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CONDEMNATION & EMINENT DOMAIN

Condemnation & Eminent Domain: Inverse Condemnation

_Hansen v. City of Deland_,
32 So. 3d 654 (Fla. 5th Dist. App. 2010)

No compensable taking occurs when a city pumps water into a dry drainage basin, even when it causes partial flooding of private property and damage to trees, if the landowner retained full use of his or her home and driveway during the flooding.

FACTS AND PROCEDURAL HISTORY

The owners of two parcels of land near a subdivision in an unincorporated area of Volusia County filed suit against the City of Deland (City). The subdivision contained two drainage basins, basin A and basin B. Due to excessive rainfall in 2004 and 2005, flooding had occurred near basin B, prompting the City to pump storm water from basin B into basin A, which was dry. After the pumping, water on some low-lying portions of the landowners’ properties rose to twelve-feet high. Although the City never pumped any water directly onto the landowners’ land, the properties remained partially flooded for roughly fifteen months. The landowners also lost several trees in the flooded area.

The landowners filed suit for damages against the City, alleging that the flooding constituted an illegal taking of their properties. At a bench trial, the circuit court found that although the flooding was caused by the City’s actions, the landowners were not entitled to compensation because they had retained full use of their homes and driveways during the flooding and the tree damage was merely aesthetic rather than commercial. The trial court further ruled that if the destruction of trees was negligent, it would constitute a tort, which was not alleged in the complaint. The landowners appealed to the Fifth District Court of Appeal, claiming that the trial court had erred in holding that a compensable taking had not occurred.

ANALYSIS

The appellate court concluded that the trial court’s findings were supported by competent substantial evidence and thus incor-
porated those findings without alteration. The court reviewed the relevant takings law, particularly as it applied to flooding. Although flooding may constitute a taking, it must result in a permanent deprivation of all beneficial enjoyment of the landowner’s property. For flooding to be considered permanent, the landowner must show that the flooding is continuous or reasonably expected to recur; flooding caused by rainfall would satisfy this standard. In addition, a taking is more likely to occur when the government acts to confer a public benefit rather than when it acts to prevent a public harm; here, the latter occurred.

Although the court established that flooding due to government action might constitute a taking under certain circumstances, it affirmed the lower court’s ruling that a taking had not occurred in this case because only one-tenth of one property and one-third of the other property had been affected by the flooding. Crucially, both landowners retained full use of their homes and driveways during the flooding and thus had not “suffered a substantial deprivation of all beneficial use of their properties during the period the land was flooded.” Hansen, 32 So. 3d at 656. Additionally, the court agreed with the trial court by holding that aesthetic damage to the landowners’ trees was not compensable because it was an injury to, rather than an appropriation of, their land.

SIGNIFICANCE

Hansen establishes that flooding caused by the government constitutes a compensable taking if it results in a permanent deprivation of all beneficial use of the property, including use of the home and living areas of the residential property. Hansen also supplies a framework for a successful inverse condemnation suit based on flooding, provided that the property is completely and permanently submerged or that the house itself is affected.

RESEARCH REFERENCE


Daniel R. Strader
Recent Developments

Condemnation & Eminent Domain:
Inverse Condemnation—Ripeness

_Beyer v. City of Marathon_,
37 So. 3d 932 (Fla. 3d Dist. App. 2010)

When a land use regulation deprives a property owner of most but not all reasonable economic uses of his or her property, the property owner may bring an as-applied takings claim. The statute of limitations on such a claim does not begin to run until the property owner has obtained a final decision from the land use authority regarding the application of the regulation to the property.

FACTS AND PROCEDURAL HISTORY

In 1970, Gordon and Molly Beyer purchased Bamboo Key, a nine-acre offshore island in Monroe County (Property) zoned “General Use.” This zoning allowed development at a density of one unit per acre. When Monroe County adopted the State Comprehensive Plan in 1986, the Property’s zoning changed to “Offshore Island,” which allowed for development at a density of one unit per ten acres. In 1996, development on the Property was entirely prohibited when Monroe County’s Year 2010 Comprehensive Plan (1996 Plan) designated the Property a bird rookery. Camping and nature-related activities, however, were still permissible on the Property.

In 1997, the Beyers applied to Monroe County for a beneficial use determination (BUD). When the City of Marathon was incorporated in 1999, and the Property became part of it, Monroe County had taken no action on the Beyers’ BUD application. In November 2002, at the City’s direction, the Beyers filed a new BUD application. The Beyers filed yet again in 2003, when they learned the City lost the 2002 application. After the Beyers filed a mandamus action in 2004, the City agreed to make a final BUD determination.

At the BUD hearing, the special master found the 1996 Plan completely prohibited building on the property because it did not permit development on offshore islands designated as bird rookeries. The special master then recommended denial of the Beyers’ BUD application, noting the Beyers’ waited thirty years to take
action, knowing all along the environmental restrictions regarding the Property’s use were growing increasingly more stringent.

Upon the City’s adoption of the special master’s recommendation in September 2005, the Beyers sued the City and the State of Florida for inverse condemnation. Finding the Beyers had exceeded the four-year statute of limitations imposed by Florida Statutes Section 95.11(3)(p), the trial court granted summary judgment against them. The Beyers appealed.

ANALYSIS

The Third District Court of Appeal reversed and remanded, holding the Beyers timely filed the inverse condemnation complaints against the City and the State of Florida. Although the statute of limitations for a facial taking claim begins to run on the date the regulation effectuating the taking is enacted, the court stated that under Shands v. City of Marathon, 999 So. 2d 718 (Fla. 3d Dist. App. 2008), “[a]n as-applied takings claim challenging the application of a land use ordinance is not ripe until the plaintiff has obtained a final decision regarding the application of the regulations to the plaintiff’s property.” Beyer, 37 So. 3d at 935 (quoting Shands, 999 So. 2d at 725). Moreover, for a takings claim to be considered ripe, a property owner must have taken reasonable and necessary steps to allow the land use authority to exercise its judgment regarding development plans, including the opportunity to grant waivers and variances.

The court rejected the trial court’s conclusion that the Beyers’ claim implicated a facial taking and, hence, the statute of limitations accrued with the enactment of the 1996 Plan. The court concluded that because the Property retained some beneficial economic value as a recreational area, the Beyers’ claim was an as-applied taking rather than a facial taking resulting from the enactment of a regulation that “deprive[d] the property owner of all reasonable economic use of the property,” Beyer, 37 So. 3d at 934 (quoting Collins v. Monroe Co., 999 So. 2d 709, 713 (Fla. 3d Dist. App. 2008) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992)).

Because the Beyers sought relief through the BUD process almost immediately following the enactment of the 1996 Plan, the court concluded it would be patently unfair to allow the land use authorities who caused the application-processing delays to rely on the statute of limitation defense. Therefore, the court held the
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statute of limitations period for the Beyers’ as-applied takings claim began to run when the City adopted the special master’s recommended denial of the Beyers’ BUD application on September 27, 2005. Thus, the Beyers timely filed their inverse condemnation complaints.

SIGNIFICANCE

*Beyer* confirms that when a regulatory enactment deprives property of most but not all reasonable economic use, the property owner may bring either an as-applied or a facial takings claim, but the statute of limitations for each begins to run at different times. *Beyer* clarifies that although the statute of limitations for a facial takings claim begins to run on the date of the enactment of the regulation effectuating the alleged taking, the statute of limitations for an as-applied takings claim does not begin to run until the property owner has obtained a final decision from the land use authority regarding the application of the regulations to the property.

RESEARCH REFERENCE


Jamie M. Marcario

Condemnation & Eminent Domain: Regulatory Takings

*Department of Agriculture & Consumer Services v. Bogorff,*

35 So. 3d 84 (Fla. 4th Dist. App. 2010)

When physical property has been taken and destroyed to benefit a private industry, as opposed to preventing imminent damage or harm, the Florida Constitution unequivocally requires the payment of just compensation in an amount chosen at the trier-of-fact’s discretion if supported by competent, substantial evidence.
FACTS AND PROCEDURAL HISTORY

Bogorff was the representative of a class of over fifty thousand property owners in Broward County whose healthy citrus trees were cut down and destroyed under the Department of Agriculture and Consumer Services’ (Department) Citrus Canker Eradication Program (CCEP). Once certified, the class filed a claim for inverse condemnation in the Seventeenth Judicial Circuit Court. The circuit court found that more than one hundred thousand noncommercial trees unaffected by citrus canker had been taken by the Department over a set time period, and the jury awarded $11,531,463 as just compensation for the owners’ loss. After adjusting the award for prejudgment interest and setoffs previously given to the owners, the circuit court entered final judgment for the class in the amount of $8,043,542 to which the Department appealed.

ANALYSIS

The Fourth District rejected the Department’s claim that the circuit court improperly rejected expert testimony in its favor by asserting that it has always been the province of the trier of fact to decide which evidence is entitled to greater weight, and the appellate court is not at liberty to substitute its own subjective judgment. The district court found that the record sufficiently supported the conclusion that the citrus trees had value at the time they were cut down, and no evidence sustained the Department’s claim that simply because other trees in the surrounding area had been infected with citrus canker, the owners’ trees would inevitably become contaminated. The district court bolstered its analysis by holding that even if such testimony were admitted and uncontroverted, it was still well within the discretion of the trier of fact to discredit it entirely.

To rebut the Department’s claim that trees exposed to citrus canker constituted a public nuisance and thus precluded the application of just compensation, the court first established that a finding of inverse condemnation was presumed correct and thus would only be reversed if not supported by competent and substantial evidence. The court then stressed that a finding of public nuisance was only appropriate when the property in question imminently causes or is about to cause harm or inconvenience to the general public. The Fourth District reasoned that the Department cut down the citrus trees to benefit the citrus indus-
try, not because the trees posed an imminent threat to the community.

Although the court conceded that there was no concrete test for when a governmental taking occurred, “[c]utting down and destroying healthy non-commercial trees of private citizens could hardly be more definitively a taking.” Bogorff, 35 So. 3d at 90. The court reaffirmed the axiom that one of the fundamental purposes of government is to protect private property rights, and when those rights are violated by the government itself, just compensation must be given.

The Department then argued that any common law claim for inverse condemnation was preempted when the current Citrus Canker Law was enacted. The court disagreed and stated that when a constitutional provision mandated just compensation, the government could not statutorily designate a fixed monetary ceiling for damages when the circumstances prescribed a higher amount. The court also noted that the purpose of the Citrus Canker Law was to reduce the need for litigation by setting an opening bid, as opposed to establishing a fixed compensatory maximum.

The Fourth District also found that the trial court used the proper measure of damages as the cost of replacement for the destroyed trees, as opposed to the diminished value of the real estate as argued by the Department. To support its finding, the district court reasoned not only did the trial court properly credit two expert witnesses verifying the replacement cost as the only valuation used in the arborist trade, but also the Department itself directed its own agents to research the replacement cost of the trees before implementing the CCEP.

In upholding the award of prejudgment interest, the court articulated that Florida precedent firmly established that interest is to be awarded from the date of the governmental taking. The court buttressed its reasoning by stating that it was the Department that benefitted from commencing the date for prejudgment interest to the filing of the class action, as the actual takings occurred over an earlier, dispersed time period. Although Justice Levine argued that each class member was entitled to compensation individually tailored to his or her grievance in a special concurrence, the Fourth District remarked it was not otherwise inequitable to consolidate the prejudgment interest date for administrative purposes.
SIGNIFICANCE

*Bogorff* reinforces the importance of private property rights in Florida jurisprudence through the willingness of courts to enforce both the prerogative of governmental agencies to take privately owned property without the owner’s consent, as well as the right of the owners to demand just compensation when such a taking occurs. But it is important to note the court’s suggestion that economic harm to an essential private entity such as the citrus industry, even if manifestly evident, would be insufficient to constitute a public nuisance and allow the State to circumvent the constitutional requisite of just compensation. This could have significant consequences if the government was forced to choose between the costly taking of individuals’ private property or the failure of an industry crucial to the employment or welfare of the public.

RESEARCH REFERENCE


Joe Fernandez III
CONSTITUTIONAL LAW

Constitutional Law: Due Process

Carillon Community Residential Assn. v. Seminole County,
45 So. 3d 7 (Fla. 5th Dist. App. 2010)

Participants, as opposed to parties with a direct interest at stake, are not deprived of procedural due process in a quasi-judicial proceeding by an inability to cross-examine witnesses when there are alternative methods for presenting questions, there is no deprivation of property use, and to provide otherwise would inflict undue administrative and fiscal burdens upon the government.

FACTS AND PROCEDURAL HISTORY

Carillon Community Residential Association (Carillon) objected to the adoption of an amendment to the Carillon Planned Unit Development by the Seminole County Board of County Commissioners (Board). The amendment permitted mixed-use development, specifically the construction of a four-story student-housing complex, on two parcels of land next to Carillon's property. Carillon was denied the ability to cross-examine the witnesses presented at the quasi-judicial rezoning hearing held by the Board in which the amendment was ultimately approved. Carillon petitioned the Circuit Court for Seminole County, claiming deprivation of its procedural due process rights. The circuit court denied its petition and upheld the adoption of the amendment. Carillon subsequently filed a petition for second-tier certiorari review of the circuit-court order.

ANALYSIS

The Fifth District Court of Appeal articulated that at the core of the constitutional requirement for procedural due process is the right to notice and an opportunity to be heard. The court also stressed that to trigger the protections of procedural due process, there must first be a deprivation of a constitutionally protected, cognizable property or liberty interest. The Fifth District further framed its analysis by stating that there is no bright-line test for procedural due process; rather, it is a malleable standard that
must be viewed through the lens of the particular interest and type of proceeding to ensure that basic fairness has been afforded to those involved.

The court also enumerated the criteria for determining whether procedural due process has been met as established by the Supreme Court of the United States: the private interest affected, the risk of erroneous deprivation through procedures currently used, the potential value additional procedural safeguards could provide, and the financial and administrative costs the government would incur by enacting those additional procedural safeguards.

The Fifth District also asserted it was essential to distinguish between parties and participants to a quasi-judicial hearing when considering procedural due process. Although parties who have direct interests potentially affected by the outcome of the administrative proceeding should be granted a higher level of procedural due process, participants who do not have direct interests at stake usually are given a right to be heard simply in their capacity as concerned citizens of a responsive government.

To rebut Carillon’s claim that Florida caselaw required that participants be entitled to cross-examine witnesses in a quasi-judicial hearing, the court explained that all cases conferring a right to cross-examine witnesses in administrative proceedings involved parties, not participants. The Fifth District reasoned that “none of these cases hold that an adjoining landowner has a due process right to cross-examine witnesses in a quasi-judicial rezoning hearing.” Carillon Community Residential Assn., 45 So. 3d at 10 (emphasis in original). The court remarked that the case cited by Carillon to support its proposition actually held that in a quasi-judicial proceeding, notice and an opportunity to be heard satisfy the elements of procedural due process, and to allow all interested participants to cross-examine any and all witnesses would create an untenable, unworkable administrative system for local governments. The Fifth District also noted that another circuit-court case relied upon by Carillon did not clarify whether the individuals denied procedural due process were adjoining landowners and that the case was not controlling on the Circuit Court for Seminole County.

Denying the petition for second-tier certiorari review, the court stated that while Carillon claimed the enjoyment of its property would be diminished, it had never alleged that it would
be deprived of the use of its property, as opposed to circumstances in which developers of a housing complex who had already invested considerable resources were deprived of the use of their land. To support its holding further, the court reasoned that not only was the risk of erroneous deprivation low, but Carillon had been permitted to present its own witnesses at the Board hearing. And although it was not allowed to cross-examine other witnesses, Carillon had the ability to present questions directly to the Board, which would then present them to the witnesses in question. The Fifth District also acknowledged that twenty-five members from the community spoke at the Board hearing, and to give an absolute right to each member to cross-examine all witnesses would be inordinately impractical and burdensome.

SIGNIFICANCE

Carillon Community Residential Association illustrates that while the courts are willing to uphold the important individual rights secured to citizens, especially in the context of governmental proceedings, they are also prepared to consider the actual and potential costs to local governments that result from enforcing and at times supplementing those rights. The court never minimized the benefits of transparency in government or participation by all members of the community, yet it held that to grant additional procedural rights in administrative hearings could cripple the productivity of those hearings. The case shows how courts balance the legitimate rights of members of the community to question and petition their government with the need of the government to maintain order and efficiency in procedural due process cases.

RESEARCH REFERENCE


Joe Fernandez III
Constitutional Law: Standing—Ripeness

Dermer v. Miami-Dade County,
599 F.3d 1217 (11th Cir. 2010)

A claim for pre-enforcement relief from an ordinance must show that a specific and credible threat of future harm exists to satisfy the standing and ripeness requirements of the Federal Rules of Civil Procedure.

FACTS AND PROCEDURAL HISTORY

Miami-Dade County (County) passed an ordinance making it unlawful to “make or cause to be made any false statement concerning the contents or effect of any petition for initiative, referendum, or recall . . . to any person who is requested to sign any such petition or who makes an inquiry with reference to any such petition and who relies on such statement.” Miami-Dade Co., Fla., Ordin. 06-167 (Nov. 28, 2006) (Ordinance). Dermer, Miami Beach’s former mayor, sued the County for declaratory and injunctive relief claiming the Ordinance violated his First Amendment rights. He asserted he was previously involved with referendums and initiatives, but he was now reluctant to engage in politics because of the Ordinance.

The United States District Court for the Southern District of Florida partially granted Dermer’s cross-motion for summary judgment on the grounds that the Ordinance was unconstitutional. The Eleventh Circuit Court of Appeals reversed and remanded the case to the district court with instructions to dismiss Dermer’s complaint for lack of subject-matter jurisdiction.

ANALYSIS

A federal court can hear a case only if the plaintiff alleges facts that confer standing and establish the claim is ripe. Standing requires proof of injury, causation, and redressibility. The Eleventh Circuit affirmed that the injury requirement is not strictly construed when a law is challenged as facially unconstitutional under the First Amendment. But when a plaintiff seeks prospective relief, he or she must show an imminent injury and must show a definite and well-substantiated fear that the ordinance will be enforced against him or her. Dermer’s only stated
injury was the Ordinance’s effect on his eagerness to participate in the local referendum process. Because Dermer provided the court with mere generalizations and did not include any details about when and where he planned to involve himself with a petition, recall, or referendum, the Eleventh Circuit concluded that he failed to establish an injury in fact and therefore lacked standing.

When a court is asked to resolve a claim about pre-enforcement of a law, standing and ripeness overlap because the case concerns a possible future injury. When standing is lacking because no injury exists, the claim generally is not ripe because the factual basis for the injury has not completely developed. Demonstrating ripeness requires evidence that the plaintiff will suffer a credible hardship without judicial redress and that the claim is suitable for judicial decision. This can be established by proving a plausible threat of prosecution. But Dermer’s lack of specificity prevented the court from finding such a threat. In the absence of standing and ripeness, the federal court lacked subject-matter jurisdiction.

SIGNIFICANCE

Dermer applies Supreme Court and Eleventh Circuit precedent to declare that a general fear of a future harm is not sufficient to establish either a plaintiff’s standing or that a claim is ripe for judicial review under the First Amendment argument presented.

RESEARCH REFERENCES


Stacey L. Rowan
ELECTION & VOTING RIGHTS

Election & Voting Rights: Absentee Ballots

Goldsmith v. McDonald,
32 So. 3d 713 (Fla. 4th Dist. App. 2010)

Absentee ballots not received by the supervisor of elections by the statutory deadline will not be counted, and the absentee voter bears the burden of ensuring the ballot reaches the supervisor of elections by the deadline.

FACTS AND PROCEDURAL HISTORY

The Town of Palm Beach held a mayoral runoff election with two candidates on the ballot: incumbent mayor Jack McDonald and challenger Gerry Goldsmith. The Palm Beach Supervisor of Elections distributed absentee ballots for the runoff, which listed the Supervisor’s post office box at the main Palm Beach County post office in West Palm Beach as an added location for the return of absentee ballots.

When the polls closed, McDonald led by such a close margin that the Town’s Canvassing Board (Board) conducted a machine recount and then a manual recount. After the Board held thirteen absentee ballots invalid because they were not timely returned, the manual recount showed McDonald as the winner by a single vote.

Goldsmith filed an election contest, alleging that nine of the thirteen ballots were improperly excluded as untimely. At the bench trial, Goldsmith sought to prove that three of the ballots were mailed from Palm Beach three days before the election and, therefore, should have been received at the West Palm Beach post office box by 7 p.m. on election day. But employees from the Supervisor’s office checked the box for ballots twice that day; at 10 a.m. they found some ballots, but at 5 p.m., they found none. Although Goldsmith argued that the three ballots found in the box the day after the election could have been delivered between 5 and 7 p.m. on election day, postal officials testified that mail reaching the West Palm Beach post office on election day would not have been placed in the box until the following day. Finding no evidence to support Goldsmith’s contention that the Board
improperly excluded ballots, the Circuit Court for the Fifteenth Judicial Circuit upheld the election result.

Goldsmith appealed the decision to the Fourth District Court of Appeal.

ANALYSIS

Finding the procedures employed by the Supervisor complied with the Florida Statutes governing absentee voting, the Fourth District affirmed the lower court’s decision. The court reasoned that although Florida law allows qualified voters to request an absentee ballot from the Supervisor of Elections, the governing statute explicitly states that “[t]he elector shall mail, deliver, or have delivered the marked ballot so that it reaches the supervisor of elections no later than 7 p.m. on the day of the election.” Goldsmith, 32 So. 3d at 714 (quoting Fla. Stat. § 101.6103(2) (2008) (emphasis in original)).

The court confirmed that although the right to vote in person is fundamental, the Florida Supreme Court has held that with regard to absentee voting laws, only substantial compliance is required. But the court rejected Goldsmith’s argument that returning an absentee ballot via United States mail just early enough that the United States Postal Service (USPS) should deliver it to the supervisor by the 7 p.m. election-day deadline constitutes substantial compliance. The court reasoned that the applicable statute explicitly places the onus on the voter, not the USPS, to deliver his or her absentee ballot to the supervisor. Mere placement of the ballot in the hands of the USPS did not constitute compliance, substantial or otherwise, with the statute. The court stressed that for a ballot to be counted, it must arrive before the polls close.

The court further held that in determining whether a voter has substantially complied with absentee-voting requirements, “[t]he judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law.” Id. at 716 (citing Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 844–845 (Fla. 1993).

SIGNIFICANCE

Goldsmith clarifies that although an absentee ballot need only be substantially compliant with absentee voting laws to be valid, substantial compliance requires, at a minimum, that absen-
tee voters return their ballots to the supervisor of elections on election day before the 7 p.m. deadline prescribed by statute.

RESEARCH REFERENCE

Jamie M. Marcario

Elections & Voting Rights: Ballot Initiatives

**Browning v. Florida Hometown Democracy, Inc.**, 29 So. 3d 1053 (Fla. 2010)

Any statute or rule affecting the Florida Constitution’s ballot-initiative procedure must be a neutral and nondiscriminatory decree intended by Article XI of the Florida Constitution or a regulation necessary to guarantee the integrity of the ballot.

FACTS AND PROCEDURAL HISTORY

In 2007, the Florida Legislature amended Florida Statutes Section 100.371 to allow a voter to rescind his or her signature on a petition when placing a proposed constitutional amendment on the election ballot. The new provisions made the signature-revocation form due the same day as the ballot-initiative forms. The Department of State implemented the revisions by promulgating regulations that allowed political-action committees to draft the signature-revocation forms and made it illegal for a voter to re-sign a petition once he or she opted to revoke, even if he or she was fraudulently induced to rescind his or her signature.

Florida Hometown Democracy (FHD), a political-action committee, brought suit against Secretary of State Kurt Browning seeking a declaration that the revised statute and the administrative regulations were unconstitutional and seeking an injunction prohibiting the enforcement of the new laws. Both sides filed motions for summary judgment, and the circuit court ruled for Browning. FHD appealed, and the First District Court of Appeal reversed. The Florida Supreme Court affirmed the First District’s
decision and held the signature-revocation statute provision unconstitutional.

ANALYSIS

The Florida Supreme Court stressed that the applicable constitutional provision, Article XI, Section 3, is self-executing, which allows it to operate without any legislative assistance. The Legislature can pass laws to safeguard or enhance the constitutional provision, but it cannot create laws that inhibit the provision or its purpose. The Court reasoned that a thorough reading of its precedents mandates that any statutes or regulations affecting the ballot-initiative procedure be “either neutral, nondiscriminatory regulations of petition-circulation and voting procedure, which are explicitly or implicitly contemplated by [A]rticle XI, or, if otherwise, are necessary for ballot integrity since any restriction on the initiative process strengthens the authority and power of the Legislature and weakens the power reserved by [A]rticle XI, [S]ection 3.” Browning, 29 So. 3d at 1066 (emphasis in original).

Having found that the new provisions restrict the initiative procedure by not being neutral or contemplated by Article XI, the Court analyzed whether the law was essential for ballot integrity. Secretary Browning maintained the law was necessary to prevent fraud and forgery, but the Court noted that sufficient safety measures already existed and that the new laws may increase illegitimate activities. The Court was concerned with the political-action committees, as opposed to a neutral elections official, being completely responsible for the signature-revocation forms. Also, the Court objected to the rule prohibiting a voter from signing the initiative if he or she previously revoked his signature. This would provide political-action committees with “an unopposed opportunity to convince electors to revoke their signatures for whatever reason, legitimate or illegitimate.” Id. at 1070. Finally, the Court held the revised statute unconstitutional because the revocation forms were due the same day the initiatives were due, which prohibited the initiative proponents from knowing if they had enough signatures.

Justice Polston’s dissent argued that the signature-revocation statute provided reasonable regulations necessary to ballot integrity, meeting Florida’s constitutional standard. The dissent cited similar statutes beyond the constitutional text that support ballot integrity such as the ballot-summary requirement. The dissent
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maintained that the statute’s purpose was to prevent fraud in obtaining the signature and fraud in the signature itself. The dissent also dismissed the majority’s contention that litigation would prevent this fraud, noting litigation’s costly nature. The dissent concluded that the statute was reasonable because the regulations mirrored those regulating initiative-petition sponsors.

SIGNIFICANCE

*Browning* clarifies the Florida Supreme Court’s test for the constitutionality of laws impacting the initiative process. The law must be neutral, procedural in nature, and should not be outside the scope of the constitutional amendment it supplements; or it must be necessary for the integrity of the ballot system. Otherwise, it will be ruled unconstitutional.

RESEARCH REFERENCE


Stacey L. Rowan

Election & Voting Rights: Election Code

*Jordan v. Robinson,*

39 So. 3d 416 (Fla. 4th Dist. App. 2010)

Florida law does not prohibit a candidate for judicial office from using his or her birth name on the ballot, despite having legally changed the name several years earlier. Absent a fraudulent, criminal, or wrongful intent, a candidate can use any legal name on the ballot that he or she is otherwise entitled to use.

FACTS AND PROCEDURAL HISTORY

Appellant was born Jordan Howard Breslaw, but in 1991, he changed his last name to Jordan Howard Jordan pursuant to Florida Statutes Section 68.07. When filing as a candidate for the office of County Court Judge in Broward County, Jordan submitted his name as “Jordan Howard Breslaw” for inclusion on the primary ballot. Jordan’s opponent in the election Mary Rudd
Robinson filed a motion for an emergency permanent injunction with the Circuit Court for the Seventeenth Judicial Circuit, Broward County, to prevent Jordan from using his birth name on the ballot. The trial court granted the injunction, concluding that Jordan’s use of his birth name was a clear attempt to deceive and confuse voters and to appeal to a distinct voting demographic in Broward County. Jordan appealed.

ANALYSIS

Fourth District Court of Appeal found that substantial evidence supported the trial court’s factual findings, but nonetheless reversed the decision based on its interpretation of the law. The court primarily grounded its decision in statutory interpretation. The use of a candidate’s name on a ballot for judicial office is governed by the Florida Election Code, which instructs a candidate to “please print name as you wish it to appear on the ballot.” Fla. Stat. § 105.031(4)(b) (2009). The court noted that “name” is not defined within the statute or elsewhere in the Florida Election Code, and accordingly, Section 105.031(4)(b) does not require the use of any particular name, such as one found on a candidate’s driver’s license or Florida Bar license. The court also relied on one of its recent holdings in a case involving a female candidate’s use of her maiden name on a judicial ballot. There, the court held that the candidate could submit, for use on the ballot, any legal form of name she was entitled to use. Jordan, 39 So. 3d at 418 (citing Levey v. Dijols, 990 So. 2d 688 (Fla. 4th Dist. App. 2008)). In the present case, the court found that despite Jordan’s statutory name change, the use of his birth name was analogous to a female candidate using her maiden name, and neither usage was prohibited by Section 105.031(4)(b).

Although the court affirmed a candidate’s right to use any legal form of his or her name, it qualified this right with the common law rule that “a person could adopt another name at will, absent a fraudulent, criminal, or wrongful purpose.” Jordan, 39 So. 3d at 418 (emphasis added) (citing Isom v. Cir. Ct. of the Tenth Jud. Cir., 437 So. 2d 732, 733 (Fla. 2d Dist. App. 1983). In the present case, the court found that Jordan’s purpose—attempting to appeal to an ethnic voting demographic—was not fraudulent, criminal, or wrongful in the sense required to invalidate his right to use his birth name. The court noted, “[F]or over 150 years, American candidates have used their names to appeal
to ethnic voting blocks in elections. Democracy optimistically assumes that a voter will make an informed choice on the ballot.” *Jordan*, 39 So. 3d at 418. The court distinguished Jordan’s use of his birth name from a case involving a candidate who adopted a nickname never previously used to deliberately confuse voters into thinking he was the well-known incumbent, which was ruled fraudulent and impermissible. *Id.* (citing *Planas v. Planas*, 937 So. 2d 745, 746 (Fla. 3d Dist. App. 2006)). Instead, the court characterized Jordan’s decision as essentially nothing more than the normal course of politics, and it upheld his right to use his birth name on the ballot.

**SIGNIFICANCE**

*Jordan* adds clarity to Section 105.301(4)(b) by establishing that a candidate is privileged to use any name on a judicial ballot unless such usage is an attempt to mislead voters about the candidate’s true identity. Further, the decision provides a legal justification for the established political practice of a candidate utilizing a name or nickname to appeal to a particular segment of voters.

**RESEARCH REFERENCES**


Daniel R. Strader

**Elections & Voting Rights: Election Code Violations**

*Florida Elections Commission v. Davis*,

44 So. 3d 1211 (Fla. 1st Dist. App. 2010)

With the exception of summary hearings agreed to by both parties, the conferral of a right to a formal adjudicatory hearing does not authorize an administrative law judge to impose penalties for violations of election law; rather, such a prerogative remains with the Elections Commission until otherwise expressly delegated by the legislature.
FACTS AND PROCEDURAL HISTORY
The Florida Elections Commission (Commission) received a sworn complaint on April 18, 2006 alleging that James B. Davis (Davis), who had unsuccessfully ran for a congressional seat, violated numerous election laws. The Commission investigated further and consequently issued a probable cause order, citing five violations of applicable election law. Due to a recent change in the statutes governing administrative proceedings, Davis’ failure to elect a hearing before the Commission required the matter to be adjudicated through a formal hearing by the Division of Administrative Hearings. The statutory alteration enacted in 2007 empowered an administrative law judge (ALJ) to issue a final order concerning election law violations, whereas previously they could issue only recommended orders, ultimately leaving the final adjudicative authority to the Commission. The ALJ issued a final order on June 30, 2009, concluding that Davis violated the election code as alleged in the order of probable cause and assessed a five-thousand dollar civil fine against him. As the final order did not specify to whom the penalty should be paid, the Commission filed a motion for clarification to resolve the ambiguity. The ALJ granted the motion and issued a corrected final order containing the same findings but refused to impose a penalty, claiming that he lacked the requisite statutory authority to do so and instead invited the Commission to levy its own penalties as it deemed appropriate based on the administrative record and final order. The Commission refused and later appealed.

ANALYSIS
In beginning its analysis, the First District Court of Appeal noted the confusion caused by the newly enacted statute, which gave the ALJ authority to issue final orders yet was silent as to the authority to levy penalties. The First District also asserted that the Commission at all times retained the discretion to impose civil penalties not to exceed one thousand dollars for each violation. The court emphasized that the Florida Constitution unequivocally required that any executive authority to apply penalties be expressly and duly delegated by the Florida Legislature (Legislature). To rebut the Commission’s argument that Florida law already conferred the authority upon ALJs to impose penalties as part of a final order, the court explained that the pertinent statutes relied upon were applicable only to summary
proceedings, which require the consent of both parties to the adjudication. The court remarked further that it was Davis’ inaction to elect any proceeding whatsoever that mandated a formal hearing in the first place.

The Commission additionally contended that denying authority to impose penalties contravened the statutory directive authorizing an ALJ to issue a final order. Further, the Commission argued that to compel the Commission itself to impose penalties was unworkable in practice. The First District disagreed and reiterated that only the Commission had been statutorily empowered to impose fines for violations of the election code. The court clarified its rationale by stating that “[t]he Legislature well knows how to confer on [ALJs] the power to levy administrative penalties as part of the [ALJ’s] final order authority.” Davis, 44 So. 3d at 1215. The First District supported its conclusion by citing other statutory examples in which authority to impose civil penalties had been explicitly bestowed upon the ALJ. In affirming the ALJ’s corrected final order, the court noted that the Division of Administrative Hearings was not exempt from the maxim that executive agencies are solely creatures of statute, and any reasonable doubt concerning the lawful ability to exercise a particular power should be construed against the exercise of that power by the agency.

SIGNIFICANCE

Davis illustrates how the constitutional imperative of separation of powers remains of the utmost priority in administrative law and shows how resolved the courts are to enforce that imperative. What is essential to this case is that the agency itself was willing to confer its own authority, duly delegated by the Legislature, to assess penalties to another executive body. Yet the court, as well as the ALJ, did not allow or accept that conferral without the definitive blessing of the Legislature. This reinforces the long-standing role of the judiciary as the guardian of checks and balances, even when there is no direct disagreement or conflict among the branches themselves as to the delegation of governmental authority.
RESEARCH REFERENCE

Joe Fernandez III

Elections & Voting Rights: Resign-to-Run Rule

Ruiz v. Farias,
43 So. 3d 124 (Fla. 3d Dist. App. 2010)

Florida’s “resign-to-run” law will not mechanistically bar the candidacy of an elected official whose current term expires a few hours after the commencement of the term for the new elected position.

FACTS AND PROCEDURAL HISTORY

Florida’s “resign-to-run” law provides that “[n]o officer may qualify as a candidate for another state, district, county, or municipal public office if the terms or any part thereof run concurrently with each other without resigning from the office he or she presently holds.” Ruiz, 43 So. 3d at 125 (quoting Fla. Stat. § 99.012(3)(a) (2010)).

In June 2010, Sandra Ruiz, a term-limited member of the City of Doral City Council, qualified as a candidate for the Democratic nomination to the Florida House of Representatives for District 112. Ruiz did not resign from her council position before seeking to qualify for the August 2010 primary.

Ruiz’s opponents challenged Ruiz’s candidacy on the grounds that if she were elected, the commencement of her term as a member of the Florida House of Representatives would overlap with the conclusion of her term as a Doral City Council member by several hours because successful legislative candidates assume office on the evening of the election, while Doral City Council members do not take office until the day after the election.

Finding Ruiz in violation of the “resign-to-run” law, the circuit court issued an injunction declaring Ruiz ineligible to run for the Democratic nomination. Ruiz appealed.
ANALYSIS

Unpersuaded by arguments that an emergency or a run-off election could potentially force Ruiz into the position of wearing two hats at once, the Third District Court of Appeal reversed and held that an overlap of several hours is insufficient to trigger the requirements of the “resign-to-run” law. The court noted that if one of the hypotheticals proposed by Ruiz’s challengers occurs, the problem would be resolved by the Doral City Charter’s provision that if the membership of the city council is reduced to less than a quorum, the remaining members may appoint additional members by majority vote to meet the short-term need. Further, the court emphasized that the “resign-to-run” law addresses concurrent terms, not hypothetically concurrent terms.

The court reasoned that Ruiz’s case did not compromise the object of the “resign-to-run” law, which is to prevent candidates running for a new office from having the option of returning to their current position in the event their campaign is unsuccessful. Moreover, the court found Ruiz’s challengers’ mechanistic application of the “resign-to-run” law to be an attempt to circumvent the people’s right to choose their elected representatives. Because this is one of the most important rights citizens share, the court stated that the law requires that doubts about a political candidate’s qualification be resolved in favor of the candidate.

SIGNIFICANCE

Ruiz clarifies that courts will not mechanistically apply Florida’s “resign-to-run” law to hold an otherwise qualified candidate ineligible because of a technical overlap in the term of his or her current elected position and the commencement of the elected position for which he or she seeks to run.

RESEARCH REFERENCE


Jamie M. Marcario
ENVIRONMENT

Environment: Water & Waste Handling
Finance & Taxation: Nontax Revenues

I-4 Commerce Center, Phase II, Unit I v. Orange County,
46 So. 3d 134 (5th Dist. App. 2010)

A county or local government has wide latitude in establishing user fees, or fees charged in exchange for providing a specific governmental service or instrumentality, that are not arbitrary, unreasonable, or discriminatory, and the local government is not obligated to consider actual service use when calculating the fee for it to be held just and equitable.

FACTS AND PROCEDURAL HISTORY

I-4 Commerce Center (Center) challenged the validity of the methodology Orange County (County) used when determining the user fees charged for its wastewater system. The first component of the user fee was a volume charge based on the actual water used by the customer. The second component was a flat administrative fee assessed monthly against all customers. The third and disputed component was capacity cost, or the amount of system capacity the County must maintain to meet the customer’s potential needs, and it was based solely on the size of the customer’s water meter. The Center used two water meters: a two-and-a-half inch meter used for the Center’s daily wastewater needs such as toilets, sinks, and dishwashers, and an eight-inch meter, which served as the basis for the Center’s capacity cost and was used for the Center’s fire suppression system as well as during similar extraordinary circumstances. In the event the fire suppression system was triggered, the vast majority of water would flow through the fire sprinklers on the property, which were not connected to the wastewater system. The Center conceded that although they were connected to the wastewater system through the eight-inch meter, valves attached to the water line diverted the flow to the two-and-a-half-inch meter and would only open if the fire suppression system was activated or the line broke. The County acknowledged that the Center usually did not use the eight-inch meter, but maintained that the County must con-
stantly maintain system capacity consistent with an eight-inch meter in the event the larger meter is used, and therefore the fee calculation was valid.

The Center filed a complaint for declaratory judgment in the Circuit Court for Orange County, claiming an insufficient nexus between the benefits received by and the fees charged to the Center, as well as a disparity between the fees and the actual costs incurred by the County to provide its wastewater system. The circuit court dismissed the complaint with prejudice and the Center appealed.

ANALYSIS

The Fifth District Court of Appeal began by explaining that while local governments have no authority to levy any tax other than a property tax, they have traditionally been given discretion to impose special assessments and user fees. The Fifth District distinguished user fees from general taxation by articulating that user fees, unlike taxes, are charged for a specific service that benefits the customer in a way not shared by other members of the community. The court also noted that local governments generally have been given much discretion in establishing user fees, even when different rates have been charged for different classes of users, and that such fees will be upheld so long as they are not found to be arbitrary, unreasonable, or discriminatory.

In finding the user fees imposed by the County valid, the court noted that Florida courts have consistently upheld other local ordinances establishing user fees for public utilities such as stormwater management, sewer maintenance, and garbage removal as lawful, regardless of whether the customer actually used or required the service provided. The court further supported its rationale by citing a Second District case that held mere availability of a utility service to a property owner established a sufficient basis for assessing a user fee. The Fifth District remarked that the Center never alleged that the County did not regularly provide the capacity for an eight-inch water line. “The fact that the actual use of the eight-inch water line is far less than its maximum potential use does not render Orange County’s rate schedule illegal.” I-4 Com. Ctr., 46 So. 3d at 137.

The court also held there was nothing about the third component of the user fee that was arbitrary, unreasonable, or discriminatory. To rebut the Center’s claim that the user fee cal-
calculation violated the Florida statute authorizing counties to charge fees for wastewater services, the court asserted that the list provided in the statute for methods to establish a fee schedule were expressly nonexclusive. Affirming the judgment of the circuit court, the Fifth District explained that the only mandatory provision of the statute required all fees to be just and equitable, and lack of actual use of the service provided did not make the fee unjust or inequitable.

SIGNIFICANCE

I-4 Commerce Center could have two potentially significant implications regarding a local government’s ability to assess user fees. First, considering the current economic state in both Florida and throughout the country, citizens may become disaffected at the idea of having to pay for governmental benefits they are not actually receiving. While this case dealt with a larger commercial entity, the sting of paying excessive utility fees may hit harder among struggling families or small businesses. Second, although the court at the beginning of its analysis differentiated between general taxes and user fees, the distinction begins to fade and user fees could gradually grow over time to resemble general taxes until the two are virtually indistinguishable, thus implicating a local government’s prohibition against imposing general taxes.

RESEARCH REFERENCE


Joe Fernandez III
FINANCE & TAXATION

Finance & Taxation: Ad Valorem—Exemptions

_Wells v. Haldeos_,
48 So. 3d 85 (Fla. 2d Dist. App. 2010)

A husband and wife may claim two separate residency-based homestead exemptions if they have established separate family units. The taxpayer has the burden of demonstrating that separate family units exist.

FACTS AND PROCEDURAL HISTORY

James Haldeos (Haldeos) permanently resided in Pasco County beginning in 2005. Haldeos’ wife permanently lived in the state of New York. She also received New York property tax exemptions based on her residency. Property Appraiser Mike Wells (Wells) denied Haldeos a Florida homestead exemption, reasoning that a married couple could not receive multiple homestead exemptions.

Wells and Haldeos stipulated to all material facts at trial. Haldeos and his wife had established separate residences in good faith and lacked any financial connection. Haldeos maintained a Florida driver’s license and registered his vehicle in Pasco County. The trial court found that Haldeos and his wife constituted separate family units because they had no emotional or financial contact with each other. Therefore, the trial court held that Haldeos and his wife could claim separate homestead exemptions. Wells appealed to the Second District Court of Appeal.

ANALYSIS

Article VII of the Florida Constitution provides Florida’s homestead exemption. The exemption extends to anyone with an equitable or legal title in real estate, but only one exemption is permitted per family unit. The Second District first addressed whether allowing Haldeos and his wife to claim separate homestead exemptions would violate the Florida Statutes. The court rejected this argument and found that the applicable statute prohibited only an individual, and not a married couple, from claiming two residency-based tax exemptions. The court reasoned
that the legislature could have included married couples in the statutory language if it had intended to prevent married couples from ever receiving two exemptions.

The court next addressed Wells’ argument that a statute providing ad valorem tax relief must be construed against the taxpayer. The court agreed, but it found that the statute was unambiguous in its reference to an individual rather than a family unit. Further, the Florida Department of Revenue had enacted a rule directing that married couples may be granted separate homestead exemptions if they establish separate family units. The Florida Statutes required Wells to follow this rule in determining whether Haldeos could receive a separate homestead exemption. The court also noted that the Florida Attorney General had issued an opinion in favor of granting separate exemptions to a husband and wife with separate permanent residences.

Wells then contended that allowing separate homestead exemptions would be impossible for a property appraiser’s staff to administer. The court rejected this argument, noting that Haldeos had the burden of showing that he qualified for the homestead exemption. Therefore, the Second District affirmed the trial court’s ruling and “conclud[ed] that in the unique circumstances . . . where the husband and wife have established two separate permanent residences in good faith and have no financial connection with and do not provide benefits, income, or support to each other, each may be granted a homestead exemption if they otherwise qualify.” *Wells*, 48 So. 3d at 88.

**SIGNIFICANCE**

*Wells* clarifies that a husband and wife may claim separate homestead exemptions so long as they maintain separate family units, and it explains that property appraisers are prohibited from applying a bright-line rule that married couples, without exception, are to be treated as a family unit. Further, it reinforces a policy set out by the Department of Revenue and Florida Attorney General for allowing separate exemptions in certain limited circumstances, such as those presented in this case. This case will help establish a legal definition for the term “family unit”—a definition that is sorely needed to ensure the uniform administration of homestead-exemption laws by county property appraisers.
RESEARCH REFERENCE

Christian M. Leger

Finance & Taxation: Bond Financing

*Miccosukee Tribe of Indians of Florida v. South Florida Water Management District,*

48 So. 3d 811 (Fla. 2010)

The Florida Constitution is not violated when a water-management district issues bonds to finance the purchase of land from a private entity when such land will serve a public purpose related to water conservation. But a water-management district cannot finance an option to buy undisclosed lands in the future.

FACTS AND PROCEDURAL HISTORY

In October 2008, the South Florida Water Management District (District) filed a complaint under Florida Statutes Chapter 75, seeking validation of a proposed issuance of certificates of participation (COPs). The District planned to use the COPs to buy land from the U.S. Sugar Corporation (U.S. Sugar) to pursue an Everglades restoration project. Parties against the land purchase filed responses in opposition, including the Miccosukee Tribe (Tribe) and the New Hope Sugar Company (New Hope), and a validation hearing was held in the Fifteenth Judicial Circuit over several days between February and August 2009.

On August 26, 2009, the circuit court issued a final judgment validating the COPs for six hundred fifty million dollars, enough to buy seventy-three thousand acres of land. Among its extensive factual findings and legal conclusions, the court found that the District’s responsibilities included Everglades restoration and that the District had established a master lease-purchase program financed by the COPs to buy land from U.S. Sugar for that purpose. Under the master lease-purchase program, the District would establish and ground lease the property to a nonprofit leasing corporation, which would then lease the property back to the
District. The District would manage and improve the property, regaining possession at the end of the ground lease. The court concluded that the District had legal authority to issue the COPs, which would be secured by its lease payments; that the COPs would serve a legal purpose of water storage and treatment; and that the COP’s issuance complied with legal requirements. In September 2009, the Tribe and New Hope filed separate notices appealing the ruling, which the Florida Supreme Court consolidated along with separate administrative appeals dealing with the same issues.

ANALYSIS

New Hope and the Tribe raised several issues on appeal. The Florida Supreme Court (Court) first addressed the claim that the final judgment was incomplete because the circuit court failed to consider the economic feasibility of the project proposal. The Court cited its own precedent establishing that an issuing entity’s judgments regarding the economic feasibility of a proposed project were beyond the scope of judicial review. Thus, the trial court was correct not to have considered the project’s merits.

Next, the Court turned to the question of whether the debt obligation’s purpose was not legal because the proceeds of the COPs would not be used for a proper public purpose, but rather to buy land from a private party without any specific projects planned for the various parcels. The Court noted that before approving the purchase, the District had issued a detailed report elaborating on several anticipated benefits of the project related to improving water quality and that the District’s assessment of the public purpose was presumed valid unless clearly erroneous. Further, the Court cited legislative declarations that the purchase of land to conserve water resources was a valid public purpose that justified issuing revenue bonds. The Court concluded that the District was authorized to acquire lands for the purpose of conserving and protecting water and water-related resources, and the District could issue revenue bonds to finance the costs of such projects.

The Court then rejected the appellants’ argument that despite the District’s authority to pursue this general type of project, the District had failed to make an adequate showing of public purpose in this case. The Court noted that the circuit court had conducted nine days of evidentiary hearings involving expert
witnesses and over five hundred pages of exhibits from the District detailing its plans for the land. That the circuit court had adequately considered the public-purpose issue was further shown by the fact that it rejected the District's plan to buy an extra 107,000 acres due to a lack of planned uses, and it only approved the purchase of seventy-three thousand acres for which the District had made a sufficient showing of public purpose. Therefore, the Court concluded that the circuit court's finding of a public purpose was supported by competent, substantial evidence.

The Court then addressed the appellants' claim that the transaction violated several provisions of the Florida Constitution. First, the Court stated that the project did not violate Article VII, Section 10 of the Florida Constitution, which prohibits an agency from using its taxing power or credit to aid a private entity such as U.S. Sugar. The Court explained that such a transaction is valid if it serves a public purpose, even if an incidental or direct private benefit will also result. Because the Court had already determined that the project served a valid public purpose, the requirements of this test were met.

The appellants then argued that the transaction violated Florida Constitution Article VII, Section 12, requiring that any municipal debt obligation payable from ad valorem taxation and continuing for more than twelve months must be approved by voter referendum. The Court explained that its previous rulings had distinguished between ad valorem taxing power and tax revenues, with only a pledge of the former granting the bondholder an enforceable right to compel the District to levy ad valorem taxes to pay its debt. In this transaction, the District had not pledged its full faith and credit; rather, it had only promised to make lease payments in one-year intervals, renewable annually at its discretion, with the only penalty for nonpayment being normal lease penalties. The District had merely pledged tax revenues without an accompanying right for the bondholders to demand added taxation, and therefore, the COPs were not subject to a voter referendum. The Court cautioned, however, that despite the fact that the District was authorized to pay its COPs with lease payments from the U.S. Sugar land or any other land it currently owned, it could not include in the master lease any lands that carried a pledge of the District's ad valorem taxing power, which would offend this constitutional provision.
The final constitutional argument advanced by the appellants was that the transaction violated Article VII, Section 11, which requires any bond issued by a state agency to be approved by the Florida Legislature. The Court explained that water-management districts occupy an ambiguous position in Florida law and have been deemed state agencies for some purposes but not others. But the Court concluded that because the Florida Constitution expressly authorized water-management districts to levy ad valorem taxes but prohibited state agencies from doing the same, the District was not a state agency within the meaning of this constitutional provision. In summary, the Court held that the transaction at issue did not violate any of the provisions of the Florida Constitution.

The appellants next argued that the financing structure of the transaction was illegal for two reasons: (1) the District had no authority to form the nonprofit leasing corporation; and (2) the lease agreement was not supported by adequate consideration. The Court quickly dismissed both arguments. First, Florida Statutes Section 373.584 grants the District broad authority to “do all things necessary and desirable in connection with the issuance of revenue bonds,” which the Court held to be applicable to the establishment of the nonprofit leasing corporation. Miccosukee Tribe, 48 So. 3d at 828. Second, the Court held that the leasing corporation would be supplying valuable management services related to the COPs, the leases, and the title of the land, which made up adequate consideration for the lease payments.

The appellants then challenged the portion of the COPs that would be used to secure an option to buy the extra 107,000 acres within ten years. Although the value of the option was disputed, the Court found competent, substantial evidence supporting the circuit court’s finding that the option made up fifty million dollars of the total contract price. The appellants argued that because the option money would be spent on nothing tangible and would be taxpayer debt even if it were never exercised, the option did not serve a public purpose. The Court agreed, concluding that because the 107,000 acres subject to the option had been found by the circuit court to lack a public purpose, the option itself had no public purpose either. As a result, the Court reversed the portion of the circuit court’s final judgment validating fifty million dollars in COPs. The Court concluded its opinion by summarily dismissing the appellants’ argument that the District’s plan to convey some
of the land to local governments for economic development exceeded its authority, holding that the Florida Statutes expressly authorized the District to sell surplus lands not ultimately required for the project.

A concurring opinion by Justice Lewis noted his disagreement with the majority on several points. Justice Lewis first argued that the fact that this transaction involved certain land swaps, whereby some of U.S. Sugar’s land would later be traded for undisclosed land more valuable for the purpose of water conservation, violated the requirement that all of the land bought must have a public purpose. Second, Justice Lewis ridiculed the notion that because the lease would be renewable annually at the District’s discretion, it was an obligation lasting not more that twelve months and did not require a voter referendum. Justice Lewis argued that despite this contractual technicality, the District’s ability to default on the lease was illusory as a matter of practical reality, and therefore, the District’s obligation actually continued for the full lease term. Finally, Justice Lewis chastised the Court for perpetuating what he deemed an overly broad reading of Article VII, Section 12 of the Florida Constitution in distinguishing between ad valorem taxing power and tax revenue. Justice Lewis argued that this was a distinction without a difference because in practice, the District would inevitably be forced to levy more ad valorem taxes to compensate for the diversion of existing revenue to the project.

SIGNIFICANCE

*Miccosukee Tribe* establishes that a water-management district has the authority to issue certificates of participation to finance the purchase of land from a private entity when such land will serve a public purpose related to water conservation. The public purpose may include a future land swap, but the purpose must be identified for each parcel of land, so an option to buy land without an established public purpose is not a valid use of certificates of participation. Such a transaction does not require a public referendum, provided that a district’s obligations do not bind it for longer than twelve months at a time. The transaction does not offend the Florida Constitution if it pledge a district’s tax revenues but does not involve a pledge of a district’s power of taxation.
RESEARCH REFERENCES


Daniel R. Strader

Finance & Taxation: Excise Tax Limitations

City of Wilton Manors v. Department of Management Services,
48 So. 3d 962 (Fla. 4th Dist. App. 2010)

The Florida Legislature may create not only a statewide excise tax, but it may also condition its revenue distribution to municipalities upon their further compliance with supplemental statutory directives, as interpreted by the appropriate agency charged with their administration.

FACTS AND PROCEDURAL HISTORY

In 1953, the Florida Legislature (Legislature) statutorily authorized municipalities to impose an excise tax against casualty insurance for property within the city and then to use the resulting revenue toward a retirement trust fund created for police officers. The statute also established a board of trustees and specified the number of police officers who must serve on the board and govern the retirement fund. The relevant statutes were amended in 1999 to require municipalities to hold an election and determine whether the pension funds would be segregated so that police officers or both police officers and firefighters would have a pension plan separate from other municipal employees. The statute stated that a new board of trustees may need to be created, depending on the outcome of the election, but it also gave municipalities the choice of opting out of the retirement program altogether, thus barring them from any further income derived from the excise tax. Before 1999, the City of Wilton Manors (City) combined its police officer retirement plan with that of all other general municipal employees’ pensions. The City would remit money gained from the excise tax to the State Department of
Revenue and consequently receive the funds back from the Division of Retirement in the Department of Management Services (Division).

When the pertinent statutory amendments were enacted, the Division notified the City that to receive benefits under the tax program, an election must be held by the police officers to decide whether to separate the general pension fund into two funds, one covering police officers and the other covering other municipal employees. After the City refused to hold such an election in 2000, the Division stated its intention to withhold the tax revenue for the previous fiscal year, because the City’s retirement plan was no longer in compliance with the statutory framework, as interpreted by the Division. The City requested a formal adjudicatory hearing, and the administrative law judge subsequently issued a recommended order finding that the City’s failure to hold an election or separate the retirement funds did not authorize the Division to withhold tax revenues accumulated since 1999 and urged the Division to disperse the funds back to the City. The Division rejected this reasoning and argued in its final order that the 1999 amendments unequivocally established that failure to hold an election and divide the general pension fund rendered the City ineligible to receive future tax revenues. The City appealed the Division’s final order.

ANALYSIS

The Fourth District began by explaining the Legislature’s constitutional authority to create a tax and allocate it under a statutory scheme. The court also emphasized the significant level of weight given to an agency’s interpretation of a statute in the scope of its regulatory authority and the high burden of proof needed to overcome a presumption of correctness. Noting that construction of a statute must be done in the context of the entire body of law as a cohesive plan, the court focused on the mandatory language requiring a municipality to hold an election of police officers. While the Fourth District remarked that it might be unusual to mandate an election, the legislative directive was in no way unclear.

The court explained the overriding purpose behind the 1999 amendments was to create a pension fund exclusively for police officers or, in the alternative, police officers and firefighters. The court reasoned that the only logical conclusion must be to adopt
local law when necessary or forfeit their right to receive tax revenue. “Although none of the statutes expressly state that the failure to separate police pension plans from other municipal employee plans will result in the loss of eligibility to share in the premium tax revenues, that is patently the only conclusion that seems to fit the specific provisions enacted.” City of Wilton Manors, 48 So. 3d at 967. The court supported its conclusion by indicating that participation in the premium tax plan is completely voluntary, and the overarching design of the statutory body is to provide funds exclusively for the pensions of police officers.

The Fourth District reasoned that if combined retirement plans were still eligible to receive tax revenue, the requirement of an election by police officers would otherwise be meaningless. The court articulated that the City’s decision to retain its combined pension plan was not mere oversight, but rather the City Manager admitted during the adjudicatory hearing that the costs of administering two separate pension plans outweighed the income gained from the excise tax. Affirming the Division’s final order, the court held that the Division’s statutory interpretation was consistent with the Legislature’s conception as a whole and thus entitled to deference from the judiciary.

SIGNIFICANCE

The Florida Constitution grants the power to levy only the property tax to local governments. Wilton Manors reinforces the Legislature’s constitutional authority to prescribe the circumstances under which cities and counties may levy taxes other than the property tax. When a city chooses to exercise authority granted to it by the Legislature to levy a tax, it must do so in the manner prescribed by the Legislature or forfeit its right to the tax.

RESEARCH REFERENCE


Joe Fernandez III
Recent Developments

Finance & Taxation: Special Assessments

Desiderio Corporation v. City of Boynton Beach,
39 So. 3d 487 (Fla. 4th Dist. App. 2010)

A municipality may impose a special assessment against real property for a portion of an integrated fire and emergency medical services department budget when it reasonably separates the cost of providing fire services from the cost of providing emergency medical services and only levies the special assessment to fund the fire services’ cost.

FACTS AND PROCEDURAL HISTORY

A special assessment is a tax on private property for public enhancements that provides a distinctive benefit to private property. The Fourth District Court of Appeal previously held that emergency medical services (EMS) do not provide a special benefit to private property and therefore cannot be subsidized by a special assessment. The City of Boynton Beach uses a fire rescue department in which personnel are trained as both firefighters and paramedics. Given the Fourth District’s ruling, the City hired a company to determine the amount of time and labor spent on firefighter services versus the amount dedicated to EMS. The company then determined the proportion of non-EMS calls attributed to various property types to calculate the assessment amount for each type. The City approved the company’s findings and enacted the assessments.

The City used the funds to hire new firefighters and paramedics, buy a fire truck, and build and remodel fire stations. Several property owners challenged the assessment and asked for an injunction to stop the City from doing so. They contended that the assessment did not specially benefit the properties, the method used to allocate the amount of the assessment was arbitrary, and the City spent the money on non-firefighter-related services. After a bench trial, the circuit court found the special assessment was valid. The Fourth District affirmed.

ANALYSIS

A special assessment will be deemed valid only when the property assessed receives a special benefit from the services that
the assessment helps fund and the amount assessed is appropriately allocated. A benefit is special when the services funded are logically related to the property assessed. Because of the difficulty in determining benefits to property and allocating costs, a court is deferential to a city's determination, and the assessment will be upheld unless the city's findings are arbitrary. A decision is arbitrary if a city's findings are not supported by ample evidence. If significant evidence exists, the city's findings enjoy a presumption of correctness.

Florida courts have concluded that firefighters' services provide a special benefit to property while EMS provides a benefit solely to people. To comply, the City hired a company to determine how to separate the costs of the two services accordingly. Following the company's testimony, the Fourth District determined substantial evidence supported the City's decision, and as a result, the presumption of correctness attached. Furthermore, the court concluded the property owners did not provide sufficient evidence to rebut the presumption. The property owners adopted an overly strict interpretation of what constitutes fire services. Firefighters respond to a variety of calls unrelated to fire, such as automobile accidents and mistaken calls, and courts allow for flexibility in such cases. The Fourth District affirmed the circuit court's approval of the City's determination that the assessment benefited the property, stating that "the City took an approach that limited its risk of using the special assessment to fund services that did not benefit property." Desiderio Corp., 39 So. 3d at 497.

Additionally, the apportionment was not arbitrary because the City used property categories and historical usage of fire and EMS services to determine cost allocation. Both methods received approval in previous cases, and the combination of the two methods demonstrated the City's desire to ensure the cost of the assessment did not exceed the value of the benefit to the property. Finally, the court declared that while the City must exclude the cost of EMS from the assessment, no Florida decision requires that funds collected through the use of a special assessment be spent only on items used exclusively by firefighters, so the EMS members of the unit can also benefit from the items.
SIGNIFICANCE

Desiderio Corporation clarifies that a special assessment may be levied to alleviate the costs of firefighter services when the fire services are integrated with emergency medical services as long as adequate determinations are made to separate the time and cost spent on each. This case is the latest in a long line of decisions clarifying the proper use of special assessments as a source of local-government revenue.

RESEARCH REFERENCE

Stacey L. Rowan

Finance & Taxation: Special Assessments

West Villages Improvement District v. North Port Road & Drainage District,
36 So. 3d 837 (Fla. 2d Dist. App. 2010), review granted, North Port Road & Drainage District v. West Villages Improvement District,
48 So. 3d 837 (Fla. 2010).

With the exception of property used for general governmental purposes, neither the Florida Constitution nor the Municipal Home Rule Powers Act permits a municipality to levy special assessments against public property in the absence of express legislative authorization or necessary implication.

FACTS AND PROCEDURAL HISTORY

West Villages is an independent special district located in Sarasota County that owns nine parcels of real property within the city of North Port. In 2008, the North Port Road & Drainage District, a municipal dependent special district, amended its enabling ordinance to levy non-ad valorem assessments against property owned by governmental entities. After North Port gave notice of its plan to include the nine parcels on its assessment roll for the 2008–2009 fiscal year, West Villages filed timely written objections, arguing that since the property in question constituted
public property it was exempt from non-ad valorem assessments unless statutory authority indicated otherwise. These issues were also raised at the public hearing for the proposed assessments, but North Port passed the resolution establishing the assessment rates and subsequently denied West Villages’ appeal. West Villages filed a petition for writ of certiorari with the Circuit Court for Sarasota County. In denying the petition, the Circuit Court held that a dependent special district has the authority to levy non-ad valorem assessments pursuant to its home rule authority.

ANALYSIS

The Second District began its analysis by noting that certiorari should be granted only when procedural due process was denied or the legal error so egregious as to result in a serious deprivation of justice. West Villages argued that the circuit court departed from the essential requirements of the law by failing to apply Blake v. City of Tampa, in which the Florida Supreme Court explained that while it is certainly within the legislature’s authority to levy assessments against public property, it must be done expressly through special enactment or by necessary implication. 156 So. 97, 99 (Fla. 1934). North Port maintained that City of Boca Raton v. State established municipalities’ ability to impose assessments absent statutory authority under the 1968 amendment to the Florida Constitution and Municipal Home Rule Powers Act, unless the assessment was prohibited by law. 595 So. 2d 25, 28 (Fla. 1992).

The court agreed with West Villages’ assertion and reasoned that City of Boca Raton was limited to a municipality’s ability to impose special assessments in general and did not affect the principle in Blake that public property, except property used for generic governmental services such as a post office, is exempted from special assessments imposed by municipalities. The court emphasized that City of Boca Raton did not address whether public property could be taxed without legislative approval and therefore “in relation to the imposition of special assessments, the exception for public property is still alive and well according to the Florida Supreme Court.” West Villages, 36 So. 3d at 841.

The court bolstered its findings by observing it has never been the practice of the Florida Supreme Court to overrule itself by implication, and since the decision in City of Boca Raton did not even refer to Blake, much less overrule it, the Florida
Supreme Court’s holding endured and thus precluded North Port from adding West Villages’ property to its assessment roll. The court also noted that the Florida Attorney General expressly agreed with its conclusion. But noting that Blake involved a local school district, whereas West Villages is an independent state governmental entity, the court certified the question raised in this case to the Florida Supreme Court as one of great public importance. The Second District quashed the order of the Circuit Court and granted certiorari.

SIGNIFICANCE

West Villages clarifies that local governments should ensure they have statutory authority to levy special assessments on government owned property. This case could lead to public discourse or future legislation because local government entities like North Port could argue that their lack of authority to assess property belonging to independent districts might lead to increased assessments on property owned by private entities.

RESEARCH REFERENCES


Joe Fernandez III
GOVERNMENT CONTRACTING

Government Contracting: Damages

_Martin County v. Polivka Paving, Inc.,_
44 So. 3d 126 (Fla. 4th Dist. App. 2010)

In a suit brought by a contractor against the government to recover home-office overhead costs, the _Eichleay_ formula is the exclusive method for calculating damages. Thus, failure to satisfy the _Eichleay_ formula’s entitlement elements prevents recovery of home-office overhead costs.

FACTS AND PROCEDURAL HISTORY

The plaintiff Polivka Paving, Inc. (Contractor) entered into a contract with the defendant Martin County (County) to construct soccer fields and related improvements at a County park in exchange for an agreed-upon price. Material costs at the construction site were higher, and the job took longer to complete than originally agreed. The parties modified the contract to reflect the greater cost. After Contractor completed the job, the county refused to pay. Due to the county’s refusal to pay, Contractor’s cash flow was limited, preventing it from taking on new jobs.

Contractor filed suit against the county for breach of contract. At trial, the contractor sought to recover the amount specified in the modified contract. Additionally, the contractor sought to recover “home-office overhead” costs incurred between the originally anticipated completion date and the actual completion date. Contractor argued that the _Eichleay_ formula for calculating home-office overhead costs was inapplicable in the case, as the _Eichleay_ formula applied only to cases in which work was suspended, and work for County was never suspended. Contractor then proposed that the court adopt a rule that as long as the contractor could prove its costs were foreseeable, the contractor could use an alternative method of calculating its recovery of home-office overhead costs.

County argued that the _Eichleay_ formula was the exclusive method for calculating home-office overhead costs. To satisfy the _Eichleay_ formula’s entitlement elements, a plaintiff must have suspended work for the government and had no ongoing work on
other jobs. Contractor admitted that it had other ongoing jobs during the time it was working for County. Because Contractor never suspended work for the government and had ongoing work on other jobs, it did not meet the entitlement elements of the Eichleay formula and, consequently, could not recover home-office overhead costs. County motioned for a directed verdict denying recovery of home-office overhead costs.

The trial court denied County’s motion for a directed verdict. A jury subsequently awarded Contractor both the unpaid amount of the modified contract and home-office overhead costs in accordance with Contractor’s alternative calculation method. County appealed the trial court’s denial of its motion for directed verdict to the Fourth District Court of Appeal.

ANALYSIS

The Fourth District reversed the trial court, concluded that the trial court should have granted County’s motion for a directed verdict, disallowing recovery of home-office overhead costs, and held that the Eichleay formula is the exclusive method for calculating home-office overhead costs.

The Fourth District began by restating the entitlement elements of the Eichleay formula. Under the Eichleay formula, a plaintiff must show that “(1) a government-imposed delay occurred; (2) the government required the contractor to ‘standby’ during the delay; and (3) while ‘standing by,’ the contractor was unable to take on additional work.” Triple R Paving v. Broward Co., 774 So. 2d 50, 57 (Fla. 4th Dist. App. 2000). In the case at bar, Contractor admitted it never suspended work for County and that it was working on other jobs simultaneously. Based on these admissions, Contractor failed to meet the entitlement elements of the Eichleay formula.

The Fourth District then defined home-office overhead costs and the purpose for allowing their recovery. Home-office overhead costs are “those [costs] that are expended for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract.” Triple R Paving, 774 So. 2d at 57 (quoting Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1421). For example, in order to operate his or her business continuously, a contractor must maintain a home office and pay utility bills, licensing fees, and officers’ salaries. When the contractor is forced to suspend work on a particular job for the government and is
simultaneously precluded from working on other jobs as a result of waiting to resume work for the government, home-office overhead costs are unabsorbed, and the contractor is financially injured. The contractor is not injured, however, when either work for the government is not suspended or the contractor is able to work on other jobs during the suspension, as the contractor would have incurred the home-office overhead costs regardless. Therefore, unless both work for the government has been suspended and the contractor is unable to work on other jobs, a contractor should not be permitted to recover home-office overhead costs.

Based on the purpose for allowing the recovery of home-office overhead costs, the Fourth District held that “a contractor seeking entitlement to recover home-office overhead damages from the government must prove that a government-imposed delay required the contractor to indefinitely stand by to the point that the contractor was effectively suspended and unable to take on additional work.” Polivka Paving, 44 So. 3d at 131. Stated differently, a contractor must satisfy the entitlement elements of the Eichleay formula to recover home-office overhead costs. Failure to satisfy the elements prevents the recovery of home-office overhead costs. Here, Contractor admitted that work for the government was never suspended and that it had other ongoing jobs. As a result, Contractor failed to satisfy the entitlement elements and could not be allowed to recover home-office overhead costs. Accordingly, the trial court decision allowing such recovery was reversed.

In her dissenting opinion, Judge May agreed with Contractor and concluded that it should not be required to satisfy the entitlement elements of the Eichleay formula to recover home-office overhead costs. Judge May would have limited the application of the Eichleay formula and entitlement elements to cases in which there exists actual suspension of work. In the case at bar, Contractor sought to recover home-office overhead costs that were incurred not due to suspension but because of the government misrepresenting property conditions. The Eichleay formula was not intended to apply to cases in which a contractor underestimates home-office overhead costs based on a government misrepresentation.
SIGNIFICANCE

Polivka Paving reinforces the strict requirements that must be met to recover home-office overhead costs. Under this strict formula, some injury to a contractor is not recognized. Specifically, when a job is extended longer than originally anticipated, a contractor is not entitled to the unanticipated amount of home-office overhead costs that would have been included in the contractor’s bid had the actual duration of the job been known. Additionally, a contractor is not compensated for damage when he or she is unable to accept new jobs because the government refused to pay for work performed.

RESEARCH REFERENCE


Charles E. Simpson
LAND USE PLANNING & ZONING

Land Use Planning & Zoning: Administrative/Judicial

_Durham Park Neighborhood Association, Inc. v. City of Miami,_

This opinion is the dissenting opinion of a judge who disagreed with the majority's evaluation of the competent, substantial evidence standard as applied to the reversal of an administrative law judge's findings in the underlying case, which concerned the rezoning of land. The opinion was issued following the denial of a motion for rehearing en banc.

FACTS AND PROCEDURAL HISTORY

Brisas del Rio (Brisas) owned two parcels of land in the City of Miami (City). The second parcel was zoned “Industrial and Medium Density Multifamily Residential.” Brisas applied to the City Commission (Commission), asking it to rezone the second parcel to “Restricted Commercial” and to approve a construction project on the land. Miami River Marine Group, Herbert Payne, and Durham Park Neighborhood Association (collectively, the Neighborhood) all opposed Brisas’ applications. Brisas presented evidence that the current designation was at odds with the surrounding properties and that the requested rezoning would improve the area’s planning goals. The Planning Department recommended that the requests for rezoning and construction amendments be granted. The Commission unanimously approved Brisas’ applications after discussing the parcel’s condition and whether the construction would displace existing businesses.

In April 2006, the Neighborhood opposed Brisas’ applications and sought review of the Commission’s vote by the Division of Administrative Hearings. An administrative law judge (ALJ) heard expert testimony from Lourdes Slazyk, assistant director of Planning and Zoning in Miami, stating that the amendments met all concurrency requirements and were consistent with local property uses. The ALJ also heard testimony stating that the proposed construction was incompatible with the Miami River as
a working river. The ALJ found the amendments to be fairly debatable and recommended the amendments’ adoption. The Neighborhood challenged the ALJ’s decision, but the Department of Community Affairs accepted the recommendation.

The Neighborhood appealed to the Florida Third District Court of Appeal. The court held that the ALJ had improperly relied upon prior orders that had been superseded and remanded for proceedings in accordance with the superseding opinions. The City and Brisas motioned for rehearing or rehearing en banc. The Third District denied a motion for rehearing en banc concerning an earlier reversal of an ALJ’s findings. Judge Wells dissented from the majority’s per curiam denial holding that the judge’s findings were supported by competent substantial evidence.

ANALYSIS

Judge Wells began by detailing the evidence presented to the ALJ in the hearing on the rezoning and construction applications. The ALJ had heard uncontroverted expert testimony regarding traffic, concurrency requirements, and consistency with local property uses. Additionally, the ALJ heard conflicting testimony from various witnesses stating reasons why the amendments were incompatible with the uses already in effect, although some of this testimony also supported the opposing argument. Based on the evidence presented, the ALJ had found that the amendments were fairly debatable. Because of the high deference given under the “fairly debatable” standard of review, the ALJ suggested that the amendments be adopted.

After a review of the record, Judge Wells concluded “that the administrative decisions on review were fully supported by both competent, substantial evidence, and the law.” Durham Park, 2010 WL 4962877 at *7 (Wells, J., dissenting). Therefore, Judge Wells disagreed with the majority’s denial of the rehearing motions, and stated that he would affirm the ALJ’s decision in favor of the City and Brisas.

SIGNIFICANCE

Durham Park reveals judicial tensions over the proper level of deference that should be given to administrative decisions concerning rezoning applications.
RESEARCH REFERENCE


Christian M. Leger

Land Use Planning & Zoning: Administrative/Judicial

Neumont v. Florida,
610 F.3d 1249 (11th Cir. 2010)

An ordinance is properly enacted even if the public did not receive proper notice of changes made to it during the enactment procedure unless the changes affect the general purpose of the ordinance. It is properly enforced even if an administrative appeal opposing it is filed. The ordinance may be challenged in federal court only after state remedies have been exhausted concerning the specific ordinance at issue.

FACTS AND PROCEDURAL HISTORY

In 1997, Monroe County (County) enacted an ordinance that restricted the use of property as a vacation rental. Plaintiff property owners, who rented out their homes as vacation rentals, sued to stop enforcement of the ordinance. They alleged that the ordinance was improperly enacted under Florida Statutes Section 125.66(4), was prematurely enforced, and amounted to a taking of property without just compensation. The District Court for the Southern District of Florida dismissed all claims in summary judgment proceedings. In 2006, the case came before the Eleventh Circuit Court of Appeals. The Eleventh Circuit certified a question to the Florida Supreme Court concerning statutory interpretation. Following the Supreme Court’s answer, the Eleventh Circuit affirmed the dismissal of all claims.

ANALYSIS

Florida Statutes Section 125.66(4)(b) requires public notice and hearings for substantial changes made to an ordinance during the enactment process. To decide if the vacation-rental ordinance was improperly enacted, the Eleventh Circuit asked the
Florida Supreme Court to determine when changes to an ordinance during the enactment process are considered “substantial or material” under the statute. The Supreme Court determined changes are “substantial or material” only when they change the ordinance’s general purpose. After comparing the original public notice describing the ordinance with the ordinance as enacted, the Supreme Court declared the general purpose had not changed. Therefore, the manner of enactment was valid and the Eleventh Circuit affirmed the district court’s dismissal of the claims that concerned the enactment.

The Eleventh Circuit also affirmed the dismissal of the premature-enforcement claims. Plaintiffs alleged the ordinance was prematurely enforced because implementation should have stopped when they filed an appeal under Florida Statutes Section 120.68. But an appeal does not postpone an ordinance’s enforcement.

Plaintiffs’ next claim contended the ordinance amounted to a taking of their property without just compensation. Plaintiffs did not exhaust their remedies in state court. Instead, they asserted that they were exempt from the exhaustion requirement because of past state lawsuits they filed in opposition of the overall effort to ban vacation rentals. The Eleventh Circuit affirmed the dismissal of the taking claim because “[p]laintiffs ha[d] an obligation to exhaust their state remedies for the specific ordinance and its application before they c[ould] challenge a taking under that ordinance in federal court.” *Neumont*, 610 F.3d at 1252.

Finally, Plaintiffs maintained a futility argument asserting the state would take action to make the case moot before a court could decide the issues. The court dismissed the futility argument as speculative and further noted that state courts may hear even a moot case if the issue is likely to recur.

**SIGNIFICANCE**

*Neumont* clarifies that ordinances may be changed during the enactment process without public notice or hearing as long as the general purpose remains the same. It confirms that an ordinance may be enforced although a petition against it has been filed. Finally, *Neumont* reaffirms state remedies must be exhausted for the specific ordinance before a suit is filed in federal court.
Land Use Planning & Zoning: Adult Business

Flava Works, Inc. v. City of Miami,
609 F.3d 1233 (11th Cir. 2010)

Zoning ordinances that prohibit businesses in residential areas apply both to locations where goods are sold and locations where commercially valuable materials are created, even if financial and administrative activities are conducted elsewhere.

FACTS AND PROCEDURAL HISTORY

Flava Works, Inc. (Flava) operated an adult entertainment business with its principle place of business at 2610 North Miami Avenue, Miami, Florida. At this location, Flava conducted all financial and accounting phases of its business. Flava also operated a website that transmitted explicit images captured via webcams in a residence at 503 Northeast 27th Street, Miami, Florida (27th Street). The 27th Street residents were expected to capture their sexual relations on webcams in exchange for free lodging plus $1,200 per month. The 27th Street residence was in an R-4 zoning district, which only allowed for high-density multi-family residences and certain specified businesses. The City of Miami (City) notified Angel Barrios, the owner of the 27th Street residence, that the operation violated two zoning ordinances—one restricting adult entertainment and the other restricting the operation of a business in a residential zone. The City of Miami Code Enforcement Board found that Barrios had violated the two zoning ordinances, and it issued an enforcement order.

Flava and Barrios filed a suit in federal court seeking to quash the enforcement order. They asserted constitutional claims and a state-law petition for certiorari. After determining that supplemental jurisdiction was proper, the district court granted Flava and Barrios’ motion for summary judgment, concluding
that the case was virtually indistinguishable from Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232 (11th Cir. 2001). The district court held that the purpose of the zoning ordinance was to restrict adult entertainment offered to the public at the physical location and that the activities occurring at the 27th Street residence did not rise to the level of an unlawful business operation. The City then appealed the district court’s grant of summary judgment.

ANALYSIS

On appeal, the City abandoned its argument that Flava and Barrios violated the zoning ordinance that restricted adult entertainment in residential zones. Instead, the City argued that the district court erred by reweighing the evidence and also by relying on the Eleventh Circuit’s prior ruling in Voyeur Dorm. The court began by noting that under Florida law, parties are entitled to a first-tier certiorari review as a matter of right, a second-tier certiorari review as a matter of discretion, and that both Florida substantive law and standards of review applied to the case. Since the district court had conducted the first-tier certiorari review, the proper role of the circuit court was to perform a second-tier certiorari review. The court rejected the City’s first argument that the district court reweighed the evidence in violation of the standard of review because “the district court neither reweighed the evidence nor challenged the factual determinations of the Code Enforcement Board.” Flava, 609 F.3d at 1237–1238.

The court then addressed the City’s second argument that the district court had erroneously relied on Voyeur Dorm in making its ruling. The court found that the district court’s reliance was misplaced because the case was distinguishable from the present facts. According to the court, Voyeur Dorm addressed only whether a residence was an adult entertainment establishment and not whether it was a business in the general sense. Conversely, the zoning ordinance at issue in the present case restricted businesses in residential areas. The zoning ordinance also specifically addressed what types of businesses were allowable, and the enterprise at the 27th Street residence did not fall within those specific exceptions. The court found that even though no product was bought or sold at the residence, the video footage created there was later sold over the Internet for profit. This activity was consistent with the common understanding of a business, and the mere fact that other aspects of the business were
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performed elsewhere was immaterial. Thus, the court reversed the district court’s grant of summary judgment and reinstated the Code Enforcement Board’s order against operating a business at the 27th Street residence. The court also remanded the case for additional proceedings on the constitutional matters.

SIGNIFICANCE

Flava restricts the Eleventh Circuit’s prior holding in Voyeur Dorm as only addressing the meaning of an adult entertainment establishment and not businesses generally. Flava also extends the definition of a business for zoning purposes to places where items of commercial value are created for later resale in addition to locations where goods are bought and sold.

RESEARCH REFERENCE


Christian M. Leger

Land Use Zoning & Planning: Comprehensive Plan Amendments

Payne v. City of Miami,

Future land-use amendments must be generally consistent not only with zoning classifications inextricably linked to the actual development of the land, but also with the municipality’s comprehensive land use plan and its concomitant policies of promoting economic growth and preserving the surrounding natural resources.

FACTS AND PROCEDURAL HISTORY

Riverside Investments, LLC (Riverside) petitioned for and received a small-scale amendment to the Future Land Use Map (FLUM) of the Miami Comprehensive Neighborhood Plan (Comprehensive Plan) for a 4.3 acre waterfront parcel of land on the south side of the Miami River in the greater Port of Miami area.
This amendment changed the land-use designation from Industrial to Restricted Commercial. Riverside also applied for and obtained a change in the zoning designation from Waterfront Industrial (Industrial) to Restricted Commercial. The City of Miami (City) adopted Ordinance Number 12761 on January 31, 2006, formalizing these changes as well as granting Riverside a Major Use Special Permit (MUSP) to construct two twelve-story multifamily residential condominiums expected to house 633 units and about 1,600 new residents.

Captain Herbert Payne (Payne), the owner of a tugboat company on the Miami River, together with the Durham Park Neighborhood Association (Durham Park), an association of ninety residents and business owners located east of the Riverside property, and other interested groups representing marine and industrial businesses filed a petition with the Division of Administrative Hearings (DOAH) challenging the adopted amendments. The recommended order issued by the administrative law judge (ALJ), and later affirmed by the Department of Community Affairs, found the FLUM amendment consistent with the Comprehensive Plan and its ancillary policies. Payne and the other parties challenging the ordinance appealed, and the Third District reversed the final order. The City and Riverside both filed motions for rehearing and rehearing en banc.

ANALYSIS

The Third District began by explaining that administrative findings are overturned only when not supported by competent, substantial evidence or when an ALJ’s interpretation of law was clearly erroneous. The court also noted that land-use designations were creations of legislative discretion and similarly entitled to deference. The Third District articulated that the general purpose behind comprehensive land use plans is to regulate urban development and thus strike a workable balance between meeting the needs of expanding commerce and a rising population, while also preserving natural resources and mitigating the effects of both human and environmental pollution. To support its findings, the court noted that amendments to comprehensive plans can occur only twice per year unless the amendment is very insignificant or in the case of an emergency, and it also noted the procedure behind regulatory implementation of the local zoning code.
The court stressed that although the organizations that populate the Port of Miami River had grown and changed throughout the initial adoption of the Comprehensive Plan, the purpose of the Comprehensive Plan was to protect the burgeoning marine and manufacturing industry, which provided an essential source of revenue to the City. The Third District also remarked that in maintaining the Comprehensive Plan, it is critical that those activities dependent upon water or waterfront property be given priority to ensure expansion of the Port. To rebut the dissent’s claim that zoning issues should be considered distinct from the FLUM amendment, the Third District reasoned that obtaining both the FLUM amendment as well as the zoning reclassification was crucial to Riverside’s future development of the land and that zoning and land-use designations were intended to work cooperatively to discourage incompatible land uses. “It would be inconsistent to amend the land use to Restricted Commercial and not also amend the Waterfront Industrial zoning classification, and impossible to change the zoning classification without also amending the land use map.” Payne, 2010 Fla. App. LEXIS at *34. The court emphasized that Riverside’s development plans could bear fruit only if both the FLUM amendment and zoning ordinance were approved, so it would be imprudent to consider each in a vacuum.

To illustrate the incompatibility of Riverside’s efforts to build a residential complex, the Third District mentioned that the adjacent parcels were all used for heavy manufacturing or industrial purposes, resulting in a “spot plan amendment” that could cause numerous problems for Riverside residents with regard to noise, air pollution, and security issues. The court stated that one of the key components of the Comprehensive Plan was preventing use of waterfront property for non-water dependent uses to conserve the jobs of industrial and manufacturing employees. The ALJ found that Durham Park, which was near the Riverside property, proved that residential use was consistent with the Comprehensive Plan. The Third District disagreed and stated that Durham Park was on the opposite side of the River and hundreds of feet from the Riverside property. The court rejected Riverside’s argument that the parcel could provide housing to local industrial employees and stated there was no evidence the area adjoining Riverside was in need of additional housing to begin with. The court clarified that the opposite effect was likely to occur, threat-
ening the economic viability of the River by raising property taxes and diminishing available waterfront property.

To rebut Riverside’s claim that their property was located on the “Mid-River,” where existing housing has long been permitted, as opposed to “Upper River,” which is exclusively industrial, the court asserted the exact location of the parcel was irrelevant as the Miami River Master Plan excluded any residential development with the exception of accessory use to a marina. The Third District buttressed its holding by reasoning that although a concurrency analysis must be completed regarding sewer drainage, potable water, and transportation facilities before any housing developments can be constructed, the City did not actually collect any data, but rather assumed most of the requirements were met and merely stated those assumptions on a one-page document. Reversing the final order of the Department of Community Affairs, the Third District explained that the ALJ failed to consider the most pertinent parts of the Comprehensive Plan in judging the consistency of the FLUM amendment granted to Riverside.

The dissent started its analysis by arguing that since there was a healthy and informed level of disagreement over the use of the property in question, the majority should have deferred to the City in forming and implementing its own policies. The dissent instead focused on the judicial custom of deciding land-use issues separately from zoning issues and thus argued that the majority’s argument that the FLUM amendment was inconsistent with the Comprehensive Plan, which involved zoning regulations, was irrelevant. The dissent contended that instead of harming the Port, the Riverside project would only be conducive to the surrounding property by improving blighted areas and providing close and affordable housing to those who worked along the River. The dissent also noted that Durham Park, as a collection of homeowners who lived on the opposite side of the River and did not own any businesses adjacent to the Riverside parcel, lacked standing and was not otherwise prejudiced. The dissent concluded by pointing out that one of the experts testifying against the FLUM amendment admitted that it was possible for industrial uses to adjoin residential areas without significant inconvenience to either.
SIGNIFICANCE

Payne represents one of the major problems that burgeoning urban areas must contend with, which is balancing the need for economic growth with the inevitable occurrence of population growth. Both the majority and the dissent noted the benefits and burdens the Riverside project carried with it. Payne also traced the fine line the court must tread when interpreting a law enacted by the legislature without substituting its own judgment, something the dissent readily accused the majority of doing. The Third District also suggested that one of the reasons behind reversing the FLUM amendment was to prevent nuisance actions in the future between the residents of the Riverside condominiums and the industrial businesses nearby, illustrating that reducing litigation is still an important concern considered by the judiciary when viewing the record and potential implications of a case.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d Building, Zoning, and Land Controls §§ 115

Joe Fernandez III

Land Use Planning & Zoning:
Comprehensive Plan Amendments—Consistency

Katherine’s Bay, LLC v. Fagan,
52 So. 3d 19 (Fla. 1st Dist. App. 2010)

When reviewing an amendment to a comprehensive plan for consistency with the plan’s other policies, all policies, especially specific policies, must be considered and read in light of the whole; lay testimony from non-expert witnesses cannot provide the basis for an administrative ruling when expert testimony is required regarding the subject matter at issue.

FACTS AND PROCEDURAL HISTORY

Ronald Fagan, a Citrus County (County) landowner, sued to overturn an amendment to the County’s Comprehensive Plan
(Plan). Specifically, Fagan argued that the amendment was invalid because it conflicted with policies contained in the Plan’s Future Land Use Element (FLUE), making the Plan internally inconsistent. The Board of County Commissioners enacted the amendment upon application by Katherine’s Bay, LLC (Appellant), another Citrus County landowner and developer who owned a 9.9-acre parcel located in an area designated as the “Coastal Area,” which borders the Gulf of Mexico. The amendment changed the future land-use designation of the Appellant’s parcel from one in which development was severely limited, to “Recreational Vehicle Park/Campground” (RVP). The Appellant already owned another RVP in the area that was vested before enactment of the Plan.

Fagan’s claim focused on two FLUE policies. The first relevant policy stated that the County should guide development to areas with minimal environmental limitations. The second policy directed the County to achieve functional and compatible land uses and reduce incompatible uses. Under Florida law, Fagan’s challenge to the amendment triggered a hearing before an administrative law judge (ALJ). At the hearing, Fagan and his neighbor testified about the area’s natural beauty and the run-down appearance of the Appellant’s existing RVP. Fagan further testified that introducing another RVP to the area would increase traffic, litter, noise, and light pollution, thus decreasing his property value.

A County staff report as well as testimony from Dr. Timothy Pitts and Sue Farnsworth—both employed as County planners—provided more evidence about the site’s environmental limitations. According to both the report and Dr. Pitts’ testimony, the site was in the midst of significant wetlands and a Karst Sensitive Area, which is an area of porous rock that leaves the underlying groundwater particularly sensitive to pollutants. Given the property’s environmental limitations, the report concluded that the property’s development would necessarily be limited to less than the allowable maximum intensity under the Plan. Consistent with the report, however, Dr. Pitts testified that these limitations did not prohibit an RVP on the property; the RVP could be developed if it followed certain environmental regulations, such as setbacks to mitigate wetland impacts. Thus, the report recommended that the amendment be approved.
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After the hearing, the ALJ concluded that the property was subject to severe environmental limitations, so the amendment was inconsistent with both FLUE policies cited by Fagan. Specifically, the ALJ found that the amendment conflicted with the policy that development be guided to areas with minimal environmental limitations. Furthermore, the ALJ relied on Fagan’s concerns regarding noise, light, traffic, litter, and property value in concluding that the amendment and proposed RVP would be incompatible with surrounding land uses. The Administration Commission adopted the ALJ’s recommendations and issued a final order holding that the amendment was void.

ANALYSIS

On appeal, the Appellant challenged the ALJ’s findings on both FLUE policies. Regarding the policy requiring that development be guided toward areas with minimal environmental limitation, the Appellant argued that: (1) the ALJ failed to give due weight to the County staff’s recommendations that the amendment be approved; and (2) the ALJ erred in failing to apply FLUE policies that were more specific to RVPs.

The court dismissed the first argument by noting that the hearing record showed that the ALJ had given serious consideration to the County staff’s report. The ALJ was not required to agree with the report, and the court would not reweigh the evidence on appeal.

Turning to the second argument, the court identified two other FLUE policies that directly addressed RVPs and allowed for their development in Coastal Areas, provided that certain environmental precautions were taken. Invoking rules of statutory construction favoring specific provisions over provisions that are more general and requiring related provisions to be read in harmony with each other, the court reasoned that these FLUE policies specifically contemplated future development of RVPs, even within the environmentally sensitive Coastal Area. Further, the court reasoned that because a statutory presumption assumes that local governments’ decisions regarding the compliance of plan amendments are correct, any doubts about the amendment’s consistency with the Plan should be resolved for upholding the amendment. The court held that in light of these policies, the ALJ’s finding that the property was subject to severe environmental limitations was not a basis to prohibit development, so long as
that development complied with the appropriate environmental
limitations provided for in the Plan.

Regarding the second policy invoked by Fagan, which
required that changes in future land-use designations be compat-
ible with surrounding uses, the Appellant argued that the ALJ
erred by relying on the testimony of Fagan and his neighbor to
find the amendment incompatible. The court agreed that this was
unacceptable lay testimony that could not be used to support such
a finding. The court noted that existing legal standards allowed
for lay testimony to establish non-expert matters such as the nat-
ural beauty of the area, but that “it was error for the ALJ to rely
on Appellee’s testimony concerning potential light pollution,
increased traffic, and negative impacts on the value of the homes
in the area.” Katherine’s Bay, LLC, 52 So. 3d at 30–31. The court
stated that just because Fagan’s property had a different future
land-use designation than that of the Appellant was insufficient
to make the two uses incompatible and no competent, substantial
evidence was presented to support Fagan’s testimony or the ALJ’s
finding of incompatibility. Accordingly, the court held that both of
the ALJ’s conclusions regarding the amendment’s inconsistency
with the Plan were erroneous. The court reversed and remanded
the case to the Administration Commission for reinstatement of
the amendment.

SIGNIFICANCE

Katherine’s Bay, LLC makes clear that administrative rulings
must not rely exclusively on the testimony of a non-expert layper-
son for matters requiring expert testimony, such as the impact of
proposed development on pollution, traffic, and property values.
Further, the decision establishes that when reviewing an
amendment to a comprehensive plan for consistency with the
plan’s other policies, all policies must be considered, and general
rules of statutory construction apply. In particular, specific poli-
cies should be favored over general ones, and all policies should be
read harmoniously whenever possible, with a presumption that
the local government’s decision is correct.

RESEARCH REFERENCES

- 2 Fla. Jur. 2d Administrative Law § 413 (WL current through
Land Use Planning & Zoning: Comprehensive Plan Amendments—Consistency

*Nassau County v. Titcomb,*
41 So. 3d 270 (Fla. 1st Dist. App. 2010)

In challenging a development plan’s consistency with a comprehensive plan, plaintiffs have standing when their interests are affected to a greater degree than those of the general community. When evaluating a plan’s consistency, the action should be upheld if it follows the plan’s unambiguous language.

FACTS AND PROCEDURAL HISTORY
The owners of Crane Island wanted to develop land and requested a formal designation of the property by the Water Management District (District) pursuant to a policy provision in Nassau County’s (County) Comprehensive Plan (Plan). Following the District’s determination that the land was upland, the County designated the land low-density residential, which allowed more development per acre. Local residents and members of the Sierra Club sued the County, protesting its decision. The trial court concluded first that the plaintiffs had standing; second, it concluded that although the recharacterization was permitted under the policy, the development was not consistent with the Plan and allowing it would lead to an absurd result. The First District Court of Appeal affirmed the trial court on the issue of standing but reversed on the consistency issue.

ANALYSIS
Under Florida Statutes Section 163.3215, an “aggrieved or adversely affected party” can challenge an authorized develop-
ment that is inconsistent with a municipality’s comprehensive development plan. An individual has standing if the degree of the adverse effect to his or her interest surpasses that of the community as a whole. The First District declared that the statute must be liberally construed to ensure it protects the intended interests. “Section 163.3215 establishes a broad legislative grant of standing [that] we are not at liberty to reject.” Nassau County, 41 So. 3d at 278. The plaintiffs used the area surrounding Crane Island for canoeing, fishing, and photography in a manner that showed an interest greater in degree than that of the public in general.

While the First District agreed that the plaintiffs had standing, it did not concur with the lower court’s use of the absurdity doctrine in deciding whether the County’s decision was consistent with the Plan. The court concluded that the absurdity doctrine should be used only when the municipality’s comprehensive plan’s plain language is ambiguous. The County’s Plan’s language allows for a redetermination of property from wetlands based on the input from the District. The County followed the wording precisely; therefore, the result is consistent with the Plan.

Two of three members of the panel deciding this case dissented, in part, from the majority opinion. Chief Judge Hawkes disagreed that the plaintiffs had standing to challenge the development, while Judge Benton concluded that the proposed development violated the County’s Plan.

SIGNIFICANCE:
Nassau County reaffirms the liberal, enhanced standing rule of Florida Statutes § 163.3215 and clarifies application of the absurdity doctrine in a manner that shows deference to unambiguous legislative enactments.

RESEARCH REFERENCES

Stacey L. Rowan
Land Use Planning & Zoning:
Development Orders—Statute of Limitations

Presidents’ Council of SD, Inc. v. Walton County,
36 So. 3d 764 (Fla. 1st Dist. App. 2010)

In an action to contest the decision of a planning and zoning department concerning whether a development order is consistent with a comprehensive plan, the thirty-day time period for filing an action begins when the department’s order is filed with the individual who serves as the department’s clerk, even when the official title of the person who serves as the clerk does not specifically identify the person as a “clerk.”

FACTS AND PROCEDURAL HISTORY
The plaintiff brought an action in circuit court seeking declaratory and injunctive relief regarding a development order of the Walton County Department of Planning and Zoning (Department), based on the grounds that the development order was inconsistent with the local comprehensive plan. The circuit court determined that the action was untimely under Florida Statutes Section 163.3215(3), and thus granted summary judgment for Walton County. The plaintiff appealed.

ANALYSIS
The First District Court of Appeal stated that the lower court had correctly applied the relevant Florida law, which provides that all actions for declaratory or injunctive relief to contest a development order must be filed either: (1) within thirty days following rendition of the order; or (2) after exhausting all local administrative appeals, whichever occurs later. As there were no administrative appeals in this case, the time limit for filing the action was thirty days after the order was rendered, which was the date when the signed order was filed with the Department’s clerk. The court explained that although the Department employee with whom the order was filed was not identified by job title as a clerk, the definition of a “clerk” under Florida Rule of Appellate Procedure 9.020(h) includes “the person . . . who most closely resembles a clerk in the functions performed.” Presidents’
Council of SD, Inc., 36 So. 3d at 765. In this case, the Department’s employee had a variety of responsibilities; but because she was in charge of records filings, she was a clerk within the meaning of the law. Therefore, the court held that the thirty-day time limit began to toll as soon as the order was filed with the Department’s clerk, and because the action was filed long after the limit had expired, the lower court’s order of summary judgment was proper.

SIGNIFICANCE

Presidents’ Council of SD, Inc. demonstrates that a thirty-day time period for filing an action for declaratory or injunctive relief to contest a development order begins to run on the date the order is filed with the clerk for the department of planning and zoning or similar entity. Notwithstanding the other job responsibilities or official job title of the person with whom the order is filed, that person is a clerk within the meaning of the law if his or her job functions most-closely resemble those of a clerk.

RESEARCH REFERENCE


Daniel R. Strader

Land Use Planning & Zoning: Equitable Estoppel

Monroe County v. Carter,
41 So. 3d 954 (Fla. 3d Dist. App. 2010)

Property tax records maintained by the county property appraiser, an independent constitutional officer, could not be imputed to the county code enforcement agency for a homeowner’s laches defense; and equitable estoppel could not be applied against the code enforcement agency as a defense against housing violations when no permit or certificate of occupancy had ever been issued by the agency.
FACTS AND PROCEDURAL HISTORY

In 2006 and 2007, a Monroe County (County) Code Enforcement inspector discovered that Sandra Carter was in violation of certain County Code (Code) provisions because she converted the downstairs area of her apartment into a separate enclosure that she was renting to a tenant. At a hearing before a special magistrate, the magistrate entered findings of fact and determined that Carter had violated six Code provisions. After an unsuccessful attempt to reverse the decision on procedural grounds, Carter obtained a circuit court order reversing the magistrate’s ruling on the merits. The circuit court held that because the County was aware of the apartment since at least 1983 and failed to take action against Carter, the magistrate should have ruled for Carter on her claims of laches and equitable estoppel. The County appealed the circuit court’s ruling.

ANALYSIS

The Third District Court of Appeal began by stating that a defense of laches required Carter to prove four elements: (1) that her conduct gave rise to the Code Enforcement notices of violation; (2) unreasonable delay by Code Enforcement after having knowledge of the violations; (3) lack of understanding on her part that Code Enforcement would act on the violations; and (4) that injury or prejudice to her occurred when the violations were prosecuted. The court next recounted the magistrate’s finding that although the County Property Appraiser learned of Carter’s apartment in 1983 and levied taxes on the property, the County Code Enforcement office did not have actual knowledge of the violations until 2006.

The Third District concluded that the circuit court erred by imputing the Property Appraiser’s knowledge of the violations to the County Code Enforcement office. As a matter of law, “mere notice to one independent office or agency of government is not imputed to another such office.” Carter, 41 So. 3d at 957. Further, the court held that it was erroneous for the circuit court to disturb the magistrate’s factual finding that Carter’s experience as a licensed real-estate agent undermined her credibility in claiming that she reasonably relied on the County’s non-enforcement. Finally, the court ruled that unlike an earlier case applying equitable estoppel against a government entity, Carter’s case did
not present the type of “exceptional circumstance” required for such an application because she had never received a permit or certificate of occupancy for the apartment, and the violation created a potential risk of death, injury, or property damage.

SIGNIFICANCE  
_Carter_ reaffirms the principle that a circuit court should not substitute its judgment for that of a special magistrate, nor should it reweigh the magistrate’s factual findings when supported by competent, substantial evidence. Further, the decision clarifies that one independent government agency’s knowledge is not imputed to another agency.

RESEARCH REFERENCE  

Daniel R. Strader

Land Use Planning & Zoning:  
Inverse Condemnation—Statute of Limitations  

McCole v. City of Marathon,  
36 So. 3d 750 (Fla. 3d Dist. App. 2010)

The statute of limitations to file a claim against the State for inverse condemnation begins to run once there has been a final decision regarding an application for a particular use, or when it would be futile for the plaintiff to submit additional applications in light of history or the expressly stated view of the appropriate governmental entities.

FACTS AND PROCEDURAL HISTORY  
In 1978, Mr. and Mrs. McCole (Plaintiffs) bought an undeveloped piece of property in Florida. The property was located in Monroe County (County) and zoned single-family residential. Eight years later, in 1986, the County adopted the State Comprehensive Plan (State Plan). The State Plan added wetlands protection regulations and the beneficial use determination
(BUD) process. The BUD process allowed the County to modify wetlands protection regulations to avoid the unconstitutional taking of a landowner’s property by allowing changes to land development regulations.

In 1989, three years after the County adopted the State Plan, Plaintiffs filed two separate applications for permission to build a single-family residence on their property, one with the State’s Department of Environmental Regulation (DER) and another with the County’s Growth Management Department (GMD). Both applications were denied. The State’s DER and the County’s GMD specifically informed Plaintiffs that the denials could be appealed. The plaintiffs, however, failed to appeal.

In 2003, fourteen years after Plaintiffs’ applications were denied, they filed a BUD application with the newly incorporated City of Marathon (City). Plaintiffs claimed they had lost all beneficial use of the property due to the wetlands protection regulations. The City denied their BUD application. Plaintiffs filed suit against the City claiming inverse condemnation.

In 2007, Plaintiffs submitted a new application to build a residence on the property with the DER’s successor agency, the State’s Department of Environmental Protection (DEP). The DEP denied the application. Plaintiffs filed suit against the State claiming inverse condemnation. The trial court granted summary judgment in the State’s favor, reasoning that Plaintiffs’ inverse condemnation claim was barred by a four-year statute of limitations. The plaintiffs appealed for relief in the Third District Court of Appeal, arguing that the BUD process established no statute of limitations and, therefore, the inverse condemnation claim was not subject to a statute of limitations.

ANALYSIS

The Third District affirmed the trial court’s holding, concluding Plaintiffs’ claim was barred by the statute of limitations. The Third District defined the applicable statute of limitations and then clarified when it began to run.

First, the Third District found there was a four-year statute of limitations for Plaintiffs to file their inverse condemnation claim. Under Florida Statutes Section 95.11(3)(p), “[a]ny action not specifically provided for in these statutes” is subject to a four-year statute of limitations. Inverse condemnation is not specifically provided for in the Florida Statutes and, consequently, the
four-year statute of limitations is applicable. Further, a plaintiff cannot be allowed to use the BUD process to circumvent the statute of limitations that would otherwise apply to an inverse condemnation claim brought outside the BUD process.

Second, the Third District found that the statute of limitations began to run after Plaintiffs’ permit applications were denied by the State’s DER and the County’s GMD in 1989. The statute of limitations begins to run “[o]nce a clear determination has been made as to the permissible use of a property . . . .” McCole, 36 So. 3d at 753. A clear determination is present once an application has been filed for a particular use of a property and a final decision regarding such permission has been rendered. Additionally, a clear determination exists when it would be “futile [for a plaintiff] to submit additional applications in light of past history or the expressly stated view of the appropriate governmental entities.” Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561, 573 (Fla. 4th Dist. App. 2002).

The plaintiffs submitted applications for permission to build a single-family residence to the State’s DER and the County’s GMD. Both governmental entities rendered final decisions denying such permission in 1989. The multiple denials made it futile for the plaintiffs to submit additional applications. This clear demonstration as to the permissible use of their property triggered the four-year statute of limitations for the plaintiffs to bring their claim. The plaintiffs did not bring their claim until 2003, fourteen years after their applications were denied and ten years after the statute of limitations had expired. Therefore, the Third District concluded the plaintiffs’ claim was barred.

SIGNIFICANCE

McCole underscores that the statute of limitations for an inverse condemnation claim begins to run when either the plaintiff has applied for a particular use of his or her property and received a final decision denying such use, or it would be futile for the plaintiff to submit additional applications requesting such use of the property in light of history or the expressly stated view of the appropriate governmental entities. Further, the statute of limitations cannot be avoided by bringing the claim through the BUD process.
RESEARCH REFERENCE


Charles E. Simpson

Land Use Planning & Zoning: Rezoning

_Palmer Trinity Private School, Inc. v. Village of Palmetto Bay_,
31 So. 3d 260 (Fla. 3d Dist. App. 2010)

A municipality cannot arbitrarily deny a rezoning request when the surrounding parcels have become subject to less restrictive classifications because such action is unlawful reverse spot zoning, nor can a municipality interfere with constitutionally protected property rights by considering the specific use of the land when determining whether to grant the request for rezoning.

FACTS AND PROCEDURAL HISTORY

Palmer Trinity Private School (Trinity) owned two connected parcels of land. Trinity operated a preparatory school on Parcel A and wished to expand the school onto Parcel B. But such expansion required Parcel B to be rezoned from its current classification as AU (agricultural zoning) and EU-2 (estate single family), which allowed for only one home per five acres, to EU-M (estate modified single family), which allowed for one home per 15,000 square feet. While all of the surrounding parcels, including Parcel A, were initially zoned as either AU or EU-2, the vast majority of them had been reclassified over time to EU-M. Trinity applied to rezone Parcel B and filed for special exceptions and variances to develop the school further. Looking solely at the application for rezoning, the Village of Palmetto Bay (Village) enacted Ordinance 08-06 and denied Trinity’s request, stating that the school’s expansion was incompatible with the Village’s Comprehensive Land Use Plan (Plan), and Trinity had not adequately shown that the expansion would not negatively affect the community. The
circuit court appellate division denied certiorari for review of the rezoning ordinance, and Trinity appealed.

ANALYSIS

Trinity argued that denying the request for rezoning was reverse spot zoning because it resulted in Parcel B being subject to restrictions that adjacent parcels were not. The Third District agreed and asserted that because Ordinance 08-06 prevented some landowners from using their property in ways that similarly situated landowners could, it was arbitrary state action and thus impermissible. Reverse spot zoning is arbitrary by definition because it prohibits certain uses for some landowners but not others when there is no relevant distinction between the character of land. The court also noted that there was nothing in the record to justify a denial of the request to rezone Parcel B as it was virtually indistinguishable from the adjoining parcels, which had been reclassified to EU-M.

To rebut the Village’s claim that the expansion of the school was incompatible with the Plan, the court reasoned that the Village itself expressly stated that the expansion of the school, as well as the special exceptions and variances, were not under consideration when the rezoning request was denied. The court also found that the Village’s zoning analysis explicitly recommended the zoning request be approved as it was generally consistent with the classifications for neighboring parcels and would promote the underlying policies of the Plan.

Finally, the court explained that it was improper for the Village to deny the zoning request based on anything but statutory zoning concepts, in this instance the planned use of Parcel B to expand the school. “In effect, the Village denied the rezoning request, and implicitly denied the special exception, because it did not wish Palmer Trinity to use the property to expand its school within the parameters of the less restricted EU-M zoning classification.” Trinity, 31 So. 3d at 263. By using the planned specific use of the parcel as justification for denying the request, the Village exercised direct governmental control that infringed upon Trinity’s constitutionally guaranteed private property rights. The court quashed the appellate division’s decision granted certiorari.
SIGNIFICANCE

*Trinity* stands for the proposition that when reviewing requests for rezoning, a municipality can consider only permissible zoning concepts established by statute, limiting governmental discretion in zoning decisions.

RESEARCH REFERENCE


Joe Fernandez III
MUNICIPAL AUTHORITY

Municipal Authority: Code Enforcement

*Miami-Dade County v. Wilson,*
44 So. 3d 1266 (Fla. 3d Dist. App. 2010)

A county provides adequate notice to satisfy due process concerns when it mails a notice of administrative hearing both to a property owner’s address of record and to the address the owner listed in his request for the hearing. A temporary injunction against the county preventing it from taking an appropriate administrative action is unwarranted when the property owner fails to exhaust his administrative remedies.

FACTS AND PROCEDURAL HISTORY

In May 2007, Miami-Dade County (County) fire inspectors visited a nightclub owned by Wilson. They reported several structural and electrical violations to the County Building Department (CBD), which conducted its own inspection in June 2007. The CBD later mailed Wilson a Notice of Violation. After Wilson failed to correct these violations, the County mailed him a citation on January 9, 2008, giving him the option to either pay a $510 penalty and correct the violations or request an administrative hearing.

Wilson appealed the citation and requested a hearing, which the County scheduled for September 4, 2008. The County mailed hearing notices to Wilson’s address of record with the County, as well as to the address appearing on the letterhead that Wilson had used in his hearing request letter. The notice stated that Wilson’s failure to attend the hearing would constitute a waiver of his right to a hearing and an admission of the violation, possibly triggering additional penalties. After Wilson failed to appear at the hearing, the County fined him $835 and required him to bring the property into compliance within thirty days. On September 8, 2008, Wilson called the County and stated that he had requested a continuance of the hearing, but the County was not aware of such a request. During this phone conversation, the County informed Wilson of the result of the hearing, and Wilson chose not to appeal the decision.
After Wilson failed to correct any of the various electrical-related safety violations, the County determined that the property posed an “immediate hazard to life or property,” and on August 11, 2009, the County posted a Notice of Intent to Disconnect Power at Wilson’s nightclub. Wilson, 44 So. 3d at 1268. When Wilson’s failure to pay his original fine resulted in additional penalties, he requested another hearing, which was held on November 5, 2009. At the hearing, Wilson tried to present a case against the original citation for his electrical violations, and when the hearing officer informed him that the hearing was only for the purpose of disputing the continuing accrual of penalties, he requested and was granted a continuance. Wilson then filed suit seeking a temporary injunction.

On November 30, 2009, Wilson filed a Motion for Emergency Injunction to prevent the County from demolishing his building. On December 4, 2009, the electric company disconnected the power to Wilson’s nightclub and padlocked the meter to prevent tampering. The trial court conducted an evidentiary hearing on December 11 and held that Wilson was denied due process on the original citation, thereby entitling the court to intervene in the administrative hearing process and excusing Wilson from the requirement that he exhaust his administrative remedies. Consequently, the trial court ordered the County to reconnect Wilson’s power immediately. The order was automatically stayed pending the County’s appeal, but the stay was vacated upon Wilson’s emergency motion on December 22, 2009, on condition that the property would remain unoccupied pending a further safety inspection by the County. The County then filed the present appeal, contending that the trial court erred in granting the temporary injunction because Wilson failed to exhaust his administrative remedies. Additionally, the County claimed that due process was met by following the legal requirements for notice of the September 4, 2008 hearing.

ANALYSIS

The Court stated that due process required only that notice was reasonably calculated to inform Wilson of the hearing, not that Wilson actually received such notice. Further, the Court noted that even when an owner does not receive notice of a hearing, “if the owner found out, during the appeal time that an order was issued, it is incumbent on the owner to take some action.”
Wilson, 44 So. 3d 1270. In the present case, the Court held that the County’s attempts to contact Wilson at both his address of record and the address listed at the top of his hearing request were adequate as a matter of law to satisfy due process concerns. Additionally, the Court determined that Wilson must have been aware of the hearing, as evidenced by his phone call to the County four days after the hearing alleging that he had sought a continuance. Even if he was not aware of the hearing, when he learned of the result during the phone conversation, he still had an additional twenty-six days to file an appeal or request that the hearing be reopened. Instead, Wilson chose not to appeal, and therefore had not exhausted his administrative remedies prior to filing his complaint. The Court reversed the trial court’s order granting Wilson a temporary injunction and remanded the case for further proceedings.

SIGNIFICANCE

Wilson stands for the general rule that due process does not require actual receipt of notice by affected parties in an administrative proceeding. Rather, due process is satisfied when the government gives notice that is reasonably calculated to inform parties with known interests in the proceeding. Whether notice is received or not, an affected party who has actual knowledge that a hearing has occurred must exhaust his or her administrative remedies, including all available appeals, before obtaining an injunction to prevent an administrative body from taking appropriate action.

RESEARCH REFERENCES


Daniel R. Strader
Municipal Authority: Code Enforcement

Orange County v. Liggatt,
46 So. 3d 130 (Fla. 5th Dist. App. 2010)

A county may reasonably categorize structures requiring regulation by specific criteria rather than by their myriad configurations and uses.

FACTS AND PROCEDURAL HISTORY

In 2007, Peter and Susanne Liggatt (Property Owners) replaced some pilings below a landing area of their dock located on a canal next to their property without obtaining a permit. Later, the Orange County Environmental Protection Division (Division) sent the Property Owners a Notice of Violation, which stated that the repairs violated Section 15-346(c) of the Orange County Code of Ordinances (Ordinance), and a Proposed Consent Agreement, which outlined the corrective actions necessary to bring the property into compliance and resolve the enforcement action.

The Property Owners appealed to the Environmental Protection Commission, which held a hearing and entered a recommendation against the Property Owners. At a later hearing before a Special Magistrate, the Property Owners responded to the allegation that they made unauthorized repairs to a grandfathered dock by arguing the structure at issue was not a “dock” but a railed off “picnic deck” unsuitable for transfer to and from a boat. Moreover, the Property Owners contended the replacement of pilings was not a “repair” but maintenance, and that even if it were a repair, there was no violation because the pilings were not in the water.

The Special Magistrate concluded the Property Owners were in violation of the Ordinance; the Property Owners appealed. Finding no competent evidence that the structure in question was a “dock,” the Circuit Court of Orange County concluded the Property Owners had not violated the Ordinance and reversed. Orange County sought certiorari review of the circuit court decision, and the Florida Fifth District Court of Appeal granted the writ.
ANALYSIS

Finding the structure in question was a “dock” under the county’s expansive definition, the court quashed the circuit court’s decision. The court looked to the Orange County Code of Ordinances, which defined “dock” as follows:

[A]ny permanently fixed or floating structure extending from the upland into the water, capable of use for vessel mooring and other water-dependent recreational activities. The term “dock” also includes any floating structure, boat lift[,] or mooring piling, detached from the land, capable of use for mooring vessels and/or for other water-dependent recreational activities. . . . This term does not include any vessel that is not permanently docked, moored, or anchored.

Liggatt, 46 So. 3d at 133 (quoting Orange Co. Code of Ord. (Fla.) § 15-333) (emphasis by the Fla. 5th Dist. App).

The court rejected the circuit court’s conclusion that the county’s definition of “dock” was ambiguous because it included any structure that extends from the upland to the water capable of use for mooring vessels, regardless of whether it was designed or used for such purpose. Rather, the court reasoned that “[r]ather than attempt to catalog all the various structures extending into the water that require regulation according to their various configurations and uses, the County [could] reasonably categorize them according to specific criteria, including their capacity to moor a boat.” Liggatt, 46 So. 3d at 133. Finding the Property Owner’s structure was capable of mooring a boat, the court held it was covered by the Ordinance.

SIGNIFICANCE

Liggatt clarifies that a county ordinance that defines structures requiring regulation by expansive criteria that encompass many structural types and uses will not be deemed ambiguous.

RESEARCH REFERENCE


Jamie M. Marcario
Municipal Authority: Police Power Controls

_Kuvin v. City of Coral Gables_,
45 So. 3d 836 (Fla. 3d Dist. App. 2010)

When there is no encroachment on intimate relationships or restraint upon the expressive activities of citizens, zoning ordinances that give proper notice of the proscribed conduct and reasonably regulate the aesthetic qualities of residential areas are rationally related to promoting the public welfare and a valid exercise of police power.

FACTS AND PROCEDURAL HISTORY

Lowell Joseph Kuvin lived in a rental home in Coral Gables (City) and continually parked his Ford F-150 pickup truck on the street in front of his home since his residence did not include a garage. The City gave many warnings that Kuvin was violating Zoning Code 8-11, which allowed trucks to be parked in residential communities only if inside an enclosed garage, and Zoning Code 8-12, which prohibited trucks, trailers, and other vehicles designed for commercial use from parking on public property between 7 p.m. and 7 a.m. The City Building and Zoning Board issued Kuvin a citation and, after holding an administrative hearing, imposed a fifty-dollar fine plus costs. Kuvin appealed the Zoning Board’s decision, claiming that Zoning Codes 8-11 and 8-12 were unconstitutionally vague and impermissibly infringed on his First Amendment right to freedom of association. The Circuit Court for Miami-Dade County denied Kuvin’s motion for summary judgment and entered a final declaratory judgment for the City to which Kuvin appealed.

ANALYSIS

The Third District Court of Appeal applied the rational basis standard of review when dismissing as meritless Kuvin’s claim that the City ordinance infringed on his fundamental right to freedom of association. The court reasoned that while First Amendment protection extended to intimate relationships and expressive associations, neither of these classifications were implicated. The court found that not only did Kuvin fail to claim that others were prevented from visiting him at his home, but
even if he did, the occasional social visit from a friend was not sufficiently intimate to fall under the aegis of the First Amendment. The court also asserted that Kuvin was not prevented from engaging in expressive activities under freedom of association as the ordinance applied solely to his vehicle and did not prohibit its ownership, but rather it regulated where Kuvin was permitted to park it.

Without fundamental rights involved, the court determined that the ordinances were entitled to a presumption of validity and noted that Florida precedent required the court to uphold the ordinances unless there was no substantial relation to a legitimate public policy or the ordinances were clearly arbitrary in nature. The City argued that the ordinances were a reasonable approach to retain the aesthetic appeal of residential areas. The court agreed and asserted that Florida jurisprudence consistently acknowledges that legislation designed to protect the appearance of residential areas is a legitimate use of police power and rationally related to maintaining the prosperity and residential atmosphere of a community. The court found that “aesthetics can be an important factor in ensuring the economic vitality of an area and that the separation of the commercial from residential not only affects the health and hazards of the community, it impacts the welfare of the community and the value of property within its borders.” Kuvin, 45 So. 3d at 846. To support its reasoning, the Third District emphasized that the ordinances did not prohibit the ownership or use of trucks capable of commercial use but simply required that they be parked in an enclosed garage overnight.

To rebut Kuvin’s argument that the City should distinguish between trucks used for personal as opposed to commercial purposes, the court responded that such a distinction would result in irrational outcomes because it is infeasible to discern use only by looking at the truck considering many people use trucks for both commercial and personal purposes. The court also countered dissenting Justice Cortinas’ contention that the ordinance was an elitist attempt to prohibit all trucks of a specific make, model, or size to enshrine the “white-collar” nature of the City by stating that not only was Kuvin on notice concerning the ordinances in question before he rented his home, but he exclusively argued that the ordinances were unconstitutional solely because his
truck was used for personal purposes and not because his vehicle was a certain make or model.

The court refuted Kuvin’s vagueness claim by holding that the ordinances had a clear definition of what constituted a vehicle prohibited by the regulation as Kuvin himself conceded during the proceeding that his F-150 is a truck for purposes of the Zoning Code. The court also noted that the City had given multiple warnings of his noncompliance with the ordinance so that Kuvin could not in good faith argue he was unaware of what conduct was prohibited. The Third District affirmed the circuit court’s order enforcing the ordinances as constitutionally valid.

SIGNIFICANCE

Kuvin reinforces the longstanding assertion that a local government is entitled to a considerable amount of deference and discretion when creating and administering zoning ordinances based largely on subjective aesthetic considerations. Still, the dissent discusses many factors that could come into play in the future concerning challenges to the validity of these ordinances, such as the fact that trucks are becoming increasingly popular and no longer considered a “blue-collar” vehicle in the public mind, potentially leading to an electoral backlash by the residents of the City, as well as the possibility of a preposterous result in which a brand-new truck would be fined for violating the ordinance whereas a dilapidated and unsightly car would not.

RESEARCH REFERENCE


Joe Fernandez III
ORDINANCES & REGULATIONS

Ordinances & Regulations:
Municipality-Sponsored Monopolies

_Danner Construction Company v. Hillsborough County_,
608 F.3d 809 (11th Cir. 2010)

Even if a state law is preempted by the Sherman Antitrust Act, a county is immune from liability if the ordinance is implemented under an explicit state policy authorizing anticompetitive conduct.

FACTS AND PROCEDURAL HISTORY

In 1983, the Florida Legislature approved the Hillsborough County Solid Waste Disposal and Resource Recovery Act (Act). 1983 Fla. Laws ch. 83-415. The Act assigned “exclusive control over the collection and disposal of solid waste” to the county. _Id._ Only companies awarded franchises could conduct waste-management services. Danner Construction Company, a customer, and Gateway Roll-Off Services, a company not awarded a franchise, filed a lawsuit to halt application of an ordinance created to implement the Act. Danner and Gateway asserted the ordinance caused inflated rates and unlawful interference with competition in the waste-disposal market under the Sherman Antitrust Act and state law.

The United States District Court for the Middle District of Florida held the ordinance was invalid because it created a hybrid restraint, which is an antitrust term for government enforcement of private parties’ anticompetitive practices. The district court decided it could not address the immunity issue because the hybrid restraint was a per se violation of the Sherman Act. The Eleventh Circuit Court of Appeals reversed the decision and declared that even if a law is preempted by the Sherman Act and would be a violation under the federal law, an immunity analysis must still be done. After completing the analysis, the court confirmed that Danner’s challenge in an arena typically regulated by state and municipal actors failed because of state action immunity.
ANALYSIS

The Supreme Court of the United States determined state government actors are immune from liability in antitrust actions when acting under state law. *Parker v. Brown*, 317 U.S. 341, 350–351 (1943). When a municipal ordinance is preempted by the Sherman Act, a court must determine if the law is a “clearly articulated and affirmatively expressed state policy of antitrust immunity for the municipality.” *Danner*, 608 F.3d at 813. The Eleventh Circuit assumed that the state law was preempted by federal law. The court recognized that a state implicitly acknowledges the foreseeable anticompetitive results inherent in granting regulation of services to a municipality when it awards such control. Therefore, when the state intentionally granted exclusive control over waste management to the county, it demonstrated an awareness of the unavoidable anticompetitive effects. Furthermore, because the Act expressly defined the authority of the county and the ordinance complied with the statute’s wording in implementing the Act, the county was immune from liability.

SIGNIFICANCE

*Danner* reaffirms the view that a county enjoys immunity from antitrust liability under the Sherman Antitrust Act when state law authorizes the county’s anticompetitive legislation and the anticompetitive result of such legislation is foreseeable.

RESEARCH REFERENCE


Stacey L. Rowan

**Ordinances & Regulations: State Preemption**

*Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010)

The Florida Election Code does not, as a matter of law, preempt the general field of election law, and therefore it does not preclude local election ordinances. In areas where local election
laws are in direct conflict with the Florida Election Code, the local law’s offending sections are invalid, but such sections may be severed so as not to invalidate the entire statute, provided that the remaining provisions are not dependent upon the severed provisions to be operational.

FACTS AND PROCEDURAL HISTORY

The petitioner, Sarasota Alliance for Fair Elections (SAFE), was a political-action committee that submitted for inclusion on the November 2006 ballot a voter referendum on a proposed charter amendment affecting the Sarasota County election laws. The amendment’s three sections provided detailed election requirements to begin on January 1, 2008. The first section (Section 6.2A) required that all voting machines used in the county, including electronic machines, must provide a voter-verified paper ballot that would serve as the official record for auditing purposes. The second section (Section 6.2B) provided for a mandatory audit of the voting system, to be completed by an independent auditing service to compare hand counts of the paper ballots with the machine counts and to be conducted on a minimum of five percent of the voting precincts. The amendment’s third section (Section 6.2C) provided that no election could be certified until the mandatory audits were completed, and it also required that any discrepancy greater than one percent between machine counts and hand counts during the mandatory audit would trigger a comprehensive audit of all ballots in the county. This audit could also be triggered by a discrepancy of less than one percent if the discrepancy were sufficient to change the outcome of the election.

In August 2006, the Board of County Commissioners of Sarasota County (Board) filed a declaratory action in circuit court seeking a ruling that the proposed amendment was unconstitutional. In response, SAFE filed a petition for an emergency writ of mandamus to compel the Board to include the amendment on the November 2006 ballot. The circuit court consolidated the two actions, and following an evidentiary hearing, it concluded that the amendment was constitutional in its entirety because it was not preempted by and did not conflict with Florida Election Code (Code). The amendment was placed on the November ballot and was approved by the voters. On appeal, the Second District Court of Appeal held that the Code impliedly preempted the entire
amendment, and that the amendment directly conflicted with the Code and was thus unconstitutional. The district court then certified for review the question of whether the Code preempts the field of election law and precluded local election laws related to counting votes, recounting, canvassing, auditing, and vote certification.

ANALYSIS
The Florida Supreme Court divided its analysis into three phases: it first examined the preemption issue as a general matter; it then analyzed the specific provisions of the proposed amendment to determine whether any provisions directly conflicted with the Code; and it concluded with a brief discussion of the severability of an unconstitutional statutory provision from the remainder of the statute.

In its treatment of the first issue, the Court stated that an area of law could be preempted either expressly or impliedly. Express preemption exists only when there is clear language from the legislature evidencing its intent to preempt an area of law. The Court found no such language in the Code. Preemption may be implied when the legislative scheme is sufficiently pervasive to show the legislature’s intent to preempt, and when there are strong public policy reasons to find preemption. Courts should look to the overall object and policy of the state law in determining the legislative intent, and may consider factors such as the nature of power exerted by the legislature, the object the statute seeks to achieve, and the character of obligations the statute imposes. While the Court agreed with the Second Circuit that the Code was an extensive legislative scheme, it found that “the Legislature’s grant of power to local authorities in regard to many aspects of the election process does not evince an intent to preempt the field of election laws.” Sarasota Alliance, 28 So. 3d at 887. The Court cited several examples of Code provisions that expressly granted regulatory authority to local governments as evidence that the legislature never intended to preempt local election laws completely.

The Court next examined each of the three sections of the proposed amendment to determine whether any were in direct conflict with the Code. A conflict would exist, the Court stated, if it were impossible to comply with one provision without violating another. The Court found no conflict with the Section 6.2A of the
amendment, which required the use of voting machines with paper ballots. Although the Code allowed a broader range of approved voting machines to be used, the Court concluded that these were merely minimum requirements for permissible machines, and no conflict was created by Section 6.2A imposing additional standards for machines used in Sarasota County. Additionally, the Court stated that even if a conflict were found, the question would be moot because of a Code amendment passed in 2008 eliminating the use of touch-screen voting machines in Florida.

The Court also found no conflict in Section 6.2B of the amendment, which required mandatory audits of the county's voting system. Although the Code gave the legislature the authority to order an audit of a county's voting system, the Court found that the Code did not preclude a county from conducting an audit on its own. But the Court cautioned that its analysis was based on the Code as it existed in 2006 at the time of the proposed amendment. The Court did not address recent amendments to the Code's auditing requirements, except to state that in the event of any conflict between the county amendment and the amended Code, the Code would prevail. Given the more detailed auditing requirements of the amended Code, it is possible that such a conflict exists, but the Court chose not to address that question, as it was not at issue in the present case.

Although the Court ruled that the first two sections of the amendment did not conflict with the Code, it did find a conflict with Section 6.2C and thus held that section to be unconstitutional. The Court found that three separate conflicts existed in Section 6.2C. First, the Code specified that the county canvassing board must certify election results, whereas the proposed amendment required an independent auditing firm to complete its audits before the result could be certified. The Court found that this auditing requirement directly conflicted with the canvassing board's statutory authority to certify election results. Second, the auditing requirement did not provide any time limit for the audits to be completed, whereas the Code required all results to be certified within a specified time frame. Thus, there would be a conflict if the audit were not completed in time to certify the results according to the time frame of the Code.

The Court found the final conflict in Section 6.2C's comprehensive auditing requirement, which would be triggered
according to certain discrepancies between machine counts and hand counts of paper ballots discovered during the mandatory audit outlined in Section 6.2B. The Court characterized this comprehensive audit as a manual recount, which raised a number of problems with the Code. First, the amendment provided a different trigger for invoking the recount requirement than did the Code. The Code required a recount based on the election margin, whereas the amendment required a recount based on the discrepancy between machine and paper ballots. Second, the Code promulgated specific regulations for how recounts were to be conducted, and the amendment specified no procedures at all. Third, because an independent auditing firm would not be subject to the administrative rules enacted pursuant to the Code, two different entities would be handling the ballots during the same time period, because compliance with the Code would require the supervisor of elections or county canvassing board to conduct the recount, whereas the amendment would require the recount to be conducted by independent auditors. Finally, the Court noted that the Code provided that no vote shall be counted except as specifically prescribed by the Code, which would preclude any alternative recount procedures.

The Court concluded its analysis by addressing whether the unconstitutional Section 6.2C could be severed from the first two sections rather than invalidating the entire amendment. The Court addressed this question by citing the Sarasota County charter, which provided that the charter’s unconstitutional provisions could be severed unless other valid provisions were necessarily dependent for their operation upon the unconstitutional provisions. In the present case, the Court ruled that neither Section 6.2A, specifying requirements for voting machines, nor Section 6.2B, providing for mandatory audits, was dependent upon the invalid third section for its operation. The Court then concluded that Section 6.2C should be severed from the remaining sections, which remained valid.

Although all of the justices agreed that the Code does not preempt the field of election law, two justices wrote separately to dissent with the majority’s ruling on the existence of conflict between the county charter amendment and the Code. Justice Lewis argued that the majority was wrong to characterize the comprehensive audit outlined in Section 6.2C as a manual recount because its purpose was different from that of a recount.
The comprehensive audit was intended to assess the accuracy of the voting machines rather than tally the vote count for each office. Justice Lewis also argued that the majority interpreted preemption too broadly as precluding county voters from enacting additional layers of protection to ensure voting accuracy.

Justice Polston wrote separately to argue that all three sections of the amendment conflicted with the Code and were therefore invalid. Part of Justice Polston’s decision was based on a different interpretation of the Code’s voting-machine requirements, which stated that county officials could purchase any voting machine approved by the Department of State. In contrast, Justice Polston argued that Section 6.2A, by placing further restrictions on the machines used in Sarasota County, directly conflicted with the Code because county officials could no longer purchase any approved voting machine. Justice Polston adopted the Second Circuit’s ruling on Section 6.2B by reference, and concluded by stating that the amendment was unconstitutional in its entirety.

SIGNIFICANCE

Sarasota Alliance’s most widely applicable aspect is that the Florida Election Code does not, as a matter of law, preempt local governments from enacting their own election laws, as long as the local laws are not in direct conflict with the Code. Further, any provisions of local laws found to be unconstitutional are severable from otherwise valid provisions, provided that the local charter allows for severability, except to the extent that such valid provisions are dependent upon the invalid provisions for their operation.

RESEARCH REFERENCE


Daniel R. Strader
PRACTICE & PROCEDURE

Practice & Procedure:
Exhaustion of Administrative Remedies

_Palm Lake Partners II, LLC v. C & C Powerline, Inc._,
38 So. 3d 844 (Fla. 1st Dist. App. 2010)

Parties to a contract must intend to create a duty to a third party for that third party to have any right to prevent modification of the contract through justifiable reliance. Additionally, all municipal and state administrative remedies must be exhausted before a court may issue a declaratory judgment.

FACTS AND PROCEDURAL HISTORY

Peter Del Col, John Marchi, and Roy Simpson (Sellers) owned fifty-five acres in the City of Jacksonville (City). Palm Lake Drive bisected Sellers’ property. C & C Powerline, Inc. (C & C) ran a business on a thirty-acre parcel to the north. Sellers sought to amend the City’s comprehensive plan to change the fifty-five acres’ zoning classification from industrial to residential. When C & C learned of the proposal, its owner spoke with an agent of Sellers. The owner and agent verbally agreed that C & C would not object to the amendment if Sellers would construct an alternate access road.

On May 1, 2005, Sellers and Palm Lake Partners II, LLC (Palm Lake) entered into a purchase agreement, which specified how the road would be constructed and financed. On August 23, 2005, the City rezoned the parcel as a PUD subject to further agreement. Sellers conveyed the parcel to Palm Lake with a written amendment for a future easement for the access road. The amendment provided that a road would be built by February 28, 2009, or Palm Lake would be released from building the road and would return $350,000 to Sellers. In February 2007, City officials determined that the road construction would violate the ordinance authorizing the PUD.

C & C learned that the road would not be built and filed a complaint seeking declaratory judgment of its rights under the City’s ordinance. It also claimed to be the third-party beneficiary of Sellers’ purchase agreement and alleged that Palm Lake had
breached. C & C sought an injunction preventing the lease of residential units until a road was built. Sellers filed cross claims seeking declaratory relief under both the City’s ordinance and the purchase agreement. The trial court granted partial summary judgment for C & C, holding that it was a third-party beneficiary that had materially altered its position in reliance on Sellers’ promises. The trial court then invalidated the amendment to the agreement and granted specific performance in favor of Sellers for an access road to be built by Palm Lake. Palm Lake and Sellers appealed to the First District Court of Appeal.

ANALYSIS

The First District began by concluding that the trial court had erred in holding that the purchase agreement created a permanent obligation in Palm Lake to construct a road. The parties to a contract can create an obligation to a third-party beneficiary in a contract. Otherwise, the parties retain control over their relations. Additionally, a beneficiary must materially alter his or her position in reasonable reliance on the contract. The court held that C & C had not relied on the purchase agreement but only on Sellers’ verbal assurances. Further, any reliance C & C may have placed on the purchase agreement would not have been reasonable because the agreement had several contingent obligations. Therefore, the First District reversed the trial court’s judgment in favor of C & C and against Palm Lake.

The First District next addressed the judgment for specific performance entered against Palm Lake for the construction of an access road. The Sellers had negotiated for the purchase agreement and were entitled to its benefits. But the agreement allowed for amendments. Palm Lake and the Sellers altered their agreement through an amendment that discharged the obligation to build an access road if construction had not commenced by February 28, 2009. The amendment also provided that $350,000 would be returned to Sellers if construction on the road had not begun. The First District found this provision to be similar to a liquidated-damages clause and reversed the trial court’s grant of specific performance.

Lastly, the First District considered the trial court’s denial of Sellers’ cross-claim for declaratory judgment under the City’s ordinance. Administrative remedies must be exhausted when they are available before a court may issue a declaratory judg-
Recent Developments

The First District found that “exhaustion of remedies applies to municipal governmental agencies no less than it applies to state administrative agencies subject to the Administrative Procedure Act.” Palm Lake Partners II, LLC, 38 So. 3d at 853. In this case, the Sellers had failed to exhaust municipal administrative remedies that could have given them authoritative answers to any construction questions. The court held that the trial court correctly refrained from issuing a declaratory judgment and affirmed the lower court in that respect.

SIGNIFICANCE

Palm Lake Partners II, LLC squarely addresses when an individual may become a third-party beneficiary and what rights that beneficiary may have under a contract between two other parties. Furthermore, it reemphasizes that parties must exhaust all administrative remedies before seeking relief from the courts.

RESEARCH REFERENCES


Christian M. Leger

Practice & Procedure: Home Venue Privilege

Addison v. City of Tampa,
33 So. 3d 742 (Fla. 2d Dist. App. 2010)

A governmental entity retains the home venue privilege unless it falls within one of four specific exceptions to the privilege. Additionally, a governmental entity need not be a named party in the class action to assert the home venue privilege, and the named parties may assert the privilege on behalf of the non-named parties.
FACTS AND PROCEDURAL HISTORY

Michael C. Addison and Richard T. Pettit (Addison and Pettit) filed a lawsuit in Hillsborough County contesting the constitutionality of an occupational license tax targeted at practicing attorneys in the City of Tampa. The complaint sought to declare the occupational license tax unconstitutional, require the defendants to refund four years of taxes paid, and enjoin enforcement of the taxes. Addison and Pettit named the City of Tampa, the City of Miami, and Miami-Dade County as defendants and representatives of all Florida counties and municipalities in similar situations. In February 2004, the trial court dismissed Miami-Dade County and the City of Miami as defendants for improper venue under the home venue privilege, which left the City of Tampa as the only named defendant in the lawsuit.

The trial judge then certified two classes in the lawsuit—a plaintiff class comprised of Florida attorneys subject to occupational license taxes and a defendant class of all municipalities and counties that impose occupational license taxes on lawyers. The certification caused thirty-five counties and two hundred municipalities to be included as non-named defendants, including Miami-Dade County and the City of Miami, both of which had been previously dismissed as defendants. The City of Tampa filed a motion on behalf of all non-named defendants outside Hillsborough County invoking the home venue privilege. The trial court entered a non-final order granting the motion to exclude all non-named defendants outside Hillsborough County based on the home venue privilege. Addison and Pettit appealed the non-final order to the Second District Court of Appeal.

ANALYSIS

The Second District first established that the home venue privilege is a common law privilege that applies to lawsuits against government entities. Under the home venue privilege, proper venue rests in the county where the government entity maintains its primary headquarters. The home venue privilege is absolute unless an established exception applies. The Florida Supreme Court has identified four exceptions to the home venue privilege: “(1) where the legislature has waived the privilege, (2) the ‘sword wielder’ exception, (3) a suit against the governmental defendant as a joint tortfeasor, and (4) where a party petitions a trial court for access to public records.” Addison, 33 So.
3d at 744. The burden rests with the governmental entity to establish that the home venue privilege applies, and it is the burden of the plaintiffs to prove an exception to the privilege. The court found that the defendants did not fall under a recognized exception to the home venue privilege. Therefore, the court affirmed the circuit court’s dismissal of all non-named defendants outside Hillsborough County.

The court further assessed Addison and Pettit’s arguments against applying the home venue privilege. Addison and Pettit argued that the non-named defendants were not parties to the lawsuit, and therefore were unable to assert the home venue privilege. The court could not find any case that defined who may be a “party” under the home venue privilege. It also noted that non-named defendants may be parties for some purposes but not for others. The court held that common sense and due process protections compelled the conclusion that the non-named defendants could assert the home venue privilege. Finally, the court rejected Addison and Pettit’s assertion that only named parties were proper for determining venue in the class action context because none of the cases offered in support of the proposition involved government defendants or their home venue privilege. Thus, the court affirmed the dismissal of all non-named class members outside Hillsborough County.

SIGNIFICANCE

Addison firmly limits the exceptions to the home venue privilege to the four exceptions delineated by the Florida Supreme Court. Further, Addison specifically expands the rights of non-named governmental parties in a class action lawsuit to include the right to assert the home venue privilege.

RESEARCH REFERENCES


Christian M. Leger
Practice & Procedure: Writ of Mandamus

_City of Tarpon Springs v. Planes_,
30 So. 3d 693 (Fla. 2d Dist. App. 2010)

A writ of mandamus is an inappropriate remedy for a party seeking to compel government action when the matter does not involve governmental performance of a ministerial duty.

FACTS AND PROCEDURAL HISTORY

The Planes Family (Family) purchased three contiguous cemetery plots from a cemetery owned and operated by the City of Tarpon Springs (City). The purchase contract incorporated the cemetery’s rules and regulations by reference. These rules and regulations included the explicit provision that the gravesite purchaser buys the exclusive right to internment in a particular space, but the gravesite itself remains the sole property of the City. Additionally, the purchase contract provided the contract could not be modified except by written agreement of the parties.

In keeping with the purchase contract’s modification provision, the Family submitted a request to the City for approval to construct a single mausoleum across the three burial plots. The Board of City Commissioners denied the request. Upon denial, the Family requested relief under Florida Statutes Section 70.51, the Florida Land Use and Environmental Dispute Resolution Act (Act). The Act allows landowners who think a governmental entity’s development order or enforcement action is “unreasonable or unfairly burdens the use of the owner’s real property” to gain relief under the Act through “appointment of a special magistrate to act as a facilitator or mediator to ‘effect a mutually acceptable solution’ in an informal setting.” _City of Tarpon Springs_, 30 So. 3d at 695 (citing Fla. Stat. §§ 70.51(3), (17)(a) (2008)).

When the City declined to participate in such proceedings, “the Family petitioned the circuit court for a writ mandamus to compel the City to participate in the Act’s informal dispute resolution process.” _City of Tarpon Springs_, 30 So. 3d at 695. The City appealed the circuit court’s grant of the petition and issuance of the writ of mandamus.
ANALYSIS

Relying on City of Bradenton v. Johnson, 989 So. 2d 25 (Fla. 2d Dist. App. 2008), the Second District Court of Appeal reversed, holding that a writ of mandamus is only appropriate when a party seeks to compel a governmental entity to perform a legally required ministerial duty. The court noted that “[a] ministerial duty is ‘some duty imposed expressly by law, not by contract or arising necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative.’” City of Tarpon Springs, 30 So. 3d at 695 (quoting Escambia Co. v. Bell, 717 So. 2d 85, 88 (Fla. 1st Dist. App. 1996) (quoting State ex rel. Allen v. Rose, 167 So. 21, 22–23 (Fla. 1936))). In this case, the court found that agreeing to a modification of a contractual agreement regarding the building of mausoleums was not the City’s ministerial duty but a discretionary matter in the City’s role as the cemetery’s proprietor and a party to the contract.

Moreover, the court held the City had no duty to submit to the Act’s dispute resolution procedures because the Family did not qualify as an “owner” under the Act. Even if the Family had an equitable interest in the burial plots, it had not applied for a development permit or received a development order, so its dispute with the City did not qualify as a land use dispute subject to the Act’s resolution procedures.

SIGNIFICANCE

City of Tarpon Springs clarifies that because a writ of mandamus is designed to compel a government entity to perform a ministerial duty, it is an inappropriate remedy when the government entity has acted in its discretionary capacity as a proprietor. The case also signals that a party cannot compel a government entity to submit to the dispute resolution procedures of the Florida Land Use and Dispute Resolution Act if the party is not an owner and there is not a verifiable land use dispute.

RESEARCH REFERENCE


Jamie M. Marcario
PUBLIC EDUCATION

Public Education: Boards—Discipline

A.B.E. v. School Board of Brevard County,
33 So. 3d 795 (Fla. 5th Dist. App. 2010)

A student cannot be disciplined for possessing alcohol at school when the alcohol was consumed at home before arriving at school, or for conduct that disrupts the school environment when, before coming to school, he or she supplies alcohol to another student whose behavior actually causes the disruption.

FACTS AND PROCEDURAL HISTORY
The School Board of Brevard County (School Board) expelled A.B.E., a middle school student, for gross misconduct that disrupted the learning environment. A.B.E. admitted drinking a few sips of alcohol with her friend, A.H., at home about forty-five minutes before going to school. At school, A.H. began vomiting in the hallway and other students informed the principal about the drinking. No one at the school suggested A.B.E. acted out of the ordinary that day. Regardless, the School Board held that A.B.E. possessed alcohol on school grounds because she consumed the alcohol within one hour of arriving at school. The School Board further asserted A.B.E. was under the influence of alcohol at school and disrupted the school environment. The Fifth District Court of Appeal reversed the School Board’s decision and vacated the expulsion order.

ANALYSIS
Under Florida Statutes Section 1006.07 (2010) and School Board Rule 5500, the School Board can only discipline a student based on conduct that occurs on school grounds (or while the student is being transported at the School Board’s expense). Based on these limitations, the Fifth District held the School Board had no grounds for expelling A.B.E. for drinking alcohol before coming to school. In addition, the Fifth District determined the evidence did not indicate that A.B.E. was under the influence of alcohol at school. Finally, the Fifth District concluded that the School Board could not punish A.B.E. for conduct that disrupted the school
when it was A.H.’s conduct that caused the disturbance and not any conduct by A.B.E. while she was at school. The court held that “[t]o the extent that there were calls to parents and student discussion or administrative activities that rose to the level of disruption, it was not due to any conduct by A.B.E. while she was at school . . . .” A.B.E., 33 So. 3d at 799.

SIGNIFICANCE

A.B.E. clarifies that the School Board may only expel a student for conduct that occurs on school grounds unless the evidence reveals the student is actually under the influence of alcohol while at school, which is cause for discipline even if the alcohol was consumed elsewhere.

RESEARCH REFERENCE


Stacey L. Rowan
PUBLIC EMPLOYMENT

Public Employment: Collective Bargaining

*Utility Workers Union of America v. City of Lakeland*,
35 So. 3d 1023 (Fla. 2d Dist. App. 2010)

Labor practices in effect when a group of employees unionize, but before a collective bargaining agreement is reached, must remain in effect until an agreement is reached. Thus, the city committed an unfair labor practice by violating the status quo when it chose to provide a customary cost-of-living increase only to nonunionized employees.

FACTS AND PROCEDURAL HISTORY

In June 2007, members of the City of Lakeland’s (City) electric department hired Utility Workers Union of America (UWUA) as their representative in collective bargaining negotiations. The City had uniformly adjusted the wages for all employees for the previous twenty years. In September 2007, however, the City implemented a wage increase for only nonunionized employees. The UWUA, arguing unfair labor practices occurred under the Lakeland Public Employee Relations Ordinance, filed a claim against the City.

The general counsel for the Lakeland Public Employee Relations Commission (PERC) dismissed UWUA’s claim, and PERC affirmed the dismissal. UWUA appealed, and the Second District Court of Appeal reversed the dismissal and remanded ordering PERC to analyze status quo considerations. On remand, PERC found that the status quo had not been violated and dismissed UWUA’s claim for a second time. UWUA again appealed to the Second District.

ANALYSIS

The Second District began by noting that it must defer to the PERC’s expert construction of the law so long as the construction is supported by competent, substantial evidence consistent with legislative intent. The court first examined whether the City’s decision to exclude union employees from wage increases was an unfair labor practice. The status quo period is the time gap sepa-
rating successive collective bargaining agreements. “[A]n employer is prohibited from unilaterally altering wages, hours, and other employment terms and conditions” during the status quo period. *Utility Workers*, 35 So. 3d at 1025. The Second District agreed with the UWUA that the City's policy of granting wage increases to all employees was one element of the status quo. Thus, the City failed to maintain the status quo and engaged in an unfair labor practice when it refused to provide wage increases to unionized employees.

The court next addressed whether the UWUA was entitled to attorney's fees. The court awarded UWUA attorney's fees because it was the prevailing party under the claim. The court remanded the case, ordering the City to retroactively provide the unionized workers with wage increases and ordering the PERC to pay attorney's fees to the UWUA.

**SIGNIFICANCE**

*Utility Workers* clarifies that a status quo period includes the time period after employees unionize but before a collective bargaining agreement is reached. The decision restricts the ability of a city to treat unionized and non-unionized employees differently during the status quo period.

**RESEARCH REFERENCE**


Christian M. Leger

**Public Employment: Pension Benefits**

*Board of Trustees of the City of Delray Beach Police & Firefighters Retirement System v. Citigroup Global Markets, Inc.*, 622 F.3d 1335 (11th Cir. 2010)

A municipal board of trustees was bound by an arbitration agreement executed by the board's chairman when the board vested the chairman with authority to act on its behalf. Such a
delegation of power was not prohibited under Florida law, and the chairman’s authority to execute the arbitration agreement was implied because it was incidental to the authority expressly delegated to him by the board.

FACTS AND PROCEDURAL HISTORY

The Board of Trustees (Board) managed a pension fund for the retired police officers and firefighters of Delray Beach, Florida. The Board hired Citigroup as an independent professional consultant to evaluate the performance of the fund’s investment managers. The parties signed an investment-consultant contract in October 1995, which required Citigroup to perform services to monitor, evaluate, and report the performance of the fund’s investment managers on a regular basis. The contract contained no arbitration clause.

During a meeting in November 2003, the Board expressly authorized its chairman William Adams (Adams) to execute a contract on its behalf hiring NWQ Investments (NWQ) as one of the fund’s investment managers. As a necessary corollary to this agreement, the Board also opened an investment account for NWQ to use when investing fund assets. The Board chose to open the account with Citigroup, and Adams executed several documents related to this account. These account agreements contained broad arbitration clauses requiring arbitration not just of disputes related to the account but of all claims or controversies arising out of any agreement between the Board and Citigroup.

In November 2008, the Board sued Citigroup in Florida state court for alleged misconduct by Citigroup related to its duties as pension consultant. Citigroup removed the action to federal court and moved to compel arbitration under the account agreements Adams had executed in connection with the NWQ hiring.

Citigroup argued that the arbitration clauses covered the Board’s claims because the claims arose from performance or breach of other agreements between the parties, namely, the original consulting contract. In response, the Board argued that Adams lacked actual or apparent authority to modify the terms of the consulting contract, and therefore, the arbitration clauses could not be enforced. The district court found for the Board and denied Citigroup’s motion to compel arbitration. It reasoned that Florida law did not permit Adams to bind the Board via unilateral action and that Adams did not have actual or apparent authority
to modify the consulting contract without the Board’s majority vote.

ANALYSIS

The Eleventh Circuit began by rejecting the Board’s argument that Florida law did not allow the Board to delegate to Adams the authority to bind the Board to arbitration. The court noted that, as a municipal agency, the Board was governed by general principles of administrative law, and no Florida or local municipal law expressly prohibited the delegation of its authority to Adams in this instance. On the contrary, Florida law permitted the Board to carry out its investment powers through authorized agents such as Adams. Therefore, there was no legal reason why Adams could not have had the authority to enter into the account agreements and bind the Board to the arbitration provisions therein.

The court then quickly addressed the Board’s contention that delegating its authority to Adams would be a violation of the Florida Sunshine Law, which requires all Board decisions to take place at public meetings. In response, the court stated that even if such an arrangement did violate the Sunshine Law, the Board could not benefit from its own misconduct. Only a private citizen could seek to set aside an agreement between the government and another party based on an alleged Sunshine Law violation. Thus, the Board could not invoke the statute to overturn its own actions.

After establishing that Florida law did not prevent the Board from delegating authority to Adams, the court next concluded that the Board had indeed delegated to Adams an implied power to enter into the arbitration agreement. This implied power arose because the Board had expressly authorized Adams to execute an investment-management contract with NWQ. Citing general agency principles, the court noted that along with an express grant of authority to take some action, there exists an implied authority to perform incidental acts that are reasonably necessary to accomplish that action. The court reasoned that “the express authority to hire a named investment manager implies the authority to open an account through which that manager can perform the only job that it was hired to perform.” Citigroup Global Mkts., Inc., 622 F.3d at 1343. Without implied power to make account agreements necessary for the investment manager
to do his or her job, the express power to contract with NWQ would have been meaningless.

Turning its attention to the arbitration clause itself, the court stated that because Adams possessed implied authority to execute the account agreements, he also possessed authority to bind the Board to the arbitration clauses in those agreements. The court concluded that there was nothing unusual about the arbitration clauses that would remove them from the scope of Adams’ implied powers to take reasonably necessary actions incidental to executing the account agreements. Because Adams had acted properly under the implied authority of the Board, the Board was bound by the plain meaning of the arbitration clauses in the account agreements. And as the court noted, the Board admitted that it was bound by the arbitration clauses in matters arising under the account agreements, and it only objected to the clauses as applied to their prior consulting contract with Citigroup. This admission undercut the Board’s position that Adams was not acting within his authority to execute the account agreements, and the court found no reason why the arbitration clauses should not be construed as written to apply to all agreements past, present, and future between the parties.

Judge Martin dissented. While she agreed that the Board had vested Adams with the authority to take incidental actions necessary to execute the investment management contract with NWQ, Judge Martin argued that this authority did not allow Adams to alter the nature of the preexisting consulting agreement. The dissent stated that the arbitration clause was highly unusual in the context of the existing relationship between the Board and Citigroup, and as a result, the execution of such an agreement could not be considered incidental or necessary to the investment management contract.

SIGNIFICANCE

Citigroup Global Markets, Inc. establishes that municipal agencies are subject to general principles of administrative law, and absent some local or state law preventing delegation of authority, such an agency is free to delegate authority to a board chairperson to act on its behalf. Further, while the Florida Sunshine Law creates a cause of action by private citizens, it does not prevent an agency from being bound by its own actions, even if those actions constitute a violation of the Sunshine Law.
the decision establishes that agency principles apply when a municipal board delegates authority to one of its members, such that an express delegation of authority carries with it an implied authority to take actions that are incidental and reasonably necessary to execute the delegated powers.

RESEARCH REFERENCE

Daniel R. Strader

Public Employment: Pension Benefits

City of St. Petersburg v. Remia,
41 So. 3d 322 (Fla. 2d Dist. App. 2010)

Under Florida Statutes Section 185.19, a refund to police officers of their contributions to the police pension fund is not a pension “benefit” and need not be paid from premium tax income funds. Instead, these contribution refunds are obligatory as a matter of plain text, legislative intent, and public policy.

FACTS AND PROCEDURAL HISTORY
Several former St. Petersburg police officers, who left service before the ten years required for vesting in the police pension fund had passed, asserted entitlement to the return of their contributions to the fund. The City of St. Petersburg (City), along with its police pension board of trustees, countered this assertion, and in an action between these parties, the Circuit Court for Pinellas County entered summary judgment for the former officers. The City appealed this judgment to the Second District Court of Appeal and the lower court’s decision was affirmed.

ANALYSIS
In support of its appeal, the City made three contentions: (1) under Florida Statutes Sections 185.35(1) and 185.08, any refund is a pension benefit and can be paid only by premium tax income funds (which were currently unavailable to the City);
(2) under Article 10, Section 14 of the Florida Constitution, a refund requirement is an unconstitutional, unfunded mandate; and (3) the former officers’ employment contracts bound them to the provision within them that stated contributions were forfeited absent vesting.

The Second District Court of Appeal rejected each of the City’s arguments, first addressing the claim that a refund constituted a benefit that must be paid from premium tax revenue. Florida Statutes Section 185.35 provides in relevant part:

If ... a pension plan for police officers ... meets the minimum benefits and minimum standards ... the board of trustees ... may: [p]lace the income from the premium tax ... in such pension plan ... and [it] shall be used to pay extra benefits to the police officers ....

As the terms “benefits” and “minimum benefits” are undefined by statute, the City offered the opinion of its witness from the Department of Revenue—that the contributions need not be refunded, as they are minimum benefits. The court found the witness’ opinion unpersuasive, stating there is nothing in the statute that would cause a contribution refund to be considered a benefit. The court also found the City’s reliance on City of Dunedin Municipal Firefighters Retirement System v. Dulje unpersuasive because that case dealt with contributions payable upon death to firefighters’ beneficiaries. 453 So. 2d 177 (Fla. 2d Dist. App. 1984). The court instead chose to accept the appellee police officers’ argument that legislative intent is clear in the plain language of Florida Statutes Section 185.19(1): “If any police officer leaves service ... before [vesting], such police officer shall be entitled to a refund of all his or her contributions made to the ... police officer’s retirement trust fund ....” The court further emphasized the statute’s obligatory nature.

The City next contended that Article 10, Section 14 of the Florida Constitution did not allow benefit increases in retirement or pension systems supported by public funds, and thus the contribution refund requirement was unconstitutional because it created a benefit. The court disagreed, finding that the refund is an entitlement, and it does not enhance an officer’s status or create a benefit.
Finally, the City offered an estoppel argument, asserting that the appellees were bound to the provision in their employment contract that stated, absent vesting, the contributions were forfeited. The court reasoned that legislative intent and public policy overruled the employment contract. Specifically, the court relied on Florida Statutes Section 185.01, a legislative declaration that seeks to maximize protection of police officer retirement funds by preventing any local ordinance, special legislative act, or any other local, state, or federal plan from diminishing or offsetting minimum benefits.

SIGNIFICANCE

Remia clarifies that the plain language of Florida Statutes Section 185.19(1) stands alone in controlling contribution refunds to departing, non-vested police officers; it is a city’s obligation to refund contributions made to the police pension fund by police officers who leave service prior to the vesting period or before retirement eligibility. Furthermore, a city cannot withhold contribution refunds based upon contrary contract provisions or the unavailability of premium tax income funds due to countervailing legislative intent and public policy.

RESEARCH REFERENCES


Jana Belflower

Public Employment: Pension Benefits

Department of Management Services v.
City of Delray Beach,
40 So. 3d 835 (Fla. 1st Dist. App. 2010)

If a statute is applied retroactively, courts will ensure that such application does not impair vested rights. Moreover, unless a municipality maintains a separate supplemental benefit plan
along with its defined benefit plan, it must comply with Chapter 99-1’s minimum benefit requirements with regard to pensionable compensation.

FACTS AND PROCEDURAL HISTORY

Under Florida Statutes Chapters 175 and 185, municipalities may fund retirement systems for firefighters and police officers with state-collected excise taxes imposed on property and casualty insurance premiums if the municipal pension plans comply with operational and funding standards established by the Florida Legislature (Legislature). Before 1999, if the Department of Management Services, Division of Retirement (Division) found a city’s retirement fund satisfied operating standards, the city could either place the premium tax revenue—revenue received by a municipality over the amount received for calendar year 1997—in a fund for the exclusive use of firefighters and police officers, or it could use the money to provide firefighters and police officers with extra benefits beyond those provided to general municipal employees.

Effective March 12, 1999, the Legislature enacted Chapter 99-1, which modified the relevant statutes by instituting minimum retirement benefits for firefighters and police officers—including a mandate that pensionable earnings include three hundred hours of annual overtime pay—and making receipt of premium tax revenues contingent on compliance with both the operating standards and the minimum benefits. Moreover, the Legislature directed municipalities to use the premium tax revenue solely to provide extra benefits to firefighters and police officers, regardless of whether the municipality placed the money in the pension fund or in a supplemental plan. But supplemental-plan municipalities could continue to use the definition of compensation they had in effect as of Chapter 99-1’s effective date.

The City of Delray Beach (City) had maintained a pension plan (Plan) for firefighters and police officers under Chapters 175 and 185 for many years. In 1993, the City reached an agreement with the police and firefighters unions (1993 Agreement) that it would use premium tax revenue to provide a 1 percent annual increase in pension benefits regardless of the amount of such revenues received, use any premium tax revenue in excess of the 1993 amount to increase the annual benefit enhancement in increments of 0.1 percent to a maximum increase of 4 percent and
to shield pension benefits from future collective bargaining. The 1993 Agreement also provided that if the state stopped collecting premium tax revenues, the retirement benefit enhancement would be subject to reopener negotiations. The City codified the retirement benefit enhancement in City Ordinance 85-93, which took effect October 1, 1994, and had been in effect since that date. Since its inception, the Plan had included only a member's regular wages in pensionable earnings; it did not include the minimum three hundred hours of overtime pay mandated by Chapter 99-1.

In response to an inquiry from the City regarding the application of Chapter 99-1 to the Plan and use of the increases in premium tax revenue, the Division advised the City that it could continue to fund the retirement benefit enhancement outlined in the 1993 Agreement while meeting the minimum benefit levels required by Chapter 99-1. The Division stated that because the City guaranteed the 1 percent retirement benefit enhancement regardless of the amount of premium tax increases received, the City could fund the remaining 3 percent to the extent possible by the dollar amount of the increases between 1992 and 1997. Additionally, the Division advised that under Chapter 99-1, any increase in excess of the 1997 revenues must be used first to satisfy the minimums, and any premium tax dollars received in excess of the amount necessary to fund the Plan's maximum 4 percent retirement enhancement benefit must be used to fund a new extra benefit.

The City sought a declaratory judgment that the Division's application of Chapter 99-1 violated Article I, Section 10 of the Florida Constitution, which prohibits the enactment of laws impairing contractual obligations, because Chapter 99-1 required the City to shift premium tax revenues from the 1993 Agreement's retirement benefit enhancement to pay for the inclusion of overtime in pensionable compensation, thereby reducing the benefit enhancement received by police officers in derogation of their vested rights.

The circuit court granted summary judgment in favor of the City, finding the Division's application of Chapter 99-1 was retroactive and impaired the rights of recipients under the Plan. Moreover, the court concluded the Plan as amended by the 1993 Agreement was a supplemental plan, and so the City need not
include overtime in the calculation of officers’ pensionable earnings. The Division appealed.

ANALYSIS

The First District Court of Appeal reversed and remanded for entry of summary judgment in favor of the Division. The court held that the Division did not retroactively enforce Chapter 99-1 and further, the Division’s application of Chapter 99-1 did not impair the vested rights of retirees receiving benefits under the Plan.

The court outlined the framework for analyzing retroactivity, stating that although Florida’s general rule is that in the absence of contrary legislative intent, a law impacting substantive rights and duties is presumed to apply prospectively. Further, when contrary legislative intent underlies the statute, if the statute impairs vested rights, it cannot be constitutionally applied. The court noted that while retroactivity depends on whether the statute assigns new legal consequences to events antedating its enactment, a statute does not operate retroactively simply because it is applied to conduct predating the statute’s enactment. Rather, retroactivity hinges on whether a statute’s application impacts vested rights, which the court distinguished from expectant and contingent rights. Instead, vested rights “must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand . . . .” City of Delray Beach, 40 So. 3d at 839 (quoting R.A.M. of So. Fla., Inc. v. WCI Communities, Inc., 869 So. 2d 1210, 1218 (Fla. 2d Dist. App. 2004)).

If a statute has been retroactively applied, the court looks for a clear expression of legislative intent that rebuts the presumption of prospective operation. If it finds such expression, the court then determines whether the statute impairs contractual rights or violates due process rights. In finding the Division’s application of Chapter 99-1 was not retroactively applied so as to impair the vested rights of the Plan’s beneficiaries, the court reasoned that although Plan recipients had a vested right to the 1 percent benefit increase the City guaranteed without regard to the amount of premium tax revenue received, the Division’s application of Chapter 99-1 to the Plan did not affect this vested right. The court also concluded that because the continued availability of premium tax
revenue to fund the additional annual benefit increase outlined in the 1993 Agreement depended on legislative appropriations and the Plan’s compliance with current law, the additional annual benefit increase was an expectant or contingent right that vested only when the contingencies materialized.

Based on this analysis, the court reasoned that under the Plan, retirees had a vested right only to the annual increment in benefits made possible by premium tax revenue in excess of the 1993 revenue up to the 1997 revenue—a total of $325,232.20. Noting that the Division’s application of 99-1 permitted the City to use these funds to pay the additional benefit enhancement outlined in the 1993 Agreement while requiring the City to use any premium tax revenue in excess of the 1997 amount ($830,154.20) to satisfy the new overtime-hours requirement, the court held that the Division’s application of Chapter 99-1 to the Plan did not impair retirees’ vested rights under the 1993 Agreement.

The court also held that the City’s Plan was not a supplemental plan; therefore, the City was not exempt from the requirement to include three hundred overtime hours in officers’ pensionable earnings outlined in Florida Statutes Section 185.02(04), which defined “compensation” as “the total cash remuneration including ‘overtime’ paid by the primary employer to a police officer for services rendered . . . [that can be limited to] the amount of overtime payments which can be used for retirement benefit calculation purposes, but in no event shall such overtime limit be less than [three hundred] hours per officer per calendar year.” Id. at 842 (quoting Fla. Stat. § 185.02(4) (1999)) (emphasis added by the First District).

While the statute provided that a municipality that maintained a supplemental plan as of January 1, 1997 may continue to use its own definition of compensation, the court found that nothing in the record demonstrated the City maintained a plan separate from its defined benefit plan. Rather, the court found that City Ordinance No. 85-93 mandated that premium tax revenue be placed in the existing pension fund.

SIGNIFICANCE

City of Delray Beach affirms that courts will evaluate the retroactive application of a statute to ensure that such application does not impair vested rights. The case also confirms that unless a municipality maintains a separate supplemental benefit plan
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along with its defined benefit plan, it must comply with Chapter 99-1's minimum benefit requirements with regard to pensionable compensation.

RESEARCH REFERENCES


Jamie M. Marcario

Public Employment: Retaliation

Koren v. School District of Miami-Dade County,
46 So. 3d 1090 (Fla. 3d Dist. App. 2010)

An employee did not introduce sufficient evidence linking his participation in a statutorily protected activity with his employer taking adverse actions against him, and therefore he could not sustain his unfair labor practices claim for employer retaliation.

FACTS AND PROCEDURAL HISTORY

Justin Koren, a middle school teacher, brought a complaint against the Miami-Dade County School District (District) alleging unfair labor practices by his school's principal, Deborah Leal. Koren alleged that Leal had violated Florida employment law by retaliating against him for his involvement in a civil rights violation complaint against Leal by another employee. In February 2008, Koren assisted a school security guard in drafting a harassment complaint against Leal. Leal confronted Koren about his involvement in drafting the complaint, and Koren alleged that Leal subsequently took a series of retaliatory actions against him.

The first incident occurred on September 8, 2008, when Koren became ill and Leal signed a document granting approval for him to take a leave of absence. But on September 16, 2008, Leal sent Koren a letter accusing him of abandoning his job and threatening his termination if he did not respond within three
days. Leal never pursued the abandonment claim, apparently because the District had approved Koren’s leave of absence.

The second incident occurred on September 29, 2008, when Leal informed Koren via certified letter that a formal investigation was being pursued against him. The investigation sought to determine whether Koren had violated District policy by giving his computer password to a substitute teacher. Koren denied the allegation, stating that he had left his computer password only with his department chair during his absence.

Koren filed his first claim against the District in February 2009 based on these two incidents, but the Public Employee Relations Commission (PERC), the body responsible for hearing unfair labor practice complaints, dismissed the claim. After Koren filed his initial complaint, he alleged that Leal’s third retaliatory action occurred when she summoned Koren to her office and told him he was being transferred to another school. The new school location was twenty-four miles away, and Koren claims he was given no reason for the transfer. Koren filed an amended complaint, but again PERC dismissed the charges. Koren then appealed to Third District Court of Appeal.

ANALYSIS

The court first articulated the appropriate test to apply in evaluating a claim of employer retaliation. To be successful in bringing such a claim, an employee must show that: (1) he or she exercised statutorily protected conduct; and (2) the employee’s protected conduct was a substantial or motivating factor prompting the employer to make a threatening or coercive decision, or a decision adverse to the employee’s interest. PERC had already held that Koren’s assistance with his coworker’s harassment complaint was protected conduct, so only the second prong was at issue on appeal. The court concluded its brief analysis by stating that “there [was] just not sufficient objective evidence of animus, or relation of adverse events to Koren’s participation in a protected activity, necessary to sustain the allegations of unfair labor practices . . . .” Koren, 46 So. 3d at 1093. Since Koren had failed to establish a prima facie case of retaliation, the court affirmed PERC’s dismissal of his complaints.

Judge Cope’s dissent took issue with the test used by the majority, citing a Florida Second District case, Gibbons v. State Public Employees Relations Commission, 702 So. 2d 536, 537 (Fla.
2d Dist. App. 1997), requiring only that the employer took an adverse employment action and that there was a causal link between that adverse action and the employee’s protected action. To satisfy the causal link, the employee must only show that the employer was aware of the employee’s protected action at the time the employer took the adverse action. Judge Cope then noted that a United States Supreme Court case, Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 67–68 (2006), recently held that an employment action was considered “materially adverse” when it would have dissuaded a reasonable worker from taking the protected action. The dissent then applied these rules to the facts of the present case, reasoning that Leal’s actions had been materially adverse as defined by Burlington, and that the record clearly showed that Leal had been aware of Koren’s protected action at the time she took the adverse actions, thus satisfying the Gibbons test.

SIGNIFICANCE

Koren clarifies that the appropriate inquiry to apply to a claim for employer retaliation in Florida is whether an employee’s exercise of protected conduct was a substantial or motivating factor causing the employer to make a threatening, coercive, or adverse decision against the employee. The employee’s failure to make such a showing constitutes a failure to establish a prima facie case of employer retaliation, and the case must be dismissed. The dissenting opinion suggests that there is considerable latitude for evaluation of facts in the determination of what constitutes a “materially adverse” action.

RESEARCH REFERENCE


Daniel R. Strader
Public Employment: Statute of Limitations

Avila v. Miami-Dade County,
29 So. 3d 401 (Fla. 3d Dist. App. 2010)

The 180-day statute of limitations to notify a police officer of possible disciplinary action is tolled for the entire length of time a criminal investigation is pending. Furthermore, use of different terms in adjacent sections of the statute will not be construed to expand, limit, or further define the meaning or application of the section at issue in a case.

FACTS AND PROCEDURAL HISTORY
On November 17, 2005, the Miami-Dade County Police Department (Department) received a complaint that Officers Rene Avila and Edgar Perez failed to respond to emergency calls. The complaint was classified as criminal. Following an internal investigation, the Department concluded that the officers neglected their job responsibilities. The State Attorney was informed, but it took the State Attorney until at least January 22, 2007, to choose not to prosecute. The Department served notice of possible termination to Officer Avila on July 13, 2007. Officer Perez was on military leave and was unable to be served until September 3, 2007.

The officers filed a complaint with the Circuit Court for Miami-Dade County for an injunction to prohibit the Department from discharging or disciplining them. They contended they were not notified of possible disciplinary action within the 180-day statute of limitations set forth under Florida Statutes Section 112.532(6). The trial court found the officers received notice within the statute’s guidelines based upon the exceptions that toll the statute of limitations for notification. The Third District Court of Appeal affirmed, adopting the lower court’s decision verbatim.

ANALYSIS
Florida Statutes Section 112.532(6), concerning the rights of police officers, states that an officer must be notified in writing of possible disciplinary action within 180 days following the date the Department received notice of the alleged misconduct. But several exceptions toll the statute of limitations. The statute of limita-
tions is tolled “during the time that any criminal investigation or prosecution is pending in connection with the act, omission, or other allegation of misconduct.” Fla. Stat. § 112.532(6)(a)(2) (2010). The statute of limitations is also tolled if the officer to be notified is “unavailable.” Id. at § 112.532(6)(a)(3).

The court held that the officers were properly notified according to the statute because the statute of limitations did not start running until the criminal investigation was no longer pending, which occurred when the State Attorney decided not to prosecute. Further, the statute of limitations was tolled in Officer Perez’s case while he was on military leave and unavailable to be served.

While the officers acknowledged the exceptions that toll the statute of limitations, they asserted the investigation had ceased long before the State Attorney chose not to prosecute because the investigation was not active. Florida Statutes Section 112.533(2)(b) declares an investigation inactive if a finding is not made within forty-five days of the complaint being filed. The court found this argument unpersuasive because Section 112.533(2)(b) concerns the exclusion of internal affairs investigations from public-record laws, and is therefore not the applicable statutory section. Finally, the court determined that “[b]ecause the legislature used the term ‘active’ and included a [forty-five]-day presumption of inactivity in [Section] 112.533(2)(b), but not in [Section] 112.532(6)(a), the court cannot insert the term or the presumption by implication into the latter section.” Avila, 29 So. 3d at 405.

SIGNIFICANCE

Avila reaffirms the proposition that a term used in one section of a statute may not be substituted for the words in another section. Similarly, words cannot be implicitly incorporated into a section when the legislature did not put them there.

RESEARCH REFERENCE


Stacey L. Rowan
Public Employment: Workers’ Compensation

**Russell v. Orange County Public Schools Transportation,**

36 So. 3d 743 (Fla. 1st Dist. App. 2010)

To determine coverage in a hearing for workers’ compensation benefits, the Florida Legislature intended to allow the previously authorized, yet currently de-authorized, physician of an injured plaintiff to testify under the “authorized treating provider” clause of Florida Statutes Section 440.13(5)(e).

**FACTS AND PROCEDURAL HISTORY**

After experiencing an accident at work, Judy Russell (Plaintiff) sought to collect workers’ compensation benefits before the Judge of Compensation Claims (JCC). The accident may have contributed to the worsening of Plaintiff’s preexisting knee condition. In the effort to determine coverage, two medical physicians were consulted. The physicians disagreed regarding coverage. Dr. Smith was Plaintiff’s authorized physician at one point in time prior to the benefits hearing. Dr. Smith concluded that Plaintiff’s condition was covered as a result of the accident. Dr. Rosen was Plaintiff’s authorized physician at the time of the benefits hearing. Dr. Rosen concluded that there was no coverage, as Plaintiff’s accident was not a major contributing cause of Plaintiff’s knee condition.

Under Florida Statutes Section 440.13(9)(c), the Plaintiff requested that the JCC order an expert medical advisor’s (EMA) opinion to resolve the disagreement between the two doctors. The JCC denied the Plaintiff’s request for an EMA. Under Section 440.13(5)(e), “[n]o medical opinion other than the opinion of a medical advisor appointed by the [JCC] or division, an independent medical examiner, or an authorized treating provider is admissible in proceedings before the [JCC].” The JCC reasoned there was no conflict in medical opinions, as Dr. Smith, Plaintiff’s de-authorized physician, did not fall into any of the three categories of physicians who may testify in a benefits hearing. Consequently, only the medical opinion of Dr. Rosen was admissible. Further, because Dr. Rosen concluded that Plaintiff’s accident was not a major contributing cause of her knee condition, Plaintiff
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was denied workers’ compensation benefits. Following the JCC’s denial of benefits, Plaintiff appealed to the First District Court of Appeal.

ANALYSIS

The First District reversed the JCC and held that Plaintiff was entitled to an EMA based on the presence of conflicting medical opinions. The First District considered precedent, the plain language of the statute, and legislative intent.

The First District noted that this was a question of first impression. Dr. Smith was Plaintiff’s de-authorized physician at the time of the hearing. No similar case had been considered by the First District.

Next, the First District looked at the plain language of the statute and concluded that the statute is ambiguous. The statute recognizes three categories of physicians who may offer opinions as testimony at benefits hearings, one of which is “authorized treating [physicians].” The statute neither specifies that the physician must be the “currently authorized treating [physician],” nor does it “otherwise suggest the authorization of the [physician] must be in existence at the time of the benefits hearing.” Russell, 36 So. 3d at 745. Therefore, the statute is ambiguous. Further, when the plain meaning of the statute is ambiguous, the reviewing court must look toward legislative intent to ascertain the statute’s purpose.

The First District looked at legislative intent and concluded that the JCC erroneously excluded the medical opinion of Plaintiff’s de-authorized physician. The purpose of Section 440.13 was twofold. It was intended to stop plaintiffs from “doctor-shopping,” and it was intended to ensure prompt delivery of benefits to injured workers.

Excluding the opinion of a de-authorized physician contravenes the purpose of the statute. First, the JCC’s interpretation would allow a plaintiff to doctor-shop by allowing the plaintiff to exercise his or her one-time change of physician prior to a hearing in order to avoid an unfavorable medical opinion. Similarly, it would allow the plaintiff’s employer to doctor-shop by de-authorizing a particular provider before a hearing. Second, the JCC’s interpretation would allow for last minute de-authorizations and authorizations that would inevitably delay the hearing process. Third, the JCC’s interpretation would lead to
unintended consequences, such as opening the door for parties to argue that a physician, although currently “authorized” as a provider, is not currently “treating” any ailment of the patient and thus should not be permitted to testify at a benefits hearing.

For these three reasons, the First District concluded that the Legislature intended to include de-authorized physicians in Section 440.13, permitting such physicians to testify at benefits hearings. Consequently, the JCC erroneously excluded the opinion of Dr. Smith. Because Dr. Smith’s opinion should have been admitted, there was a conflict in medical opinions. Thus, the Plaintiff was entitled to an EMA.

SIGNIFICANCE

*Russell* establishes that at a hearing to recover workers’ compensation benefits, the plaintiff, or his or her employer, may use the testimony of a physician who is either currently authorized or was previously authorized to treat the plaintiff. This broadens the pool from which the parties to a benefits claim may draw testimony. This interpretation furthers the purpose of preventing both the plaintiff and his or her employer from excluding the potentially unfavorable testimony of a de-authorized physician.

RESEARCH REFERENCE

Charles E. Simpson
PUBLIC RECORDS & MEETINGS

Public Records & Meetings: Exemptions

_Rameses, Inc. v. Demings_,
29 So. 3d 418 (Fla. 5th Dist. App. 2010)

Although the Public Records Act implements a constitutional mandate providing full disclosure of government records, the legislature may create statutory exemptions for records containing the identity of undercover law enforcement personnel and surveillance techniques to protect the public interest, even though this information may have already been provided to a criminal defendant during discovery.

FACTS AND PROCEDURAL HISTORY

The Metropolitan Bureau of Investigation (MBI) conducted “Operation Overexposed” in 2004, in which undercover law enforcement personnel posed as patrons of Cleo’s, an adult nightclub owned by Rameses, Inc. Several employees were later arrested for public nudity and exposure of sexual organs, and Cleo’s was charged an administrative fine. MBI videotaped the unlawful conduct throughout the investigation, which also revealed the faces of the undercover officers. The unedited videotapes were later provided to Cleo’s employees in discovery during their criminal proceedings under Florida Rule of Criminal Procedure 3.220. At the end of litigation, Cleo’s filed a public-records request under the Public Records Act with Jerry L. Demings, the Sheriff of Orange County and records custodian of MBI. Demings refused to provide the videotapes unless the faces of the undercover officers were obscured. Cleo’s objected to the altered videotapes and filed suit in the Circuit Court of Orange County to compel disclosure. Relying on specific statutory exemptions to the Public Records Act involving law enforcement personnel and surveillance, the circuit court granted Demings motion for summary judgment. Cleo’s appealed.

ANALYSIS

The Fifth District began its analysis by noting the constitutional roots of the Public Records Act, stating it was the State’s
policy to provide broad access to government records, and the statute itself was to be construed liberally to facilitate this goal. The court reasoned that even though the Florida Legislature (Legislature) retained the right to carve out statutory exemptions to strike the appropriate balance between transparency in government and secrecy that is necessary to maintain public safety, all such exceptions were to be interpreted narrowly. The court also asserted that the party raising the exemption to the Public Records Act had the burden of proving its applicability to the record in question.

Cleo’s argued that because unedited videotapes were already provided to the employees during their criminal proceedings, Demings waived any right to require that the videotapes be edited before release as a public record. The Fifth District disagreed and remarked that although Florida Supreme Court precedent established that pretrial discovery material attained public-record status once disclosed to a criminal defendant, the Court also held that the public’s right to access discovery materials was not absolute.

To support its rationale, the court cited a Fourth District Court of Appeal case in which even though the names of a confidential informant and undercover officer were already known to the public, the Fourth District held that the statutory exemption for information regarding the identity of undercover personnel was still applicable, and the public-records request was appropriately denied. The Fifth District also found Cleo’s’ arguments concerning the statutory exemptions for “active criminal intelligence information” irrelevant as Demings did not raise the applicability of those exemptions.

The court clarified that although Cleo’s employees may have been entitled by the Florida Rules of Criminal Procedure to unedited versions of the videotapes in discovery, Florida Statutes Sections 119.071(2)(d) and (4)(c), which exempted surveillance procedures and any information revealing undercover police personnel were at all times pertinent to the records requested by Cleo’s. The Fifth District stressed that allowing criminal procedure to convert otherwise statutorily exempt information into public record “would effectively allow the rules of criminal procedure, which are enacted to govern criminal discovery, to trump legislatively approved exemptions from disclosure under the Public Records Act.” Rameses, 29 So. 3d at 423. In affirming the
award of summary judgment, the court explained that the State’s legitimate interest in protecting undercover officers, as expressed through the statutory exemptions to the Public Records Act, was not invalidated or waived by disclosure to a defendant during a criminal proceeding.

SIGNIFICANCE

In *Rameses*, by refusing to recognize a waiver exception in the context of criminal proceedings, the Fifth District indicated the considerable deference courts are prepared to give to the Legislature’s judgment and the efforts of law enforcement to prevent criminal conduct. Although the court opened its analysis by stating the importance and sweeping scope of the Public Records Act, the court stressed the countervailing necessity and prerogative of the Legislature to establish reasonable exceptions to maintain secrecy that is essential to public safety and welfare. *Rameses* also stands for the proposition that rights secured to a criminal defendant in discovery to assure a fair trial do not necessarily extend to the general public. While this may not have far-reaching implications in the context of exotic dancing in an adult nightclub, different facts involving an abuse of police discretion or brutality may cause Florida courts to reconsider this holding in the future.

RESEARCH REFERENCE


Joe Fernandez III

**Public Records: Exemptions**

**Tort Liability: Scope of Employment**

*Delaurentos v. Peguero,*

47 So. 3d 879 (Fla. 3d Dist. App. 2010)

When a plaintiff claims an employer is liable for its employee’s wrongful actions under alternate theories of respondeat superior and employer negligence, and the defendant
employer admits the employee’s actions occurred during the course and scope of his or her employment, only the action based on respondeat superior may proceed.

FACTS AND PROCEDURAL HISTORY

Miami-Dade County (County) police officer David Delaurentos shot and killed Jose Gabriel Ventura during a traffic stop. The decedent’s estate (Estate) instituted a wrongful-death action against Officer Delaurentos, alleging battery and negligence, and against the officer’s employer, Miami-Dade County, alleging vicarious liability and, in the alternative, negligence in hiring, retaining, and supervising the officer.

As part of its hiring process, the County requires police-officer candidates to undergo a psychological evaluation conducted by a licensed psychologist, and the officer involved in this case underwent such an evaluation in 2005. In connection with its negligent-hiring claim against the County, the Estate sought the psychological evaluation records provided to the County as a condition of the officer’s employment. The County and the officer objected to the production of such records, but the trial court overruled the objections and ordered the County to produce the records. The County and the officer filed a writ of certiorari seeking to quash the order compelling disclosure of the psychological records.

ANALYSIS

Finding vicarious liability, in which the employer’s negligence is not at issue, to be the only allowable theory of liability against the County, the Third District Court of Appeal quashed the order to compel production of the psychological records on the ground that the requested discovery was neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

The court rejected two of the County and the officer’s arguments. The County and the officer contended the psychological evaluation was protected by Florida’s psychotherapist-patient privilege, which attaches to “confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition . . . .” Delaurentos, 47 So. 3d at 881 (quoting Fla. Stat. § 90.503(2) (2009)). But the court found the privilege did not apply because the psychological consultation conducted in this case was not for diagnosis or
treatment but for employment purposes. The County and officer also argued the psychological records were exempt from disclosure under the Public Records Act, which provides an exemption from public disclosure for medical information pertaining to an officer or an employee of a public agency that would identify the officer or employee if disclosed. Because the relevant statute only applies when a citizen makes a public records request, the court held the statute would not protect such records from litigation discovery.

The court found merit in the County and the officer’s third contention that the Estate’s subpoena of the psychological records sought information outside the scope of permissible discovery. The court observed that although the Estate sued the County under alternative theories of vicarious liability and negligent hiring, the subpoena for psychological records was connected to the negligent-hiring claim. The court then noted that Florida caselaw distinguishes between acts committed within the scope of employment—when the basis for employer liability is respondeat superior, and employer negligence is immaterial—and those committed outside the scope of employment—when the basis for employer liability may be the employer’s own negligence in knowingly keeping a dangerous employee.

In the instant case, the Estate alleged and the County admitted that the shooting at issue occurred in the scope of the officer’s employment. The court reasoned that when, as here, “a plaintiff alleges and a defendant admits that the alleged torts took place during the course and scope of employment, employer liability can only be pursued on the basis of respondeat superior and not on the basis that the employer was negligent.” Delaurentos, 47 So. 3d at 882 (citing Mallory v. O’Neil, 69 So. 2d 313, 315 (Fla. 1954)). Finding respondeat superior to be the only allowable theory of liability against the County under Mallory, the court held that the Estate’s request for production of the psychological records was outside the scope of permissible discovery because such records were only relevant to employer negligence.

SIGNIFICANCE

Delaurentos clarifies that when a plaintiff claims an employer is liable for the wrongful actions of its employee under alternate theories of respondeat superior and employer negligence, and the plaintiff alleges and the defendant employer admits the
employee’s actions occurred during the course and scope of his or her employment, only the action based on respondeat superior may proceed. Additionally, the case confirms that the psychotherapist-patient privilege does not attach to psychological evaluations conducted as a condition of employment rather than for the purpose of diagnosis or treatment.

RESEARCH REFERENCE


Jamie M. Marcario

Public Records: Recorded Inmate Conversations

_Bent v. State_,

46 So. 3d 1047 (Fla. 4th Dist. App. 2010)

Recorded communications between inmates and their families that do not involve criminal activity are not records subject to the Public Records Act (Act) because such disclosure does not further the Act’s purpose of providing transparency and oversight of governmental action, and may also impair the inmate's right to a fair trial.

FACTS AND PROCEDURAL HISTORY

Matthew Bent and Jesus Mendez were minors charged with attempted second-degree murder in a widely known case in Broward County. The Sun-Sentinel, a local newspaper, sent a public records request to the Broward Sheriff’s Office, requesting the recordings of all the defendants’ phone conversations made since their arrest, excluding calls between the accused and their counsel. Bent and Mendez filed for protective orders in the Seventeenth Judicial Circuit, alleging that the phone recordings were exempt from a public records request and that releasing the records to the public would unfairly prejudice their case, thus violating their constitutional right to a fair trial. The circuit court granted the defendants’ motion in part, reasoning that although the Sheriff’s Office was not required to record the phone conversa-
tions, the valid security purposes behind doing so transformed the communications into public records, although any admissions made by defendants in the recordings were exempt from disclosure. The Sheriff’s Office was then directed to release all other recordings to the Sun-Sentinel. Bent and Mendez both petitioned for a writ of certiorari, requesting that the Fourth District review the circuit court’s order.

ANALYSIS

The Fourth District Court of Appeal began its analysis by describing the constitutional roots of the Public Records Act, which grants the public a right to access and inspect any records or transmissions made or relied on by a governmental body in its official business. The court noted the broad scope of the statute as it defined public records to include virtually any form of information. In determining whether the phone calls in question constituted public records, the court clarified that not every record with a tenuous connection to a public agency is a public record, and the dispositive question is whether the record was received or created to transact official governmental business. The Fourth District stressed that the spirit of the Public Records Act was to provide transparency and accountability in government actions.

The court distinguished the case at hand from these two purposes by noting that neither objective was advanced by releasing the recordings to the public, as the communications involved only the accused and their families, and did not include any official business undertaken by the Broward Sheriff’s Office. The court held that although the agency may have legitimate safety reasons to screen the phone conversations, compiled recordings of personal conversations had no connection to official governmental business of any kind.

Underscoring the dangers of pretrial publicity in such an extraordinary case, the Fourth District asserted that a jail holds not only those convicted, but also those solely accused of crimes who are nonetheless entitled to an impartial trial. The court explained that even though Bent and Mendez may have been aware that their phone calls were being monitored by a corrections officer or prosecutor, “a lack of expectation of privacy does not affect whether the recordings are subject to disclosure under the Public Records Act.” Bent, 46 So. 3d at 1050. The court also
indicated that the inmates themselves were given no notice that their conversations were subject to public disclosure, and that an accused should have the right to discuss sensitive or private information with his or her parents and other family members without rendering it subject to public access.

The Fourth District supported its conclusion by finding that unless the content of the phone calls constituted criminal conduct or a breach of security, the information contained therein did not meet the definition of a public record, and therefore did not advance the goals of the Public Records Act. The court granted the petitions, quashed the order of the circuit court, and remanded the case for further proceedings consistent with its holding.

SIGNIFICANCE

_Bent_ illustrates what courts must do to balance the rights of the criminally accused against the public’s right to access information concerning the conduct of governmental business. It is critical to note that the Fourth District would not have protected an inmate’s communication if such communication constituted possible criminal activity or a security breach.

RESEARCH REFERENCE


Joe Fernandez III

Public Records & Meetings: Sunshine Law

_Grapski v. City of Alachua_,

31 So. 3d 193 (Fla. 1st Dist. App. 2010)

A city’s unjustified refusal to allow public inspection and copying of the minutes of a canvassing-board meeting after the polls closed and before the city commission’s next meeting violates Florida’s public records and open meetings laws, resulting in nullification of the city’s approval of such minutes.
FACTS AND PROCEDURAL HISTORY

After an April 11, 2006 City of Alachua (City) Commission election, the Board of Canvassers (Board) met to canvass the results, and a city employee prepared minutes of the meeting. Charles Grapski and Michael Canney (Citizens) attended the meeting and allegedly observed misconduct.

The City later released an agenda for the May 15 Regular City Commission meeting, the “Consent Agenda” portion of which listed “Minutes: April 11, 2006 Board of Canvassers Meeting.” Grapski, 31 So. 3d at 195. Before the May 15 meeting, the Citizens asked to inspect and copy the minutes, but the City refused to make them available until after it approved them at the meeting.

Alleging that the minutes are a public record and that the City’s refusal to allow inspection and copying of the minutes before the May 15 meeting violated Florida Statutes Section 119.07 and Article I, Section 24(a) of the Florida Constitution, the Citizens sought to enjoin the City to grant their requests for the public records or to provide reasons for denial in writing. The Citizens also sought a declaration that the City’s consent agenda procedure and approval of the minutes before making them publicly available had no legal effect because the actions violated Florida’s open meetings law, Florida Statutes Section 286.011, and Article I, Section 24(b) of the Florida Constitution. Finally, the Citizens sought to recover reasonable attorney’s fees and costs.

Reasoning that the Citizens filed the complaint almost nine months after their initial request and after receiving a copy of the minutes, the Circuit Court for Alachua County held the public records claim moot. The trial court also determined the City’s approval of the minutes by consent agenda did not violate Florida’s open meetings law. The Citizens appealed.

ANALYSIS

The First District Court of Appeal reviewed the trial court’s interpretation and application of the relevant statutes de novo. The court reversed the trial court on the public records claim, held the approval of the minutes null and void, affirmed in all other respects, and remanded for the trial court to consider Citizen’s request for the award of reasonable attorney’s fees and costs.
To succeed on their public records claim, the court stated the Citizens had to prove they made, and the City received, a specific request for public records actually in existence, and that the City improperly refused to provide copies of the requested records in a timely manner. The court found the Board to be an “agency” because it was a subdivision of the City and found the Board’s minutes to be a “public record” because they were prepared “in connection with the transaction of official business by an agency.” *Id.* (quoting Fla. Stat. § 119.011(11) (2006)).

In analyzing whether the City improperly refused to produce the public record in a timely manner, the court stated that under Florida law, “[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body . . . .” *Id.* at 197 (quoting Fla. Const. art. I, § 24(a)). Moreover, public records custodians shall permit records to be copied or inspected by anyone, while supervised by the record custodian. Such inspection shall occur at any reasonable time and under conditions that are reasonable. Accordingly, the court held the City’s unjustified refusal to allow the Citizens to inspect and copy the minutes before the May 15 meeting denied the Citizens any realistic access to the minutes and, therefore, breached the City’s duty to provide access to public records in a timely manner, contravening the purpose of the public records law. The court also held that although the Citizens had received a belated copy of the minutes, the issue of the City’s unlawful refusal to allow reasonable inspection and copying of the minutes was not moot because where an ongoing practice or one capable of repetition violates the law, as in this case, the doctrine of mootness is inapplicable.

In considering the open meeting claim, the court stated that under the Florida Constitution and relevant statutes, covered governmental entities must provide the public with notice of and access to meetings where official acts will occur.

The court then rejected the Citizens’ argument that under *Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st Dist. App. 1994), the Commission’s consent agenda procedure violated the notice requirement. In *Rhea*, the First District held that the Alachua County School Board’s decision to hold a public meeting in a distant county violated the open meetings law because the distance precluded Alachua County citizens from attending. In the instant case, however, the court affirmed the
trial court’s ruling that so long as the City properly noticed the Commission meeting and allowed the public to attend at all times, it need not list on the agenda specific items to be considered at the meeting. Thus, the consent agenda procedure was valid.

But citing Florida Statutes Section 286.011(2), which provides that the minutes of government agency board meetings must be promptly recorded and made open for public inspection, the court found the City’s denial of public access to the Board’s minutes until after they would have been useful to the Citizens violated Florida’s open meetings law. And because the open meetings law provides that “no resolution, rule, or formal action shall be considered binding except as taken or made” in compliance with the open meeting requirements, Grapski, 31 So. 3d at 200 (quoting Fla. Stat. § 286.011(1)), the court held the City’s approval of the minutes null and void.

Noting that the City could have cured its violation by reconsidering the minutes after their production, the court remanded for the trial court to award reasonable attorney’s fees and costs.

SIGNIFICANCE

Grapski clarifies that for a government entity to comply with Florida’s requirement that government entities make public records available for inspection and copying by the public at any reasonable time, it must make such records available during the time period when they would be useful to the persons seeking them. Moreover, Grapski holds that where a government entity fails to make its meeting minutes available to the public before the minutes are approved, the approval of such minutes shall have no legal effect.

RESEARCH REFERENCE


Jamie M. Marcario
Public Records & Meetings: Sunshine Law


The Florida Sunshine Law does not provide citizens with the right to speak at public meetings, only the right to attend.

FACTS AND PROCEDURAL HISTORY
The plaintiffs were citizens of Escambia County, and the defendant, Community Maritime Park Associates, Inc. (CMPA), was a nonprofit corporation responsible for developing a parcel of public waterfront property. The plaintiffs brought an action seeking a declaratory judgment to empower them to speak at CMPA meetings. It was uncontested that under the Florida “Sunshine Law,” codified in Florida Statutes Chapter 286, CMPA meetings were open to the public. The sole question for the court to consider, therefore, was whether the right to attend the CMPA meetings carried an added right to speak at those meetings. The circuit court granted summary judgment for CMPA, and the plaintiffs appealed.

ANALYSIS
The First District Court of Appeal noted that the relevant language of Florida Statutes Section 286.011(1) requires only that the CMPA meetings, like other public meetings, be open to the public. The plaintiffs relied on dicta from *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969), suggesting that citizens had a right to be heard at public meetings. But the district court explained that in a more recent case, *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), the Florida Supreme Court concluded that while citizens have a right to attend public meetings, that right does not include rights to participate in the decisionmaking process or express their opinions concerning the subject of the meeting. The district court affirmed the summary judgment order, holding that “although the Sunshine Law requires that meetings be open to the public, the law does not give the public the right to speak at the meetings.” *Keesler*, 32 So. 3d at 660.
SIGNIFICANCE

*Keesler* clarifies an important point about the Florida Sunshine Law—nearly, that although the law grants members of the public access to a wide variety of government meetings, it does not grant the public the right to speak at those meetings.

RESEARCH REFERENCE


Daniel R. Strader

Public Records & Meetings: Sunshine Law

*Sarasota Citizens for Responsible Government v. City of Sarasota,* 28 So. 3d 880 (Fla. 2010)

Subordinate committees made up of staff or delegates may conduct information-gathering meetings for public officials and may brief those officials in individual meetings without violating the Sunshine Law. Violations of the Sunshine Law caused by the improper exchange of emails may be cured by final and independent action in a public meeting.

FACTS AND PROCEDURAL HISTORY

In July 2009, the Sarasota County Board of County Commissioners (Board) and the Baltimore Orioles (Orioles) agreed upon a Memorandum of Understanding (MOU). The MOU provided that the Orioles would relocate spring training to Sarasota (City), and Sarasota County (County) would fund construction and improvements of the complex where spring training would take place. David Bullock (Bullock) conducted all negotiations for the County.

The extensive negotiations that led to the MOU took place over a series of months alongside discussions at the Board’s public meetings. The Board members discussed the negotiations in one-on-one meetings with Bullock to prepare for the public hearings. Board members also shared emails from constituents regarding the Orioles and occasionally commented on the emails. At least
one email contained a direct comment from one Board member to another. Board members sent the last email on April 12, 2009. Afterward, the Board discussed its negotiations at a series of scheduled public hearings. On July 22, 2009, the Board approved the MOU during a four-hour hearing and adopted three separate resolutions, including authorization to issue bonds.

Sarasota Citizens for Responsible Government (Citizens) filed suit against the City and County alleging Sunshine Law violations. The County and City also filed separate actions seeking to validate the bonds in furtherance of the MOU. Citizens objected to the bond validations based on the alleged Sunshine Law violations. The trial court consolidated the proceedings, validated the County’s bonds, and denied Citizens relief under its complaint. Citizens appealed to the Florida Supreme Court.

ANALYSIS

The Florida Supreme Court noted that actions in violation of the Sunshine Law are void and cause irreparable public injury. All Florida governmental authorities fall under the Sunshine Law unless exempted. The Sunshine Law also applies to subordinate committees if a board delegates authority to make decisions to that committee. But the Sunshine Law does not restrict a “committee [that] has only been delegated information-gathering or fact-finding authority and only conducts such activities.” Sarasota Citizens, 28 So. 3d at 762.

The Court first addressed whether competent, substantial evidence supported the trial court’s finding that the Board members were acting as advisors and consultants when they met with Bullock. Bullock testified that a committee to negotiate was never formed, and several other witnesses testified to providing information to Bullock during his negotiations. Thus, the Sunshine Law did not restrict the Board members from conducting these meetings. The Court specifically noted that Bullock and those he consulted with did not make any joint decisions. Therefore, the trial court’s determination was supported by competent, substantial evidence. Citizens further argued that Florida Statutes governing economic-development agencies should change the Court’s analysis. The Court rejected this argument because the individuals Bullock consulted with were not a “commission” within the meaning of the Sunshine Law.
Citizens then argued that the staff briefings of individual county commissioners in preparation for the July 22, 2009 public meeting violated the Sunshine Law. The Court noted that meetings under the Sunshine Law include formal and informal gatherings of multiple members of a board where discussion of a future foreseeable action occurs. But staff members may provide facts or information to individual board members without violating the Sunshine Law. The Court noted that Bullock’s meetings with Board members were only informational briefings concerning the terms of the MOU and included only one commissioner per meeting. Therefore, the Court held that these meetings did not violate the Sunshine Law.

Finally, Citizens contended that the trial court erred in finding that any Sunshine Law violations created by the Board’s emails were cured by the subsequent meetings. Independent and final action in the open can cure prior Sunshine Law violations, but mere ceremonial acceptance of secret action will not. The Florida Supreme Court observed that emails between the Board members may have caused violations, but the Board conducted multiple public hearings after the final email was sent. At these meetings, multiple proposals were debated and rejected before approval. Therefore, the Board had taken final and independent action in the open, and any Sunshine Law violations were cured.

SIGNIFICANCE

_Sarasota Citizens_ reaffirms public boards may delegate information-gathering authority to committees, and may participate in individual informational briefings without violating the Sunshine Law. Further, this decision details how a government agency can cure Sunshine Law violations through final action taken in a public meeting.

RESEARCH REFERENCE


Christian M. Leger
TORT LIABILITY & GOVERNMENTAL IMMUNITY

Tort Liability & Governmental Immunity:
Sovereign Immunity

*Marion v. City of Boca Raton,*
47 So. 3d 334 (Fla. 4th Dist. App. 2010)

Sovereign immunity does not protect a city’s operational decisions. Further, warning of a dangerous condition created by a malfunctioning traffic signal does not relieve the government of the duty to properly maintain the traffic signal.

FACTS AND PROCEDURAL HISTORY

Elizabeth Marion (Marion) was driving west on Glades Road, which is maintained by the City of Boca Raton (City), when she noticed that the vehicles to her left were braking as she approached the intersection of Glades Road and Renaissance Way. Marion also began to break, but she and another vehicle collided in the intersection. The City regulated the intersection with a traffic signal. At the time of the collision, a flashing yellow light faced Glades Road, and a flashing red light faced Renaissance Way. An engineer for the City stated in depositions that the traffic lights flashed in such a manner as a response to a problem with the traffic signal. The City had reset the traffic light twice in the thirty-six hours preceding the accident—one on the day before Marion’s accident, and once on the same day as the accident but before the collision.

Marion sued the City, alleging that it negligently failed to maintain the traffic control device and that the failure was the proximate cause of her injuries. The City moved for summary judgment, claiming that (1) sovereign immunity protected decisions regarding the traffic signal, (2) Marion could not establish negligence, and (3) the traffic light was not the proximate cause of Marion’s injuries. The trial court agreed that the traffic signal did not proximately cause the accident and granted the City’s motion for summary judgment. Marion appealed to the Fourth District Court of Appeal.
ANALYSIS

The Fourth District first addressed whether sovereign immunity precluded Marion’s claim for negligence against the City. Sovereign immunity protects planning-level decisions of the government, but it does not protect operational decisions. The City exercised its planning function by designing the intersection and traffic signal, but it made operational decisions when maintaining the intersection. The use of the flashing traffic signal was an operational decision because the City used the flashing traffic signal to warn of a dangerous condition caused by the malfunctioning device. Therefore, sovereign immunity did not preclude Marion’s claim.

The court then focused on the City’s contention that Marion could not prove negligence. It held that the operational duties of the government parallel the duties owed by a landowner to a business invitee, which include a duty “(1) to maintain the premises in a reasonably safe condition, and (2) to give warning of concealed perils.” Marion, 47 So. 3d at 338. A warning alone did not relieve the City of its obligation to maintain the premises.

The record showed that the traffic signal had malfunctioned three times in the thirty-six hours before the accident and did not reveal whether the City’s employees deviated from procedural norms. Thus, the record did not affirmatively refute Marion’s allegation that the City was negligent in maintaining the intersection, making summary judgment inappropriate.

Lastly, the court addressed the trial court’s ruling that the flashing traffic signal did not proximately cause Marion’s accident. It noted that the alleged negligence was the City’s failure to maintain the normal traffic signals, not a failure to maintain the flashing traffic signals. The failure to maintain a normal traffic signal created a zone of danger for motorists who navigated the intersection. The court acknowledged that the trial court might have determined that the other vehicle involved in the accident was a superseding intervening cause; but any intervening vehicles were foreseeable, making proximate cause an issue for the jury. Neither Marion’s negligence nor the negligence of another driver could absolve the City of liability as a matter of law. Therefore, the court reversed the trial court’s grant of summary judgment and remanded.
SIGNIFICANCE

Marion reaffirms the distinction between planning decisions, which are protected by sovereign immunity, and operational decisions, which are not protected. Additionally, Marion establishes a link between the duty a landowner owes to a business invitee and the duty a government owes to motorists who rely on properly maintained traffic signals.

RESEARCH REFERENCE


Christian M. Leger

Tort Liability & Governmental Immunity:
Sovereign Immunity

Youmans v. Gagnon,
626 F.3d 557 (11th Cir. 2010)

A police officer must violate clearly established laws or rights before sovereign immunity is waived. Additionally, determinations of deliberate indifference to a serious medical need will necessarily turn on the length of time until treatment and the severity of the detainee’s injuries.

FACTS AND PROCEDURAL HISTORY

In June 2007, John E. Youmans (Youmans) left the scene of a robbery in his vehicle. Two police officers stopped Youmans after some pursuit and beat him during the arrest. Youmans had visible injuries on several parts of his body due to the beating. The officers then took Youmans to the police station where Timothy Gagnon (Gagnon) booked Youmans. Youmans confessed to the crime while in Gagnon’s custody, and Gagnon sent him to a detention facility.

About four hours elapsed between Youmans’ arrest and when he received medical attention for his injuries. Youmans was in Gagnon’s custody for about three of the four hours. During that time, Youmans complained of blurry vision and pain in his hand.
He also appeared disoriented, and Gagnon could see blood on his shirt. Youmans still managed to sign a form acknowledging his rights and drink lemonade from a can. The camera in the booking room also showed Youmans trying to remove the camera’s protective cover and remove his constraints while Gagnon was out of the room. Once Youmans arrived at the detention facility, a nurse sent him to receive medical treatment, and doctors diagnosed him with blunt trauma wounds. Doctors prescribed medication and follow-up visits, but Youmans did not present any evidence that follow-up visits actually occurred.

Youmans filed suit, claiming that Gagnon had violated his Fourteenth Amendment rights by exhibiting deliberate indifference to his serious medical needs. Gagnon raised the defense of qualified immunity and moved for summary judgment. The district court denied the motion, and Gagnon appealed to the United States Court of Appeals for the Eleventh Circuit.

ANALYSIS

The Eleventh Circuit noted that qualified immunity shields government employees from liability unless their actions infringe upon well-established constitutional or statutory protections that a reasonable person would know. Employees are protected except when the employees’ actions are plainly wrong or suggest that he or she has knowingly violated the law. If the defendant raises the qualified immunity defense, the plaintiff must prove that a serious violation of his or her rights occurred and that the controlling law was well established.

Courts must consider whether the prevailing law would be clear to a reasonable officer in the specific factual context. The United States Supreme Court has cautioned courts not to undermine qualified immunity by allowing plaintiffs to allege infringement of abstract rights. The court held that the law governing Youmans’ situation was not clearly established in June 2007, when Youmans was arrested and booked.

Additionally, to establish a claim of deliberate indifference to serious medical need, a plaintiff must prove “(1) a serious medical need; (2) the defendant[‘s] deliberate indifference to that need; and (3) causation between that indifference and the plaintiff’s injury.” Youmans, 626 F.3d at 563. The medical need must require urgent medical care. The Eleventh Circuit held that Youmans had failed to show that he suffered from a serious medical
need or that Gagnon acted with deliberate indifference. Liability turns on factual determinations about the severity of the injury and the length of the delay in treatment. The Eleventh Circuit noted several cases that presented similar injuries and longer periods of delay and yet held that the officers did not act with deliberate indifference. These cases confirmed for the court that Gagnon’s actions did not exhibit deliberate indifference. Finally, the court distinguished Youmans’ injuries from a case Youmans asserted to support his position. In that case, the plaintiff’s injuries bled while in custody and required six stitches. The Eleventh Circuit distinguished that case from the present one because Youmans was not bleeding while in Gagnon’s custody and his injuries did not require any stitches. Therefore, the Eleventh Circuit concluded that Gagnon was entitled to qualified immunity and reversed and remanded to the district court.

SIGNIFICANCE

Youmans confirms that a constitutional right must be clearly established at the time it was violated before a police officer relinquishes a qualified immunity defense. Further, it establishes that a police officer has latitude when judging the circumstances surrounding an arrestee’s needs for medical attention.

RESEARCH REFERENCES


Christian M. Leger