheriffs is inconsistent with the sheriff office's current status as an independent constitutional office. The court found that the plain meaning of Section 112.533 unambiguously provides that the employing agency is the only entity that can investigate a registered complaint against a law enforcement

officer—the sheriff's office in this case. The court noted that the Attorney General has interpreted Section 112.533 in the same manner. *See* Op. Atty. Gen. Fla. 97-62 (1997).

Furthermore, because the Sheriff is an independent constitutional officer, the office is not accountable to the Orange County Board of County Commissioners but to the electorate. Therefore, the county cannot interfere with the "Sheriff's independent exercise of his duty to investigate misconduct by his deputies either by forcing him to appoint members to the CRB or by mandating his participation in CRB proceedings, either in person or through his deputies or employees." *Demings*, 15 So. 3d at 611. Thus, the court held that not only does the CRB's investigative authority conflict with the statute, but its basic structure is constitutionally infirm.

Finally, the court held that the doctrine of severability was not practical in this case. Therefore, it declared the Orange County charter and ordinance provisions creating the CRB to be void as violative of Florida Constitution Article VIII, § 1(d), (g) (2008).

SIGNIFICANCE

The Fifth District's decision reaffirms the constitutional independence of local sheriffs in charter counties and seriously restricts the ability of county governments to undertake independent, formal investigations of law enforcement personnel. In order for a county to give investigative power to citizen review boards, the charter county must abolish the independent constitutional office of sheriff and establish a local office that derives its power from the charter.

RESEARCH REFERENCES

- Kristine C. Karnezis, *Validity, Construction, and Application of Statutory Provisions relating to Public Access to Public Records*, 82 A.L.R.3d 19 (1978).
- 21 Am. Jur. 2d *Criminal Law* § 233 (2009).

Mark R. Johnson

Municipal Authority: Police Power Controls

***Dundale v. City of Miami*,**
16 Fla. L. Weekly Supp. 1017a (Fla. 11th Cir. Sept. 22, 2009)

A "Notice of Violations" will not satisfy due process requirements unless the notice is served and recorded using the proper methods and sent to the known address most likely to effectuate notice.

FACTS AND PROCEDURAL HISTORY

Mark Dundale owned rental property in Miami (Property) but lived in North Carolina. The Miami-Dade County Tax Collector's Office had a North Carolina address on file for Dundale and sent tax bills and other official documents to that address.

In April 2006, the City of Miami Code Inspector found three violations at the Property. The City of Miami (City) mailed notice to the Property via certified mail with return receipt and posted notice. Notice was never sent to the North Carolina address. The notice was recorded on November 2, 2007, stating that a fine of $250 per day would accrue until the violations were corrected. Dundale alleged to have never received notice, and he did not appear at the hearing where a default judgment was entered against him. In December 2006, Dundale evicted the tenant and moved back to the Property. Upon his return, he unknowingly remedied the violations. On April 1, 2008, a notice of lien was sent to the Property via certified mail, return receipt requested. Dundale immediately contacted the City to resolve the issue, leading to a mitigation hearing on September 4, 2008. At the hearing, it was found that he had corrected the violations by December 2006, and the fine was lowered from $163,000 to $40,000. Dundale appealed the default judgment, lien order, and mitigation order finding him guilty of zoning code violations.

ANALYSIS

Notice requirements are addressed in the City of Miami Charter and Code Part II, Chapter 2, Article X, Section 2-819. Notice is proper by either certified mail with return receipt or hand delivery to the violator's usual place of abode. A proper at-

tempt to deliver notice is sufficient regardless of whether the alleged violator received the notice.

The crux for the court was the City's failure to attempt to provide notice to Dundale at the North Carolina address. Regarding mail to the Property, the record contained only evidence of improper mailing. There was an affidavit for the mailing of the notice and notice of violations to the Property, but the return receipts were missing, and there was no proof on the postal forms of the mailing. Additionally, all the certified mail receipts lacked a postmark date. Thus, the court concluded that Dundale was denied due process and therefore vacated the default final judgment, lien, and mitigation order.

SIGNIFICANCE

Dundale clarifies the court's interpretation of the City's notice requirements. The court concentrated on the failure of the City to send notice to Dundale's North Carolina address, where tax bills and other official documents were sent. While actual notice is not a requirement, the City was required to send notice to the location most likely to give Dundale a chance to respond.

RESEARCH REFERENCE

- 38 Fla. Jur. 2d *Means of Knowledge as Notice* § 2 (2009).

Justin P. Miller

Municipal Authority: Water Rights—Jurisdiction

***Northwest Florida Water Management District v. Department of Community Affairs*,**
7 So. 3d 1129 (Fla. 1st Dist. App. 2009)

Florida Statutes Section 373.217 (2008) establishes that Florida's water management districts shall maintain the exclusive authority to regulate the consumptive use of water. Therefore, the Department of Community Affairs is without authority to require property owners to obtain its permission before installing wells on their property.

FACTS AND PROCEDURAL HISTORY

Property owners in Franklin County applied for permits with the Northwest Florida Water Management District (District) to drill wells on their property to extract water for irrigation. The property owners' land was subject to a 1977 Development of Regional Impact Order (Order) issued by the Department of Community Affairs (Department), which only permitted the installation of wells under specific circumstances. While the District announced its intent to issue permits to the property owners, the Department distributed notices of violation to the same property owners claiming the proposed wells were in violation of the Order, and that the property owners failed to obtain the Department's approval.

The District petitioned the First District Court of Appeal for either a writ of prohibition or writ of quo warranto, challenging the Department's authority to require property owners to obtain permission from the Department before drilling wells on their property. The District's writ of prohibition was denied pursuant to *Broward County v. Florida National Properties*, 613 So. 2d 587 (Fla. 4th Dist. App. 1993). However, the court granted the District's petition for a writ of quo warranto, which required the Department to immediately withdraw all notices of violation previously issued to the property owners.

ANALYSIS

Florida Statutes Section 373.217(2) declares that Part II of the Florida Water Resources Act of 1972 (FWRA) "shall provide the exclusive authority for requiring permits for the consumptive use of water . . . ." Section 373.217(3) further provides that Part II shall supersede any other law, ordinance, rule, or regulation, except the Florida Electrical Power Plant Siting Act, for the purpose of regulating the consumptive use of water. In ultimately holding that the Department had no authority to require property owners to obtain its permission before drilling wells on their property, the court relied on: (1) the plain language of Section 373.217 and (2) previous case law interpreting the FWRA.

First, the court considered Section 373.217's plain language through which it recognized the Florida Legislature's expressed intent that Part II of the FWRA provide the exclusive authority for regulating the consumptive use of water. Accordingly, because

Part II provides this exclusive authority to the water management districts and not the Department, the Department is without authority to require property owners to obtain permits before drilling wells on their land. Specifically, the court found it instructive that the Florida Legislature "created an exception to the exclusive jurisdiction of the water management districts for the Florida Electrical Power Plant Siting Act[, yet n]o similar exception is made for the Department's authority under the Environmental Land and Water Management Act of 1972 on which it here relies." *N.W. Water Mgt. Dist.*, 7 So. 3d at 1131.

Second, the court considered previous cases that interpreted the FWRA. Specifically, the court looked to the only recorded appellate decision resolving the conflict between the requirements of the Environmental Land and Water Management Act of 1972—*Pinellas Co. v. Lake Padgett Pines*, 333 So. 2d 472 (Fla. 2d Dist. App. 1976)—which the Department relied on for its authority to issue permits, and the FWRA, which the water management districts relied on for their exclusive authority to issue permits. While that decision was rendered before the FWRA included Section 373.217's specific preemption language, the court in *Pinellas County* nevertheless determined that the installation of wells was not subject to the Department's 1977 order requiring approval from the Department. 333 So. 2d at 480. Additionally, the court pointed to other decisions interpreting Section 373.217's preemptive language that support the conclusion that the District's approval is all that is necessary for property owners' consumptive use of water in Florida.

SIGNIFICANCE

This case confirms that Part II of the FWRA grants the exclusive authority to regulate the consumption of water to Florida's water management districts.

RESEARCH REFERENCES

- 56 Fla. Jur. 2d *Water* §§ 47,105 (2008 & Supp. 2009).
- 43 Fla. Jur. 2d *Quo Warranto* § 6 (2007 & Supp. 2009).

Amy Paulke