STETSON LAW REVIEW
CITY, COUNTY, & LOCAL GOVERNMENT LAW
TABLE OF CASES FOR RECENT DEVELOPMENTS

BAIL BONDS

Bail Bonds: Bond Forfeiture

***Singh Bail Bonds v. Brock*,**
2011 WL 5252736 (Fla. 2d Dist. App. Nov. 4, 2011)

The court affirmed the denial of a motion to set aside a bond forfeiture judgment, holding that the appellants had no right to pursue relief without complying with the statutory requirement to first pay the amount of the judgment to be held in escrow.

FACTS AND PROCEDURAL HISTORY

In a criminal proceeding against an Argentinean citizen, the trial court ordered the defendant to post appearance bonds of fifty-thousand dollars for each of his offenses. Singh Bail Bonds (Singh), as the qualified agent for Sun Surety Insurance Company (Sun), paid half of these bonds, totaling $350,000. When the defendant fled the country and failed to appear before the trial court, the court declared the bonds forfeited. As required by Florida Statutes Section 903.26(2)(a), the Clerk of the Court, Dwight Brock, (Clerk Brock) gave timely notice of the forfeiture to Singh and Sun, who filed a timely motion to set aside the forfeiture pursuant to Section 903.27(5).

When Singh and Sun failed to pay the forfeiture amount within the sixty-day statutory time limit, Clerk Brock entered a bond forfeiture judgment against them. In an apparent clerical error, Clerk Brock listed all fourteen bonds on the judgment, even though Singh had paid half of them. Clerk Brock corrected this error by filing an amended judgment after Singh and Sun's motion hearing, but before the trial court's final decision. The trial court later denied Singh and Sun's motion to set aside the forfeiture, and they appealed from Clerk Brock's amended bond forfeiture judgment of $350,000.

ANALYSIS

The court began by explaining that, under Florida Statutes Section 903.27(1), Clerk Brock's forfeiture judgment was a final appealable order within the court's jurisdiction. The court went on to cite Section 903.27(5), which requires that the surety pay

the Clerk of Court the amount of the judgment to be held in escrow as a precondition to a motion to set aside a bond forfeiture. The court noted that, although Singh and Sun had timely exercised their rights in disputing the forfeiture, they had failed to fulfill this precondition because neither of them paid the $350,000 due to Clerk Brock to be held in escrow. The court held that this failure constituted a breach of the bond, and therefore, "neither Singh nor Sun had the right to pursue relief." *Singh*, 2011 WL 5252736 at *2.

The court also rejected Singh and Sun's argument that Clerk Brock could not file the amended bond forfeiture judgment while their motion to set aside the forfeiture was pending before the trial court. Although a motion under Section 903.27(5) operates as an automatic stay against all further proceedings related to the forfeiture, the court characterized the amended judgment as insignificant in that it merely corrected a scrivener's error. Furthermore, the court stated that because Singh and Sun had failed to pay the $350,000 to Clerk Brock to be held in escrow, the trial court could have simply dismissed their motion rather than setting it for hearing on the merits. Finally, whatever procedural irregularities occurred had been rendered moot by the trial court's denial of the motion on its merits. Thus, the court affirmed the judgment.

SIGNIFICANCE

Singh reaffirms the need to comply with preconditions before filing a motion to set aside a bond forfeiture. As a necessary precondition to the right to seek relief from a bond forfeiture judgment, Section 903.27(5) requires that a surety pay the amount of the judgment to the clerk of the court to be held in escrow.

RESEARCH REFERENCE

- 14 Fla. Jur. 2d *Criminal Law—Procedure* § 259 (2009).

Daniel R. Strader

CONDEMNATION & EMINENT DOMAIN

Condemnation & Eminent Domain: Inverse Condemnation

***Jordan v. St. Johns County*,**
63 So. 3d 835 (Fla. 5th Dist. App. 2011)

Counties have an affirmative duty to reasonably maintain public roads; however, counties retain discretion to determine the frequency, quality, and extent of maintenance. Failure to reasonably maintain public roads may subject the county to liability for inverse condemnation as a result of an owner's diminished access to his or her property.

FACTS AND PROCEDURAL HISTORY

Robert and Linnie Jordan (collectively, "Owners"), who owned real estate parcels in a subdivision on a barrier island south of the Matanzas Inlet known as Summer Haven, sought review of the trial court's order granting summary judgment to St. Johns County (County). The Owners relied upon a single road, Old A1A, to access their beachfront properties. Old A1A bordered the Intracoastal Waterway on the west and the Atlantic Ocean on the east. Due to its proximity to the water, the road was beaten by the elements—including storms and erosion—and was difficult to maintain.

The State deeded Old A1A to the County in 1979, and the County became responsible for maintaining the road. The Owners brought suit alleging the County failed to maintain the road in usable condition. Count I of the Owners' complaint sought declaratory relief and a determination about whether the County had a duty to maintain the road. Count II requested an injunction requiring the County to maintain the road at a certain level of care. Count III alleged inverse condemnation for the Owners' diminished access to their parcels. Counts IV and V sought declaratory relief and inverse condemnation because of a county ordinance restricting residential-building permits on the island as a result of a temporary moratorium.

The County counterclaimed seeking a judgment that it had absolute discretion to determine what constituted reasonable road maintenance. The County also filed a third-party complaint to

join all the Summer Haven property owners in the suit. The trial court granted summary judgment to the County on all three pleadings, and the Owners appealed.

ANALYSIS

In reversing the trial court's grant of summary judgment on Count I, the Fifth District Court of Appeal followed the First District's ruling that a County has no authority to disclaim responsibility for maintaining a public road. Although the court required the County to maintain the road, the County retained discretion to determine the frequency, quality, and extent of maintenance for Old A1A. But "the County's discretion is not absolute. The County must provide a reasonable level of maintenance that affords meaningful access, unless or until the County formally abandons the road." *Jordan*, 63 So. 3d at 838. Summary judgment was inappropriate because whether the County maintained the road in a reasonable manner remained a genuine issue of material fact.

Similarly, the Fifth District reversed summary judgment on Count III of the Owners' complaint because it alleged a valid claim for inverse condemnation as a result of the Owners' diminished access to their property. An inverse-condemnation action stems from government action, or in this case inaction, that diminishes property values without the exercise of eminent domain powers; however, the Owners' access to their property must be substantially diminished, not merely inconvenienced. The County's reluctance to maintain the road—in light of its affirmative duty to care for the road—may support a claim for inverse condemnation. Genuine issues of material fact existed regarding the Owners' diminished access as a result of the County's failure to maintain Old A1A; therefore, summary judgment was inappropriate.

Because of the Court's reversal of summary judgment on Counts I and III, the Fifth District also reversed as to Counts II and V of the County's third-party complaint. The Court affirmed the remaining judgments by the trial court without comment.

SIGNIFICANCE

Jordan confirms that a county's failure to maintain public roads can support an inverse-condemnation claim. Further, *Jordan* clarifies that while a county has some discretion in how to

maintain public roads, it is legally obligated to perform a reasonable amount of maintenance unless it formally abandons the road by the appropriate legal process.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* § 195 (WL current through Aug. 2011).
- 28A Fla. Jur. 2d *Highways, Streets, and Bridges* § 148 (WL current through Aug. 2011).

Erik M. Hanson

Condemnation & Eminent Domain: Regulatory Takings

***City of Venice v. Gwynn*,**
76 So. 3d 401 (Fla. 2d Dist. App. 2011)

A city regulation limiting a property owner's use of the property for short-term rentals is not a compensable taking so long as the restriction does not have an unduly harsh economic impact on the property owner.

FACTS AND PROCEDURAL HISTORY

The City of Venice (City) amended its Land Development Code, which controls residential property use, to prohibit owners of single-family residences from using their properties as short-term rentals. According to Ordinance 2009-06, owners of single-family residences may only rent their property for a period of less than thirty days three times in a calendar year. But the amended ordinance contained a grandfather clause: if the property owner had obtained all necessary licenses and registrations for the single-family residence to be used as a short-term rental before July 14, 2009, then the property owner could continue such rentals.

Martha Gwynn bought her single-family residence in 2004 and intended to rent the property to seasonal visitors. After receiving notice from the City of her right to be grandfathered into the new ordinance, Gwynn failed to gather the requisite licenses and registrations; however, she continued to advertise

and rent her property for terms of less than thirty days—even after the new ordinance had gone into effect. The City of Venice Code Enforcement Board (Board) sent Gwynn a cease-and-desist notice, followed by a Notice of Hearing before the Board for her violations of the City's ordinance.

At the hearing, Gwynn admitted to three short-term rentals after the City ordinance's effective date, and the Board found that Gwynn's use of her single-family residence violated the ordinance. Gwynn appealed the Board's decision to the circuit court and argued that the ordinance constituted a governmental taking of property without just compensation. The Board argued that enforcement of the ordinance was not a compensable taking because the property had other economically viable uses. The circuit court held that the ordinance was unconstitutional as applied and reversed the Board's decision. The City then sought certiorari review from the Second District Court of Appeal.

ANALYSIS

The City did not allege a violation of its right to procedural due process, so the Second District limited its review to the question of whether the circuit court departed from the essential requirements of the law when it found the City's ordinance to be unconstitutional as applied. A use restriction may constitute a compensable taking if it has an "'unduly harsh impact on the owner's use of the property.'" *Gwynn*, 76 So. 3d at 404 (quoting *Penn C. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 127 (1978)). To determine if an ordinance unconstitutionally interferes with a property owner's rights, the court must consider (1) the economic impact on the property owner, (2) any interference with distinct investment-backed expectations, and (3) the character of the governmental taking.

Relying upon the *Penn Central* factors, the circuit court found that the ordinance was unconstitutional as applied; however, the Second District Court of Appeal held that the circuit court ignored the economic-impact factor. The circuit court failed to account for the property's continued value as a monthly rental, as a short-term rental for three periods, or as an investment property. "The circuit court focused on Gwynn's loss of the potential rentals available before the enactment of the ordinance but did not weigh this loss with the property's value based on the residual uses after the enactment." *Id.* at 405. Finding a departure from the essential

requirements of the law, the Second District quashed the circuit court's order and reinstated the Board's order proscribing Gwynn's short-term rentals.

SIGNIFICANCE

Gwynn permits local governments to place rental restrictions on property so long as the restriction does not have a harsh economic impact on the property owner. The City's restriction on short-term rentals was upheld because property owners could still rent their properties on a monthly basis or as short-term rentals for three periods or sell the properties as investments.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Eminent Domain* § 65 (WL current through Feb. 2012).

Erik M. Hanson

CONSTITUTIONAL LAW

Constitutional Law: Court-System Funding

***Lewis v. Leon County*,**
73 So. 3d 151 (Fla. 2011)

The State cannot require counties to pay costs for public defenders' offices and court-appointed counsel except for the enumerated exceptions in Article V, Section 14(c) of the Florida Constitution. Further, the State cannot rely on implied electoral intent to contradict the Constitution's plain meaning and original intent.

FACTS AND PROCEDURAL HISTORY

In 2007, the Florida Legislature enacted Chapter 2007-62, Laws of Florida (the Act), which created the Offices of Criminal Conflict and Civil Regional Counsel (the RCC). The Act required courts to appoint counsel from the RCC to represent indigent defendants when the public defender's office had a conflict of interest. Before the Act, courts appointed private counsel from a registry list in such situations. Under the Act, courts would only resort to using the registry list when there was a conflict of interest with both the public defender and the RCC. Section 19 of the Act also amended the term "public defenders' offices" in Florida Statutes, Section 29.008 to include the RCC. By expanding this term, the Legislature made Article V, Section 14(c) of the Florida Constitution apply to the RCC, thus making the counties responsible for funding the RCC's overhead costs.

Leon County, along with the Florida Association of Counties and twenty-five other Florida counties (collectively, "Counties"), filed an action for declaratory judgment alleging that Section 19 of the Act violated the Florida Constitution. The trial court agreed and granted summary judgment for the Counties, holding that Section 19 was unconstitutional under Article V, Section 14 and Article VII, Section 18(a). Five RCC officials (including Jeffrey Lewis), the Senate President, the Speaker of the House, and the State of Florida (collectively, "Appellants") appealed to the First District Court of Appeal. The First District affirmed, holding that Section 19 had violated Article V, Section 14 by unconstitutionally

shifting certain financial responsibilities for court-appointed counsel from the State to the counties. The First District also concluded that Section 19 violated Article VII, Section 18(a) of the Florida Constitution. The Appellants appealed to the Supreme Court of Florida.

ANALYSIS

On appeal, the Court agreed with the First District's conclusion that Section 19 violated Article V, Section 14 of the Florida Constitution. The Court noted that statutes, such as Section 19, will be given the presumption of constitutionality unless reasonable doubt exists to the contrary. The Court also noted that it will consider the actual language used in constitutional provisions and afford it the plain meaning that the framers and voters intended it to have.

The Court then examined Article V, Section 14 by first looking to the intent behind its enactment. When the RCC submitted this provision in 1998, the intent was to significantly revise judicial-system funding in Florida. As adopted, the provision drastically reduced local government's role in funding the judicial system. This provision placed the primary responsibility for funding Florida's judicial system with the State.

With this purpose in mind, the Court then considered the language of Article V, Section 14. Subsection (a) mandates that the State shall fund "the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c)." Subsection (c) then provides that the counties shall fund certain enumerated overhead costs for "the trial courts, public defenders' offices, state attorneys' offices, and the offices of the circuit and county courts performing court-related functions." Because Subsection (c) did not include court-appointed counsel, the Court concluded that "the plain language of the constitutional provision approved by the voters only required the counties to pay overhead costs for the offices specified." *Lewis*, 73 So. 3d at 154. The RCC's original intent, coupled with this plain language, led the Court to conclude that Section 19 violated Article V, Section 14 by redefining Subsection (c) to include the RCC.

The Court rejected the Appellants' argument that the electorate's intent to require counties to fund the RCC's overhead costs could be implied. The Appellants argued that Subsection (c)

did not include court-appointed counsel because, at the time of its proposal, courts appointed private counsel from the registry list. The RCC, on the other hand, was a public judicial office and should therefore be included among those explicitly listed as exceptions in Subsection (c). But in *Crist v. Florida Association of Criminal Defense Lawyers*, 978 So. 3d 134 (Fla. 2008), the Court held that the RCC is more similar to private court-appointed counsel than to public defenders. The Court pointed out that permitting the Legislature to effectively amend the Constitution by sidestepping the provision's plain language would deny voters the democratic process.

SIGNIFICANCE

Lewis reaffirmed the Florida Supreme Court's commitment to interpreting and applying the plain language of constitutional provisions in accordance with the framers and voters' original intent. Further, *Lewis* prevents the State from expanding exceptions to Article V, Section 14 of the Florida Constitution by statute. Because court-appointed counsel is not listed as one of the exceptions in subsection (c), the Court concluded that it was not the intent of the voters that the counties be responsible for funding the RCC.

RESEARCH REFERENCE

- 10 Fla. Jur. 2d *Constitutional Law* § 51 (WL current through Feb. 2012).

Lindsay D. Houser

Constitutional Law: Equal Protection

***City National Bank of Florida v. City of Tampa*,**
67 So. 3d 293 (Fla. 2d Dist. App. 2011)

A property owner may pursue an equal protection claim based on alleged unfair treatment under a city's zoning ordinances. Further, the doctrine of the law of the case applies to a circuit court sitting in an appellate capacity but does not bar a claim that was addressed only implicitly by the circuit court when a later appeal raises new factual allegations.

FACTS AND PROCEDURAL HISTORY

City National Bank of Florida and Citivest Construction Corporation (collectively, the "Property Owners") bought a 1.76-acre vacant parcel in the City of Tampa (the City) to develop a high-rise condominium. The property was zoned for high-rise development, but it was located in the Hyde Park Historic District. Development in this district required approval of the proposal from the Architectural Review Commission (ARC). The ARC uses aesthetic guidelines to decide whether to issue a certificate of appropriateness (COA). The ARC administrator informed the Property Owners that they must obtain certification from the City's zoning administrator as a condition precedent to applying for a COA.

Although the City had approved the Property Owners' initial plan to build a twenty-eight-story condominium, the Property Owners voluntarily scaled back to twenty-four stories. The City's zoning administrator then changed the City's longstanding interpretation of its setback requirements, apparently in response to opposition from the Historic Hyde Park Neighborhood Association (the Association). For the first time ever, the zoning administrator interpreted the setback ordinance as requiring two twenty-five-foot front-yard setbacks. This doubled the previous requirement, which had been enforced over ten thousand times in the past. Association members continued to voice overwhelming opposition to the project at public hearings. In response, the Tampa City Council amended the zoning ordinances to impose the double-setback requirement on just the project at issue.

The Property Owners redesigned their project to comply with the amended ordinance, and the zoning administrator later certified the project so that the Property Owners could apply for their COA. Although ARC raised some concerns, which the Property Owners addressed, none of these concerns addressed the development's height. Despite this, the ARC board denied the application in response to the Association's opposition to the height of the condominium at the final hearing.

After a project redesign, a second rejection of their COA application, and a denial of their appeal by the city council, the Property Owners filed a lawsuit. The suit alleged, among other claims, that the rejection violated their equal protection rights under 42 U.S.C. Section 1983. This claim was based in part on the Property Owners' discovery that the City had approved three

other high-rise projects in the Hyde Park Historic District of equal or greater height. Following some rather complex litigation, the circuit court dismissed the Property Owners' third amended complaint for damages and attorneys' fees. This appeal concerned only the dismissal of the equal protection claim.

ANALYSIS

The Second District Court of Appeal first addressed the circuit court's ruling that 42 U.S.C. Section 1983 bars an equal protection claim based on the interpretation of a zoning ordinance. It found that in reaching its holding, the circuit court had erroneously relied on earlier decisions barring substantive due process claims under Section 1983. The court held that the statute did not bar an equal protection claim based on the application of a land use regulation. On the contrary, federal courts have recognized that treating similarly situated projects differently violates the equal protection clause unless there is a rational basis for the difference. Because the Property Owners had made such allegations in their complaint, their equal protection claim was not barred by Section 1983, and the circuit court's dismissal was in error.

The City next argued the equal protection claim was barred by the doctrine of the law of the case. The circuit court had already held that the City's denial was supported by competent and substantial evidence. The City argued that this holding implied that the City had a rational basis; therefore, the law of the case doctrine made this holding binding on the equal protection claim.

The court first noted that the doctrine of the law of the case makes questions of law decided on appeal binding on that case in the same court and lower courts for all future proceedings. The court followed the Third District Court of Appeal's ruling: The doctrine can apply to a circuit court sitting in its appellate capacity if the relevant question of law was actually presented and considered by the circuit court.

But when applying the doctrine to the present case, the court rejected the City's assertion that the circuit court implicitly addressed the equal protection issue. Rather, the court compared the facts at issue in the circuit court's appellate review with facts at issue in the present appeal. The court then held that the doctrine of the law of the case did not apply "because the facts of the

case ha[d] changed since the certiorari petition was decided and the allegations in the third amended complaint present[ed] additional facts which, if true, could support an equal protection claim." *City Nat'l*, 67 So. 3d at 299–300. Specifically, during the discovery process, the Property Owners discovered the three other high-rise condominiums in the Hyde Park Historical District that the City treated differently. These additional allegations in the third amended complaint sufficiently supported an equal protection claim.

SIGNIFICANCE

City National allows a property owner to raise equal protection claims based on the interpretation of a zoning ordinance or other land use regulation. Such a claim must allege that the plaintiff has been intentionally treated differently from others similarly situated without a rational basis for doing so. Further, this decision clarifies two significant points regarding the doctrine of the law of the case. First, it requires circuit courts sitting in an appellate capacity to follow the requirements of the rule. Second, it limits the doctrine's applicability to issues addressed only explicitly.

RESEARCH REFERENCE

- 3 Fla. Jur. 2d *Appellate Review* §§ 433, 437 (2010).

Daniel Strader

ELECTIONS & VOTING RIGHTS

Elections & Voting Rights: Resign-to-Run Rule

***Lewis v. City of Tampa*,**
64 So. 3d 143 (Fla. 2d Dist. App. 2011)

Under Florida's resign-to-run law, a candidate for public office who files an Oath of Candidate form while currently holding another public office does not resign from his or her position automatically as an operation of law; rather, the candidate's name will be removed from the election ballot for the new position.

FACTS AND PROCEDURAL HISTORY

Marion S. Lewis, a captain with the Tampa Police Department, decided to run for mayor of Tampa. Lewis refused to resign from his position with the Tampa Police Department but filed an Oath of Candidate form. The City of Tampa (City) filed a complaint seeking a declaratory judgment that by filing his Oath of Candidate form Lewis resigned from his position as a matter of law.

The trial court found that Lewis was not required to resign before seeking election as the mayor of Tampa, but the Second District Court of Appeal reversed, holding that Florida Statutes Section 99.012 required Lewis to resign from his position as captain with the Tampa Police Department before running for mayor. The court did not, however, decide whether filing an Oath of Candidate form was equivalent to submitting a resignation.

On remand, the trial court found that Lewis was required to resign. After Lewis filed an amended answer and counterpetition, the trial court again denied Lewis' claims and found that Lewis had affected his resignation by filing his Oath of Candidate form. Lewis appealed to the Second District Court of Appeal.

ANALYSIS

In *Baker v. Alderman*, 766 F. Supp. 1112 (M.D. Fla. 1991), the district court found that Florida Statutes Section 99.012 requires a public officer to resign from any public office that he or she holds before running for another public office—the so-called

resign-to-run law. Lewis swore, through his Oath of Candidate form, that he had resigned from any other public office as required by Florida Statutes Section 99.012. The City argued that under the *Baker* precedent Lewis had resigned from his position with the Tampa Police Department under the resign-to-run statute.

Florida Statutes Section 99.012 was amended after the *Baker* decision to require the name of any person who fails to comply with the resign-to-run law to be removed from the election ballot. The Second District found that the "legislature intended to enforce the resign-to-run law by removing a candidate's name from the ballot rather than automatically dismissing him or her from his or her employment." *Lewis*, 64 So. 3d at 145. If the court were to apply the *Baker* precedent to the amended resign-to-run law, it would in effect render the amendment to Section 99.012 meaningless. Accordingly, the Second District reversed and remanded with instructions to consider the rest of Lewis's counterpetition.

SIGNIFICANCE

Lewis recognizes that an amendment to the resign-to-run law negated earlier precedent. Under the amended law, candidates seeking public office must resign from any other office or their names will be removed from the ballot. They are no longer presumed to have resigned by virtue of filing the Oath of Candidate form.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Elections* § 77 (2011).

Erik M. Hanson

Elections & Voting Rights: Term Limits

***Snipes v. Telli*,**
67 So. 3d 415 (Fla. 4th Dist. App. 2011)

A charter amendment placing term limits on county commissioners is valid under the Florida Constitution.

FACTS AND PROCEDURAL HISTORY

Broward County adopted a charter amendment placing a three-term limit on the office of county commissioner. William Telli brought suit, and the circuit court found at summary judgment that the term limit was invalid under the Florida Constitution.

ANALYSIS

The Fourth District Court of Appeal based its analysis on the holding of an earlier Florida Supreme Court case, *Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002), which consolidated two similar term-limit challenges. The Court held that term limits for "constitutionally authorized offices" were invalid under the Florida Constitution. In the present case, the Fourth District noted that *Cook* was rooted in the provisions of Article VI, Section 4 of the Florida Constitution, which set an eight-year limit on the total service of certain elected officials. By applying the eight-year limit to only enumerated positions, the Florida Constitution necessarily prohibits imposing term limits on any other constitutionally authorized offices. The Fourth District determined that *Cook* did not extend this prohibition to other types of offices. Thus, the primary issue in *Snipes* was whether a county commission seat is a constitutionally authorized office within the meaning of the Florida Constitution's term-limit prohibition.

The Fourth District examined Article VIII, Sections 1(d) and 1(e), which authorize certain county offices, and it noted a stark difference between those two provisions. Section 1(d) prescribes certain enumerated county offices required by each county, such as sheriff and tax collector, and it limits a county's ability to abolish these offices or change their manner of election. Section 1(e), on the other hand, does not affirmatively establish the office of county commissioner but instead only provides for this office as a fallback option should a county fail to specify an alternative form of government. The Fourth District held that "[w]here the Constitution gives free rein to the type of governing body a charter county may create, it is not a stretch of constitutional logic to conclude that a county charter may limit the terms of those commissioners it chooses to have." *Snipes*, 67 So. 3d at 418. After finding that the office of county commissioner was not constitutionally authorized under *Cook*, the court held that there was no constitutional im-

pediment to the Broward County voters enacting term limits on that office.

The district court found further support for its holding in other constitutional provisions and in public policy. First, the court noted that Article VIII, Section 1(g) gives charter counties broad powers to organize their governments. Thus, extending the *Cook* holding to county commissioners would unduly limit a charter county's constitutional authority. Second, the court reasoned that the balance between state and local interests favored statewide uniformity for Section 1(d) offices and local flexibility for county governing bodies. Lastly, the court noted that the term "constitutional officer" commonly signified only Section 1(d) officers and not county commissioners, and that nothing in the *Cook* decision suggested an intention to depart from this usage.

SIGNIFICANCE

Snipes provides express permission for a county's voters to impose term limits on county commissioners. Further, it clarifies that Florida Supreme Court precedent invalidating term limits for constitutional officers applies only to offices established in Article VIII, Section 1(d) of the Florida Constitution.

RESEARCH REFERENCES

- 12A Fla. Jur. 2d *Counties & Municipal Corporations* § 90 (WL current through Feb. 2012).
- 9 Fla. Jur. 2d *Civil Servants & Other Public Officers & Employees* § 11 (WL current through Feb. 2012).

Daniel Strader

FINANCE & TAXATION

Finance & Taxation: Exemptions

***Boca Airport, Inc. v. Florida Department of Revenue*,**
56 So. 3d 140 (Fla. 4th Dist. App. 2011)

Leasehold interests of nongovernmental lessees serving a governmental, municipal, or public purpose on government-owned real property are exempt from ad valorem taxation; however, intangible-personal-property taxes may be assessed on leasehold or possessory interests in real property that are predominantly used for commercial purposes.

FACTS AND PROCEDURAL HISTORY

Boca Airport, Inc., Galaxy Aviation, Inc., and Aviation Center, Inc., were fixed-base operators (FBOs) that leased government-owned airport properties. The FBOs offered goods, services, and amenities for both pilots and the general public. For public aviation, the FBOs provided hangar space, fuel, maintenance and repairs, pilot briefing, and weather information services. FBOs supported the general public by selling food, beverages, ground-transportation services, and lodging services.

In 2008, the Florida Department of Revenue (DOR) issued notices to the FBOs detailing its intent to assess intangible property taxes for prior years. Pursuant to Florida Statutes Section 199.023(1)(d) (2005) (repealed Jan. 1, 2007), the DOR issued notices stating the FBOs had paid rent for their leasehold interests in governmental real property that had been predominantly used for commercial purposes. Each of the FBOs filed protests with the DOR and asserted statutory exemptions from the intangible-personal-property tax. Rejecting the challenges, the DOR reiterated its intent to impose taxes on the FBOs' intangible personal property but agreed to reduce the amount of the tax.

The DOR's notices included findings of fact that the FBOs were Florida corporations that sold tangible personal property and services through their leases in government-owned property. The FBOs did not challenge these findings of fact but instead requested reconsideration of an intangible tax exemption and disputed the new tax amounts being assessed. The DOR denied re-

consideration, issued orders constituting final agency action, and further reduced the amount of intangible-personal-property tax. Each of the FBOs then filed timely notices of appeal, which the Fourth District consolidated.

ANALYSIS

The sole question on appeal was whether the FBOs—as nongovernmental lessees on government-owned property—may claim an exemption from intangible-personal-property taxes. The FBOs contended that they were exempt from intangible-personal-property taxes according to Section 196.199(2)(a) (2010) because they were nongovernmental lessees on government-owned real property serving a public function. Further, Section 196.012(6) (2010) expressly exempts FBOs from taxation.

The court agreed with the DOR and ruled that the exemptions cited by the FBOs—specifically Chapter 196—do not apply to intangible-personal-property taxes. Furthermore, the court found that the FBOs were subject to taxation because they possessed "leasehold interests of nongovernmental lessees on government-owned real property 'predominately used for . . . commercial purposes.'" *Boca Airport*, 56 So. 3d at 143 (quoting Fla. Stat. § 199.023(1)(d) (2005)) (ellipses in original). Chapter 199, which details intangible-personal-property taxes, does not contain an exemption for airports or fixed-base operations, such as that included in Chapter 196.

Finally, the FBOs contended that Section 196.199(2)(a), which provides an exemption to nongovernmental lessees that have leasehold interests in governmental property, expands the exemption to other leased-property interests. But subsection (2)(b) clearly states that the exemption provided by subsection (2)(a) shall not apply to intangible personal property under Section 199.023(1)(d). Therefore, the DOR properly issued intangible-personal-property tax assessments against the FBOs.

SIGNIFICANCE

Boca Airport permits intangible personal property taxes to be assessed on all leasehold or other possessory interests in government-owned real property that predominantly serve a commercial purpose and clarifies that the definition of public purpose contained in Chapter 196 applies to ad valorem taxes but not the intangible tax.

RESEARCH REFERENCE

- 52 Fla. Jur. 2d *Taxation* § 1431 (WL current through Aug. 2011).

Erik M. Hanson

Finance & Taxation: Homestead Exemption

***Mitchell v. Higgs*,**
61 So. 3d 1152 (Fla. 3d Dist. App. 2011)

A property appraiser may retroactively revoke a grant of homestead exemption for up to ten prior years. This clawback right is the express creation of a legislative act and is not subject to the "change in judgment" rule that precludes adjusting property valuation after the close of a tax year. Property owners do not possess a reciprocal right to claim a homestead exemption for past years even if they can demonstrate entitlement.

FACTS AND PROCEDURAL HISTORY

In 1991, Paul Mitchell moved to a Key West home owned by his family since 1928. Five years later, Mitchell applied for and received the homestead exemption for property taxes on this residence. In 1999, Mitchell bought a nearby Sugarloaf Key property. In 2005, as part of a plan to help two family members attend school on Sugarloaf Key, Mitchell changed his address on his Florida driver's license and voter's registration to that of the Sugarloaf Key property. Two years later, he reversed those changes.

An anonymous complaint filed in 2007 with Monroe County Property Appraiser Ervin Higgs (Appraiser) alleged Mitchell's exempt Key West property was vacant. Following an inspection, the Appraiser revoked Mitchell's homestead exemption for 2007. The Appraiser later found that Mitchell did not qualify for the exemption he received from 1999, when he purchased the Sugarloaf Key property, to 2006. Consequently, the Appraiser placed a lien on the Key West property for about $28,000 in unpaid property taxes, penalties, and interest.

In 2008, Mitchell sued for a judgment declaring his entitlement to the homestead exemption for the Key West property for

tax years 1999 to 2007 and removal of the lien. After considering evidence of low utility usage at the Key West property and of Mitchell's occupancy of the Sugarloaf Key property, the trial court ruled Mitchell was not eligible for the exemption in 2007. Regardless, the trial court concluded the Appraiser's exemption revocation for the years 1999 to 2006 was a "change in judgment" that could not be applied retroactively after the close of a tax year. Both parties appealed the trial court's decision.

ANALYSIS

The Third District Court of Appeal affirmed the final judgment regarding the revocation of the homestead exemption for 2007, finding the circuit court applied the proper law and that its findings of fact were supported by substantial and competent evidence, including Mitchell's occupancy of the Sugarloaf Key property, low utility usage at the Key West residence, and Mitchell's address change on his driver's license and voter's registration.

The Third District took exception to how the trial court applied the "change in judgment" rule to overturn the Appraiser's retroactive revocation of the homestead exemption that had been granted on Mitchell's Key West property from 1999 to 2006. The rule prevents a property appraiser from reassessing a parcel's taxable value for a particular tax year once that year has ended. The appellate court explained that, unlike retroactive property valuation, a legislative provision expressly addresses retroactive homestead exception revocation. The law provides the appraiser with the right to revoke the exemption for up to ten prior years and would be ineffective were it subject to the "change in judgment" rule. "The legislature has imposed a series of requirements for eligibility for the homestead tax exemption and a mechanism for recovering the tax savings (plus interest and a penalty) realized by a property owner not actually entitled to claim the exemption." *Mitchell*, 61 So. 3d at 1155.

The appellate court agreed that the revocation statute may seem unfair because it does not afford a reciprocal privilege to homeowners who may be able to show they were entitled to the homestead exemption for prior years. For example, Mitchell is barred from claiming the exemption on his Sugarloaf Key house for the years the trial court deemed that property to be his primary residence. The Third District explained the remedy for this apparent inequity is the responsibility of the legislature. Accord-

ingly, the court reversed summary judgment in favor of Mitchell for tax years 1999 to 2006 and remanded the case to the trial court to determine whether Mitchell's Key West property was entitled to the homestead exemption for those years.

SIGNIFICANCE

Mitchell distinguishes between prohibited retroactive valuation of property for tax purposes and allowable retroactive revocation of homestead exemptions. Homeowners should be on notice that a grant of exemption is not irreversible as property appraisers possess express clawback rights for up to ten prior years with respect to improperly obtained or erroneously granted homestead exemptions.

RESEARCH REFERENCE

- 51 Fla. Jur. 2d *Taxation* § 708 (WL current through Aug. 2011).

Derek Larsen-Chaney

Finance & Taxation: Homestead Exemption

***Willens v. Garcia*,**
53 So. 3d 1113 (Fla. 3d Dist. App. 2011)

To claim the dependency carry-over, which exempts homestead property from re-assessment for ad valorem tax purposes after a change in ownership, the beneficiary must have a legally enforceable claim of support against the property's previous owner, as opposed to a purely moral or personal obligation.

FACTS AND PROCEDURAL HISTORY

Shane Willens (Willens) served as a full-time resident caretaker for his disabled father. Willens' father had owned a life estate in homestead property for over twenty years. As a result, he accumulated a significant benefit from the Save-Our-Homes assessment cap, which limited annual increases in his property's assessed value to no more than three percent for eighteen years.

After Willens' father died, the homestead property passed to Willens by deed, and the Save-Our-Homes cap benefit was removed. Willens contested the property's reassessment in the

Circuit Court for Miami-Dade County, claiming the dependency carry-over exception. Under that exception, a new owner who is legally or naturally dependent on the previous owner retains the assessment reduction conferred by the Save-Our-Homes Amendment. Willens based his entitlement to the dependency carry-over on his over twenty years of caring for his father instead of pursuing other occupations. The Circuit Court affirmed the property appraiser's reassessment of the homestead property to full value. Willens appealed.

ANALYSIS

The court began its analysis by noting the statutory basis for the dependency carry-over. Under the statute, no change in ownership occurred if the transfer of property was between the previous owner and a permanent resident of Florida who was legally or naturally dependent upon the previous owner. The Third District first praised Willens for his altruistic sacrifice in caring for his handicapped father but asserted that an essential component of statutory construction is giving words their plain and ordinary meaning unless the statute suggests otherwise. Turning to the dictionary for guidance, the court reasoned that "dependent" necessarily meant one who was incapable of self-support and therefore must rely on another. The Third District also found that a "legal dependent" was one who could use a judicial forum to enforce the duty of another to provide support. Additionally, "natural" meant in the regular or ordinary course of things.

To support its conclusion, the court emphasized other examples of legal dependence under Florida law. Willens did not depend on his father as a minor or an adult child with a disability would. Willens pointed to an Attorney General opinion, which stated that "naturally dependent" could include moral obligations, even where there was no legal dependence. The Third District disagreed, remarking that Attorney General opinions do not constitute binding authority. Instead, the court cited an earlier Attorney General opinion that defined legal dependents as people who could not support themselves.

To rebut Willens's claim further, the court articulated that tax exemptions must be strictly construed against the taxpayer. Other Attorney General opinions had clearly stated that "legal dependence" denoted not only a requirement by law to provide

support but also a dependent's inability to support himself. The court maintained that Willens never claimed an actual inability to support himself while he cared for his father. To counter Willens' argument that previous Florida court decisions had held property owners who were "head of a family" could base their claims on moral obligations to care for another, the Third District noted that the "head of a family" phrase had later been deleted from the Florida Constitution. Further, the phrase was originally intended to protect the forced sale of homestead property, not property tax exemptions. Affirming the Circuit Court, the Third District asserted that it had "[found] no authority . . . which has held that a moral obligation to support an able-bodied adult child is sufficient to render that person 'legally or naturally dependent upon the owner' for ad valorem homestead exemption purposes." *Willens*, 53 So. 3d at 1119.

SIGNIFICANCE

Willens reaffirms that the dependency carry-over is strictly construed. It further clarifies that the dependency carry-over does not apply to heirs or caretakers, unless they are legal dependents.

RESEARCH REFERENCE

- 51A Fla. Jur. 2d *Taxation* § 1258 (2006 & Supp. 2011).

Joe Fernandez

Finance & Taxation: Immunity

***Accardo v. Brown*,**
63 So. 3d 798 (Fla. 1st Dist. App. 2011)

A lessee equitably owns leased property if the lessee holds virtually all the benefits and burdens of ownership, such as an option to renew the lease at the end of its term as well as obligations to insure, maintain, and pay taxes on the leased property. Statutes granting tax immunity to government-owned property do not apply when a non-governmental taxpayer is the beneficial owner in equity.

FACTS AND PROCEDURAL HISTORY

In 1947, the United States deeded land to Escambia County. The deed provided that the county could lease the land for public-interest purposes, but that the county could never dispose of or convey the property. Escambia County later leased the Navarre Beach portion of Santa Rosa Island to Santa Rosa County for ninety-nine years with automatic renewals for additional ninety-nine-year terms. Santa Rosa County then leased parcels to private individuals. In the mid-1970s, the Florida Supreme Court held that the Florida Legislature could treat the previously tax-exempt private leaseholds on Santa Rosa Island as real property and tax the private leaseholds as such.

In 1980, the Legislature enacted Florida Statutes Section 196.199(2)(b), which provided that when rental payments are due in consideration of a leasehold interest, interest should only be taxed as intangible personal property. Conversely, the leasehold interest should be taxed as real property if no rental payment is required. After this legislation, the improvements on the Santa Rosa Island properties were taxed as real property until the First District, in *Bell v. Bryan*, 505 So. 2d 690 (Fla. 1st Dist. App. 1987), held that the improvements should have been taxed at the intangible personal property rate. In 1995, however, the First District confirmed in *Ward v. Brown*, 919 So. 2d 462 (Fla. 1st Dist. App. 2005), that the Navarre Beach leaseholders equitably owned the property improvements, and therefore were not exempt from ad valorem property taxes under Section 196.199. The court noted that the lessees enjoyed the many benefits and burdens of ownership, including the ability to freely convey their interests and encumber the property as well as the responsibility for insurance, maintenance, and repair.

In the wake of *Ward*, the Santa Rosa Property Appraiser assessed ad valorem property taxes on both the improvements and the underlying land in question. The leaseholders sued for a declaratory judgment and injunctive relief, claiming that *Bell* controlled how to tax the improvements. The trial court, applying the *Ward* factors, granted summary judgment for the county defendants, finding that the leaseholders were the equitable owners of the improvements and the land below and, therefore, they were subject to ad valorem property taxes. This appeal ensued.

ANALYSIS

The First District Court of Appeal found that *Bell* did not control the taxation status of either the improvements or the land because it did not address equitable ownership. The appellate court explained that the issue was not whether the lessees were the legal owners of the property, which would clearly be prohibited by the 1947 deed, but whether they had equitable ownership for ad valorem tax purposes. Accordingly, the immunity from taxation enjoyed by Escambia County was irrelevant.

Next, the First District expanded the *Ward* factors for determining equitable ownership beyond the improvements to the underlying land. The court agreed that the appellants enjoyed the rental income and appreciation derived from their interests in the land; could convey those interests without restraint; were responsible for taxes, maintenance, and insurance; and were free to encumber the property with mortgages. The appeals court also determined that the leaseholders' option to renew their leases for an additional ninety-nine year term was the functional equivalent to an option to purchase. "These factors, which the majority relied upon in *Ward*, apply to the taxation of the underlying property as much as they do to the property improvements." *Accardo*, 63 So. 3d at 801. The court concluded that the appellants were the properties' equitable owners, thus rendering the properties ineligible for the tax exemption provided by Florida Statutes Section 196.199. Consequently, the First District Court of Appeal affirmed the trial court's order.

SIGNIFICANCE

Accardo affirms that responsibility for paying property taxes may extend beyond legal title holders to lessees with significant property interests. By having substantial rights and responsibilities, lessees may jeopardize the statutory tax immunity that would otherwise shelter property titled to a government entity. This case extends the taxable portion of the property to include the underlying land. The decision will likely spawn litigation to determine the extent to which renewable leases of different lengths create an equitable interest in real property.

RESEARCH REFERENCES

- 50 Fla. Jur. 2d *Taxation* § 100 (WL current through Jan. 2011).
- 52 Fla. Jur. 2d *Taxation* § 1431 (WL current through Jan. 2011).

Derek Larsen-Chaney

GOVERNMENT CONTRACTING

Government Contracting: Public Bidding

***Paul Jacquin & Sons, Inc. v. City of Port St. Lucie*,**
69 So. 3d 306 (Fla. 4th Dist. App. 2011)

A local government—finding it in the public interest to award a contract to its own construction division—must hold a public hearing and grant competitive bidders an opportunity to dispute the award pursuant to Florida Statutes Section 255.20(1)(c)(9).

FACTS AND PROCEDURAL HISTORY

Before constructing a community center, the City of Port St. Lucie (City) issued an Invitation to Bid (Invitation) on August 13, 2010. With the Invitation, the City disclosed that it intended to have its own Construction Division competitively bid on the project alongside private contractors and reserved the right to reject any bid. Five contractors responded to the Invitation, including Paul Jacquin & Sons, Inc. (Jacquin). The City's Construction Division (Division) bid was the lowest; Jacquin's bid the second lowest. Because the Division's bid was the lowest, the City awarded the contract to the Division and its three subcontractors.

Jacquin filed a complaint seeking a temporary injunction and declaratory relief against the City because it had awarded the contract to the Division. The lower court denied Jacquin's motion, and Jacquin appealed to the Fourth District Court of Appeal. Afterwards, the City voted to reject all bids received under the Invitation and rebid the project absent the Division.

ANALYSIS

The City argued, and the court agreed, that Jacquin's appeal was moot because the City decided to rebid the project. Florida Statutes Section 255.20(1)(d) provides that a municipality may reserve the right to reject all bids and rebid the project at its own discretion. The grounds for Jacquin's appeal subsided when the City abandoned its original Invitation and rebid the project without the Division. As a result, Jacquin's motion for injunctive and declaratory relief was moot.

Although Jacquin's motion was moot, the court issued an opinion to emphasize that the City must conform to Florida Statutes Section 255.20(1)(c)(9). According to that section, a city is not required to award a project to the lowest bidder if—after public notice and a hearing under Section 286.011—the city finds that it is in the public interest to complete the project with its own construction division. At the public hearing, a qualified contractor should have the ability to dispute the project and its estimated costs. Therefore, the court advised the City that it "must conduct a public meeting pursuant to [S]ection 286.011 . . . after public notice, if it intends to perform a project using its own services, employees, and equipment." *Paul Jacquin & Sons, Inc.*, 69 So. 3d at 309.

SIGNIFICANCE

Paul Jacquin & Sons, Inc. cautions local governments to adhere to the requirements of Section 255.20(1)(c)(9): a local government must hold a public hearing and afford competitive bidders an opportunity to dispute a project if the local government intends to award the project to its own construction division.

RESEARCH REFERENCE

- 43 Fla. Jur. 2d *Public Works & Contracts* § 26, 27 (WL current through Feb. 2012).

Erik M. Hanson

GOVERNMENT OFFICIALS

Government Officials: Discovery

***City of Key West v. Havlicek*,**
57 So. 3d 900 (Fla. 3d Dist. App. 2011)

A trial court departs from the essential requirements of law when it permits depositions of local public officials conducting site visits or investigations for quasi-judicial actions, as this has been prohibited by statute, and there is no general right to discovery for code enforcement matters.

FACTS AND PROCEDURAL HISTORY

The City of Key West enforced its tree-protection regulations, codified in Sections 110-286 to 110-295 of the Code of Ordinances (Code), through its Tree Commission (Commission). On February 19, 2008, the Urban Forestry Manager issued a Notice of Administrative Hearing to Radim Havlicek, alleging numerous violations of the tree-protection provisions in the Code. These violations specifically concerned seven trees included on the specially protected trees list. Havlicek was represented by counsel and testified at the hearing before the Commission, which found him ultimately liable for committing thirty-five irreparable Code violations. After Havlicek refused to enter into a compliance settlement agreement, the Commission forwarded the case to a special master and recommended that, if found liable, Havlicek be fined one-half the maximum amount for each violation.

Havlicek then subpoenaed three Commission members for depositions *duces tecum*. The Commission filed a Motion for Protective Order in response, and after conducting a preliminary hearing, the special magistrate orally granted the motion. Havlicek filed a Petition for Writ of Certiorari to the Appellate Division of the Circuit Court in Monroe County, which was later granted. The Commission filed its own Petition for Writ of Certiorari with the Third District Court of Appeal, which then quashed the circuit court's order granting certiorari.

The Third District found that the circuit court had no jurisdiction to review an oral order, and if the special magistrate held a trial de novo, any claim of error from the Commission hearing

was irrelevant. The Third District remanded to the special magistrate, who entered an order granting the Commission's Motion for Protective Order and confirmed that the hearing would be de novo; thus, no part of the record about the Tree Commission's hearing would be considered. Havlicek filed a Petition for Writ of Certiorari to the Sixteenth Judicial Circuit Court in Monroe County. The circuit court granted Havlicek's petition to depose three members of the Commission, and the Commission appealed.

ANALYSIS

The Commission argued that the circuit court departed from the essential requirements of the law when it concluded that the three members of the Tree Commission became fact witnesses by virtue of their site visits involving Havlicek. The Third District agreed and found the trial court's decision explicitly incompatible with Florida Statutes Section 286.0115(1)(c)(3), which grants public officials the ability to conduct site visits and investigations without becoming witnesses to the later administrative adjudication, so long as the existence of the site visit or investigation is made part of the record before the final action on the matter. The court reasoned that since the Commission members are not witnesses in the pending action, the depositions would be useless to its resolution.

The Third District rebutted Havlicek's comparison of a Fifth District case permitting depositions of public officials, distinguishing that case factually as a declaratory judgment action under the Florida Rules of Civil Procedure. The court clarified that the pending action was a code enforcement matter and thus governed by Florida Statutes Chapter 162, which had no provision regarding discovery. Quashing the circuit court's order, the Third District emphasized that the hearing before the special magistrate was to be held de novo and that no final determinations of liability regarding the Code had yet been made against Havlicek. The court remarked that Havlicek himself had admitted at oral argument that the magistrate's de novo review "makes what would otherwise be apparent violations of due process, effectively moot." *Havlicek*, 57 So. 3d at 903.

SIGNIFICANCE

Havlicek protects Florida public officials' right to conduct investigations without becoming subject to deposition as wit-

nesses in the quasi-judicial actions they themselves initiate. *Havlicek* also highlights that de novo hearings moot due process violations that may occur during an earlier administrative hearing.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Administrative Law* § 280 (2011).

Joe Fernandez

Government Officials: Legislative Immunity

***Haridopolos v. Alachua County*,**
65 So. 3d 577 (Fla. 1st Dist. App. 2011)

Legislative immunity protects an individual legislator from civil suits for both procedural and substantive challenges to a statute. An individual who seeks to challenge a statute must bring suit against the agency or department responsible for enforcing the statute.

FACTS AND PROCEDURAL HISTORY

The Senate President and the Speaker of the House (Petitioners) filed a petition for certiorari in the district court after the trial court's denial of a motion to dismiss an action for declaratory relief. Several counties and not-for-profit corporations (Respondents) brought suit seeking to declare Florida Statutes Section 163.31801(5) unconstitutional. Under Section 163.31801(5), when an impact fee is challenged, the government has the burden of proving that the fee meets legal requirements. Furthermore, Section 163.31801(5) prohibits a court from using a deferential standard.

Respondents' lawsuit named the Petitioners as parties in their individual capacities as legislators. The complaint alleged that Petitioners failed to pass the bill in accordance with several state constitutional provisions that require passage by a two-thirds majority in each chamber. Petitioners filed a motion to dismiss and contended that, because they acted within their official capacities when the legislature adopted the bill, they were immune from the suit. The trial court, however, denied the

motion and found that legislative immunity did not apply because the suit challenged the process of the bill's enactment rather than the substantive content of the bill.

ANALYSIS

When challenging a statute's constitutionality, the suit should be brought against the agency or department responsible for enforcing the statute. "[L]egislators are not proper parties to actions seeking a declaration of rights under a particular statute." *Haridopolos*, 65 So. 3d at 578. The purpose of legislative immunity is to encourage legislators to act unabated in their official capacities and free from the threat of liability or interference with performance of their duties.

Respondents' attempt to challenge the statute on procedural grounds was unavailing because, in actuality, the challenges were substantive. For instance, the challenge to the deferential standard provision was substantive because the complaint contended that the provision violated Article II, Section 3 of the Florida Constitution, which was clearly a direct attack on the statute's contents. Further, to determine whether or not the statute triggers the two-thirds requirement would require an analysis of the statute's content.

Respondents' attempt to distinguish this matter as procedural rather than substantive did not eliminate the Petitioners' legislative immunity. At all times, the Petitioners were acting within their official capacities while enacting legislation; therefore, the Petitioners were cloaked in legislative immunity. The district court granted the petition and quashed the trial court's order denying the Petitioners' motion to dismiss.

SIGNIFICANCE

Haridopolos confirms that the doctrine of legislative immunity applies for both procedural and substantive challenges to statutes. A challenge may not be directed against a legislator; instead, all constitutional challenges must be brought against the agency or department responsible for enforcing the statute.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 39 (2011 & Supp. 2011).

Erik M. Hanson

LAND USE PLANNING & ZONING

Land Use Planning & Zoning

***Town of Ponce Inlet v. Pacetta, LLC*,**
63 So. 3d 840 (Fla. 5th Dist. App. 2011)

Florida Statutes Section 163.3167(12) prohibits initiatives or referenda concerning qualifying parcels regardless of the prior fragmented quality of the land or potential mixed-use development of the land as long as the location and dimensions of the parcels designated for development can be described definitively.

FACTS AND PROCEDURAL HISTORY

Pacetta, LLC (Pacetta) bought several tracts of land from various owners and consolidated those parcels into a contiguous sixteen-acre swath of land. Pacetta planned to develop the land into a single mixed-use development, but the Town of Ponce Inlet (Town) stopped this plan with a public referendum and conforming ordinance, which made existing land use restrictions on Pacetta's property into town-charter provisions. Pacetta challenged the referendum's validity, arguing that it violated Florida Statutes Section 163.3167(12), which bars local initiatives or referenda affecting development of five or fewer parcels. The Circuit Court for Volusia County agreed and granted summary judgment for Pacetta. The Town appealed.

ANALYSIS

The Fifth District Court of Appeal first explained that Section 163.3167(12) protects small landowners from having to submit development plans to the general public rather than elected officials. Specifically, the statute prohibits land use referenda affecting five or fewer parcels. On appeal, the Town argued that Pacetta's land did not qualify for this protection based on the past use of the tract in multiple parcels, Pacetta's failure to officially designate the land for its stated purpose by applying for permits, and the multiple intended uses of the tract.

The Fifth District dismissed the Town's arguments as inconsistent with the statute's plain meaning. The court noted that Section 163.3164(16) (2008) (moved to (34) Apr. 27, 2011) defines

"parcel of land" as a definite quantity of land developed, used, or designated as a single unit. "This language clearly contemplates consideration of a planned future use of the property, does not require that the owner file applications as a prerequisite to establishing its intended use of the property, and in no way limits the development 'unit' to single uses." *Pacetta*, 63 So. 3d at 841–842 (footnote omitted). Moreover, Pacetta presented undisputed evidence that, in compliance with Section 163.3164(16), the boundaries and location of its land could be definitively established. As such, the Fifth District found the evidence conclusively demonstrated that the referendum affected five or fewer parcels in violation of Florida Statutes Section 163.3167(12), and the court thus affirmed the circuit court's summary judgment invalidating the referendum.

The Fifth District also rejected the Town's argument that the court was powerless to declare the ordinance invalid because the court owed deference to a governing board's broad discretion in enacting legislation that the board believes best serves the public. The Fifth District explained that the Town's adoption of the ordinance was not entitled to the traditional deference. While courts normally give deference to "fairly debatable" legislation, the Town had no discretion, and thus nothing to debate, in adopting the ordinance—the only available action under the referendum.

SIGNIFICANCE

Pacetta prevents local governments from interpreting "parcels" as defined in Florida Statutes Section 163.3167(12) based solely on past use of the land or an owner's intention to create a mixed use development. The case also suggests that parcels need not be small to qualify for protection from regulation by referendum as long as the land's location and boundaries can be firmly established.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 184, 247 (WL current through Aug. 2011).

Derek Larsen-Chaney

Land Use Planning & Zoning: Comprehensive Plan

***1000 Friends of Florida, Inc. v. Palm Beach Co.*,**
69 So. 3d 1123 (Fla. 4th Dist. App. 2011)

The traditional canons of statutory construction also apply to a comprehensive development plan and dictate that terms should be given their plain and ordinary meanings unless the plan provides alternate definitions.

FACTS AND PROCEDURAL HISTORY

Following a public hearing, the Palm Beach County Commission (County) unanimously granted conditional approval for a development order allowing Bergeron Sand and Rock Mine Aggregates, Inc. (Bergeron) to expand its mining operations in an agricultural area of the Everglades. The County found Bergeron's mining proposal to be consistent with the County's comprehensive development plan despite the property's designation for "agricultural production." After this decision, the not-for-profit corporations 1000 Friends of Florida, Inc. and Sierra Club, Inc. (collectively, "Plaintiffs") challenged the County's determination of consistency between the proposal and the comprehensive plan, seeking declaratory and injunctive relief in the circuit court.

The plaintiffs argued that the plan's Future Land Use Element (FLUE) permitted mining and excavation within land designated for agricultural production "only to support public roadway projects or agricultural activities or water management projects associated with ecosystems restoration, regional water supply or flood protection." *1000 Friends of Fla.*, 69 So. 3d at 1125. At the public hearing and later at trial, it became clear that the aggregate mined under the order was not to be used exclusively to support public roadway projects. To provide oversight, the County required Bergeron to provide an annual report documenting the intended use of the aggregate as well as compliance with the comprehensive plan. The plaintiffs, however, argued that Bergeron planned to sell the mined material on the open market, and Bergeron conceded that it could not control whether the aggregate would be used in constructing public roadways. As such, the plaintiffs urged that the development order was at odds with the plan's enumerated permitted uses for excavated matter.

The trial court disagreed and entered final summary judgment in favor of Bergeron and the County, concluding that using some portion of the mined material in public road construction was sufficient to comply with the plan's restrictions. The plaintiffs appealed to the Fourth District Court of Appeal.

ANALYSIS

The Fourth District first noted that the only issue on appeal was whether the order was consistent with the FLUE policy language permitting mining "only to support" public roadways, agricultural activities, or water management projects. To that end, the court applied the traditional rules of statutory construction to the plan's language. The Fourth District explained that if, as here, a term is not defined, the plain and ordinary meaning controls the interpretation. As such, the court endeavored to determine the plain meaning of "only" by using legal dictionaries and relevant caselaw. Ultimately, the court verified that "only" is a limiting term meaning "and nothing else" and is synonymous with the word "solely." "We are persuaded that mining is permitted 'only' to support the restricted and exclusive list of activities outlined in the FLUE within the comprehensive plan. As aptly stated by another court, '[o]nly means only.'" *Id.* at 1126–1127 (quoting *Union Station Assocs., LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1218, 1225 (W.D. Wash. 2002)) (brackets in original).

Thus, the court rejected the County's argument that the plan's restrictions would allow mining when as little as one percent of aggregate is used for one of the enumerated allowable activities. The Fourth District explained that such an interpretation would negate the text's plain meaning. Moreover, the County's interpretation ignored an additional maxim of construction that holds "to express or include one thing implies the exclusion of the other." *Id.* at 1127 (internal quotations omitted). The court reasoned that this rule bolstered the argument that activities not enumerated in the plan were not permitted based on their exclusion from the list of approved actions.

The Fourth District applied a final rule instructing courts to avoid interpretations that would render part of a statute meaningless. The court explained that the interpretation given by the circuit court, which effectively ignored the word "only," would

remove the exclusivity of the list of permitted activities, thereby rendering the list useless.

Consequently, the Fourth District reversed the circuit court's judgment in favor of Bergeron and the County. The Fourth District remanded the case with instructions to declare the development order inconsistent with the development plan and to enjoin the order's enforcement.

SIGNIFICANCE

1000 Friends of Florida cements the fundamental statutory-construction rule requiring that, absent a supplied contrary definition, words should be given their plain and ordinary meaning. Local governments should be precise with language selection when drafting development plans to avoid unintended interpretations.

RESEARCH REFERENCES

- 48A Fla. Jur. 2d *Statutes* § 129 (WL current through Feb. 2012).
- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 115 (WL current through Mar. 2012).

Derek Larsen-Chaney

Land Use Planning and Zoning: Comprehensive Plan—Consistency

***Graves v. City of Pompano Beach*,**
74 So. 3d 595 (Fla. 4th Dist. App. 2011)

Plat approvals, when designated "development permits" by a municipal code, are considered a development order under the Florida Statutes, and therefore, they must be consistent with a municipality's comprehensive land use plan.

FACTS AND PROCEDURAL HISTORY

The City of Pompano Beach (City) passed Resolution 2009-120, which made several changes to the plat for the Pompano Park Racino (Park)—a racetrack and casino within the City's limits. The new plat allowed for an expanded casino, more commer-

cial use, and a new hotel. Residents (Appellants) living near the Park sought declaratory relief, contending that the plat approval was a development order according to Florida Statutes Section 163.3215 and therefore must comply with the City's comprehensive plan.

The trial court granted the City's motion to dismiss, finding that the plat approval was not a development order. The Appellants then sought review in the Fourth District Court of Appeal, which originally held that the plat approval was not a development order because additional permitting steps were required before development could begin. But after a motion for rehearing, the Fourth District withdrew its original opinion and issued this opinion.

ANALYSIS

Florida Statutes Section 163.3194(1)(a) requires local government development orders, which include development permits under Section 163.3164(7), to be consistent with the comprehensive land use plan. Development permits include any "building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, *or any other official action of local government having the effect of permitting the development of land*." Fla. Stat. § 163.3164(8) (2009) (emphasis added). "Development" includes changes in the quantity of dwelling units, businesses, manufacturing establishments, and offices.

The City adopted the statutory definition of "development order," but it refined "development permit" to specifically include plat approvals, such as Resolution 2009-120. Holding that Section 163.3164(8) is not an exhaustive list, the Fourth District found that the City's definition of "development permit," which includes plat approvals, accorded with the statute's plain language. The City's plat approval permitted the Park to increase its development thresholds. "[T]he City's approval of the revised plat grants [the developer] the right to develop the subject property in accordance with the increased uses or 'restrictions' listed in the plat notes." *Graves*, 74 So. 3d at 599. Thus, the plat approval was subject to challenge to determine its consistency with the City's comprehensive land use plan.

Judge Gerber dissented, arguing that the City could not expand the statutory definition of "development order." He relied upon Florida Statutes Section 163.3215, which allows affected

individuals to bring an action concerning the consistency of "a development order, as defined in" Section 163.3164. Judge Gerber argued that the words "as defined" limited the definition of "development order" to the items enumerated in Section 163.3164, which did not include a plat approval. Thus, he would have affirmed the trial court's order, which dismissed the Appellants' complaint.

SIGNIFICANCE

Graves requires plat approvals to be consistent with the municipality's comprehensive land use plan if the municipality itself defines it as a development order. The fact that additional steps must be taken to complete development is inconsequential because the plat approval grants one the right to develop the property according to the property's newly designated uses.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 130 (WL current through Mar. 2012).

Erik M. Hanson

Land Use Planning & Zoning: Constitutional Requirements

***Bush v. City of Mexico Beach*,**
71 So. 3d 147 (Fla. 1st Dist. App. 2011)

A petitioner seeking a writ of certiorari to review the consistency of a local government's development order must do so pursuant to Florida Statutes Section 163.3215. Petitions for certiorari should be heard concerning issues other than consistency, including due process violations.

FACTS AND PROCEDURAL HISTORY

After splitting their real estate lot into two separate parcels, Joe and Mary Bush (collectively, "Bushes") applied to the City of Mexico Beach (City) for legal recognition of the lot split on September 8, 2009. In their application, the Bushes contended that the lot split complied with the City's land development regula-

tions (LDRs) and the City's comprehensive plan. Following a hearing, the Planning and Zoning Board unanimously denied the Bushes' lot-split application. The Mexico Beach City Council scheduled a public hearing regarding the Bushes' lot-split application, but the hearing was suspended pending further investigation and consideration. After numerous failed attempts to resolve the lot-split application, the Bushes filed a mandamus action against the City, forcing the City Council to hear and resolve the application; however, at the hearing, the City again suspended the matter so it could retain a land use attorney.

Meanwhile, the City was contemplating a new LDR that required neighborhood consistency when subdividing lots. The new LDR passed on April 13, 2010, and was included in the City's Land Development Code. One month later, the City Council—unanimously and without debate—denied the Bushes' lot-split application, claiming that the application did not conform to the new LDRs.

The Bushes requested certiorari review from the circuit court, arguing that the City improperly applied the new LDR and denied the Bushes an opportunity to be heard on their lot-split application. The City responded and alleged that the Bushes failed to comply with Florida Statutes Section 163.3215, which required the Bushes to file a separate action aside from their petition for writ of certiorari to determine if their lot-split application was consistent with the City's land use regulations. The circuit court agreed with the City and dismissed the Bushes' petition for writ of certiorari. The Bushes then petitioned the First District Court of Appeal for certiorari review of the circuit court's dismissal.

ANALYSIS

The First District Court of Appeal acknowledged that the City's argument was correct: consistency issues must be filed in an action pursuant to Florida Statutes Section 163.3215, rather than a petition for writ of certiorari. But the Bushes' petition for writ of certiorari raised more than consistency issues. The petition included numerous claims for due process violations stemming from the City Council's reliance upon the new LDRs and failure to grant the Bushes an opportunity to be heard on their lot-split application.

Although the due process standard required in a quasi-judicial hearing is not as stringent as that required by a full judicial hearing, the City must abide by fundamental standards of fairness pursuant to the Bushes' due process rights. Due process requires an applicant to have an opportunity to present evidence, cross-examine witnesses, and be informed of the facts on which the local government entity relies when denying an application. "To the extent that petitioners' certiorari petition in the circuit court raised issues other than the consistency of the development order, the Bushes were entitled to certiorari review." *Bush*, 71 So. 3d at 150. The district court remanded the case to the circuit court with instructions to quash the City Council's final order if the Bushes' due process rights were violated.

SIGNIFICANCE

Bush distinguishes between a writ of certiorari that merely reviews the consistency of a development order and a petition that raises additional questions concerning matters other than consistency. While petitioners seeking review of an LDR's consistency must do so pursuant to Florida Statutes Section 163.3215, they are entitled to certiorari review if their petition raises additional questions.

RESEARCH REFERENCE

- 10A Fla. Jur. 2d *Constitutional Law* § 493 (WL current through Feb. 2012).

Erik M. Hanson

Land Use Planning & Zoning: Development Regulations

***Miami-Dade County v. Torbert*,**
69 So. 3d 970 (Fla. 3d Dist. App. 2011)

Reservations included in a recorded plat are valid and enforceable only if the original plat is referenced in every subsequent deed of conveyance.

FACTS AND PROCEDURAL HISTORY

Thomas and Michelle Torbert (Torberts) sought approval from the Miami-Dade Department of Planning and Zoning (Department) to develop a sixty-five-acre parcel of land into individual one-acre homesites. Miami-Dade County (County) zoned the parcel as an Interim Zoning District, which required each individual homesite to be a minimum of five acres. According to a plat recorded in 1926, the parcel was divided into equal, one-eighth-acre homesites.

The Torberts requested a zoning determination based upon a County resolution, Section 33-196: parcels purchased before April 12, 1974 could be rezoned so long as the parcels met the one-acre-per-homesite requirement. The Department declined the Torberts' request because the 1926 plat was invalid—the plat had not been referred to or relied upon in subsequent deeds for sale; therefore, the plat could not be relied upon for rezoning purposes. Following the Torberts' appeal, the Miami-Dade Board of County Commissioners (Board) affirmed the Department's decision.

The Torberts appealed the Board's affirmation to the Circuit Court Appellate Division. The circuit court ruled that the Board applied incorrect law in finding that the original plat was revoked. The circuit court found that the 1926 plat was an exception to the five-acre rule, which restricts a five-acre parcel to one homesite. The Board brought a second-tier petition for certiorari to the Third District Court of Appeal to reverse the circuit court's ruling, which was granted.

ANALYSIS

The district court held that the circuit court applied incorrect law. When a landowner subdivides property according to a recorded plat—providing for streets, parks, and other public ways—the platted restrictions are enforceable against both the grantor and grantee of the subdivided parcels. For the reservations incorporated in a plat to pass along to future titleholders, the reservations included in the plat must be referenced in the deeds of conveyance. "The purchasers acquire rights to the plat only if the plat is conveyed by incorporating it and referencing it in the deed. . . . [The reservations] outlined in the original recorded plat only become operative when the plat is referenced as part of any future conveyance." *Torbert*, 69 So. 3d at 973.

The circuit court relied upon incorrect law when it held that the 1926 plat was recorded, never revoked, and therefore, valid. Both the Torberts and the Board conceded that hundreds of subsequent conveyances lacked any reference to the 1926-recorded plat. Applying the correct legal principle, the district court quashed the opinion of the circuit court and held that the 1926 plat was not enforceable because hundreds of subsequent deeds did not reference it. If the deed neglects to reference the original plat, the purchasers cannot rely upon the restrictions and reservations contained therein.

SIGNIFICANCE

Torbert holds that reservations and restrictions are not enforceable merely because a plat is on record. The reservations and restrictions included in a recorded plat are only enforceable if the recorded plat is referenced in subsequent deeds of conveyance.

RESEARCH REFERENCE

- 19 Fla. Jur. 2d *Deeds* § 135 (2006 & Supp. 2011).

Erik M. Hanson

Land Use Planning & Zoning: Florida Right to Farm Act

***Wilson v. Palm Beach County*,**
62 So. 3d 1247 (Fla. 4th Dist. App. 2011)

The Florida Right to Farm Act (the Act) does not prevent enforcing ordinances passed before the Act. Further, the exclusion of agricultural uses from the scope of statutes empowering local governments to create comprehensive growth plans does not necessarily preempt county development codes based upon constitutional home-rule powers.

FACTS AND PROCEDURAL HISTORY

Richard Wilson and his two business entities (collectively, "Wilson") owned and operated a nursery on several land parcels in an agricultural-residential zoning district in Palm Beach County (County). With the exception of one parcel bought in 2005,

Wilson owned the land for more than twenty years and had applicable certification and licenses.

In September 2007, the County informed Wilson that his nursery and landscaping equipment violated the County's Unified Land Development Code ("Code") because he did not have proper zoning approval. In July 2008, under protest, Wilson applied for and received a special permit for the parcel bought in 2005. The permit allowed the nursery to operate on the parcel if it met certain Code requirements, including the establishment of a setback for outdoor storage areas and structures, the limitation of the use of commercial vehicles to specific daylight hours, and the creation of a buffer next to all parking, loading, and internal roads. The permit did not require compliance with the entire Code.

In response to the County's demands, Wilson filed suit requesting declaratory and injunctive relief and alleging that the special-permit conditions violated the Act. Additionally, Wilson maintained that his activities were farming operations and did not constitute "development" as defined by Florida Statutes Chapter 163, which Wilson claimed was the enabling statute for the Code.

The County moved for summary judgment, arguing the Act only prohibits the enactment of new ordinances restricting farm activity, not the enforcement of ordinances that pre-date the Act. Moreover, the County maintained the Act did not apply to the nursery-permit regulations because they were not intended to limit farming operations. Finally, the County claimed the exclusion of agricultural uses from the definition of "development" in the statute governing the Code did not prohibit the County's growth rules because they arose from constitutional home-rule powers.

The trial court granted summary judgment in favor of the County, agreeing that the Act's plain language indicated a legislative intent to prohibit local governments from adopting, but not enforcing, regulations that would restrict farm activity on agricultural land. The court noted that the special-permit requirement was modified in 2002—two years after the Act's effective date—and, therefore, no longer pre-dated the Act, but the court still concluded that the permitting requirement and conditions were not rules to regulate farming as forbidden by the Act. Finally, the trial court held the County had constitutional authority to enforce the Code provisions affecting farming, despite the limited defini-

tion of "development" in the Code's enabling statute. Wilson appealed.

ANALYSIS

The Fourth District affirmed the lower court's conclusion that the Act does not preclude enforcement of pre-existing local rules, noting that the Act only requires that "a local government may not *adopt* any ordinance." *Wilson*, 62 So. 3d at 1250 (quoting Florida Statutes Section 823.14(6) 2011) (emphasis added, internal quotation marks omitted). The court found support in *J-II Investments, Inc. v. Leon County*, 908 So. 2d 1140 (Fla. 1st Dist. App. 2005), where the First District interpreted identical language found in the Agricultural Land Practices Act. In *J-II Investments*, the First District explained that the statute's plain language did not refer to enforcement of pre-existing regulations and reasoned that the legislature could have included the term "enforce" in its limiting language if it intended to do so. The Fourth District found the same analysis appropriate in *Wilson*. "What is expressed in the subsection is a prohibition on the adoption of further regulations. It does not prevent the enforcement of currently existing regulations." *Id.* at 1251. As such, only the ordinance modified in 2002 requiring a special permit for nurseries of less than five acres was subject to the limitations of the Act.

Here, the appellate court did not endorse the trial court's opinion that the special-permit ordinance and its attached conditions did not impact farming operations. The Fourth District rejected the lower court's reliance on two prior opinions of the Florida Attorney General suggesting that setback requirements do not appear to limit a farm's activity. The Fourth District discovered nothing in the record to support the conclusion that the conditions attached to the County's permit would not impact Wilson's nursery operations. Finding a genuine issue of material fact concerning the effects of the permit conditions, the Fourth District held summary judgment to be inappropriate and reversed and remanded the lower court's ruling on that issue.

Finally, the appellate court affirmed the opinion that Florida Statutes Chapter 163 does not preempt all local government regulation of agricultural uses. Chapter 163 empowers local governments to enact comprehensive development plans but excludes the use of land for agriculture from its definition of

"development." The court explained the County's authority for the Code emanated, in part, from home-rule powers granted by the Florida Constitution, which allows counties operating under a charter to regulate their lands to the extent that the regulation is not inconsistent with other statutes. Thus, the Fourth District agreed the ordinances were not preempted by the exclusionary language of Florida Statutes Section 163.3164 because the County did not rely exclusively on the statute for the authority to adopt the ordinances.

SIGNIFICANCE

Wilson confirms the limited scope of the Right to Farm Act and other similarly constructed statutes that only prohibit adoption of ordinances. Further, it clarifies that alteration of a regulation pre-dating such a statute revokes its pre-existing status and subjects it to the later statute's provisions. *Wilson* also cautions that constitutional authority may extend local regulatory powers beyond those enumerated in statute.

RESEARCH REFERENCES

- 38 Fla. Jur. 2d *Nuisances* § 32 (WL current through Jan. 2011).
- Fla. Const. art. VIII, § 1.

Derek Larsen-Chaney

Land Use Planning & Zoning: Nonconforming Use

***Allen v. City of Key West*,**
59 So. 3d 316 (Fla. 3d Dist. App. 2011)

A lawful, nonconforming use is "grandfathered in" when the use lawfully existed before the new zoning restrictions became effective. Also, an interpretation of a local zoning ordinance may become policy if there is reliance upon the interpretation and the interpretation is left unchallenged.

FACTS AND PROCEDURAL HISTORY

Russell and Linda Allen, among others (collectively, "Owners"), brought suit against the City of Key West (City) following

denials of their requests to be grandfathered in for new, short-term rental ordinances. The Owners bought and owned property in the City with the intent to rent the properties for short time periods so that they could offset the purchase price of the properties. At the time the Owners bought their properties, the City had an effective Growth Management Ordinance (GMO) as part of the City's Land Development Regulations (LDRs) defining transient housing as "commercially operated housing, **principally available to short-term visitors**; transient housing includes hotels, motels, guest houses, and time shares, and other housing available for rent for fewer than twenty-eight days." *Allen*, 59 So. 3d at 317 (quoting Code Ordins., City Key West, Fla. (Fla.) Ch. 24 ½ § (2)(F) (1986)) (emphasis in original).

Key West property owners and managers interpreted the "principally available" phrase to mean available at least fifty percent of the year. Property that was rented for more than fifty percent of the year would be deemed transient housing; property rented for less than fifty percent of the year could not be considered transient. The Owners and their predecessors had used their properties for short-term rentals lasting less than half of each year.

In 1998, the City adopted new LDRs that eliminated the definition of transient housing. Following three revisions, the City adopted Ordinance 02-06, which explicitly acknowledged the fifty-percent interpretation commonly applied to the former definition of transient housing and acknowledged that the City had not challenged that interpretation.

Believing their properties to be non-transient housing, the Owners had secured non-transient occupational licenses before 1998. The City denied the Owners' requests to be grandfathered in, and the Owners brought suit seeking declaratory and injunctive relief. Following a non-jury trial, the trial court entered a final judgment denying a declaratory judgment and injunction.

ANALYSIS

The issue on appeal was whether a city can force property owners previously using their respective property for lawful purposes to comply with new zoning ordinances. The court relied upon its own precedent that a "lawful nonconforming use [should be] 'grandfathered in' because the property use lawfully existed be-

fore the existing restrictions of short-term rents became effective." *Id.* at 318 (citing *Rollison v. City of Key West*, 875 So. 2d 659, 663 (Fla. 3d Dist. App. 2004)).

Similar to *Rollison*, the Owners purchased their properties when the 1986 definition of transient housing was in effect and rented the properties for short terms before the enactment of the 2008 LDRs and subsequent zoning changes. Further, the Owners complied with the informal fifty-percent rule and obtained the requisite non-transient occupational licenses. The trial court had denied declaratory and injunctive relief and ignored the *Rollison* decision, claiming that the precedent only applied to properties within the Truman Annex at issue in the *Rollison* decision. The district court disagreed and did not distinguish between the Truman Annex and the Owners' properties.

Furthermore, there was evidence in the record that the City never challenged the fifty-percent rule as interpreted by the Owners and managers. It may be inferred that an interpretation of local zoning restrictions—left unchallenged and relied upon over the course of a decade—may become an informal zoning policy.

SIGNIFICANCE

Allen requires local governments to remain vigilant for informal, unchallenged policies that may be interpreted as official zoning restrictions. When a local government leaves informal interpretations of zoning or land use policy unchallenged, those interpretations may determine which properties must be "grandfathered in" under future policy changes.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 197 (2011).

Erik M. Hanson

ORDINANCES & REGULATIONS

Ordinances & Regulations: Billboards

***Miami-Dade County v. Malibu Lodging Investments, LLC*,**
64 So. 3d 716 (Fla. 3d Dist. App. 2011)

A county government has the authority under its broad home-rule and police powers to enact ordinances regulating outdoor advertising as long as the ordinances serve a legitimate government interest and are not arbitrarily adopted. To enforce compliance with its ordinances, a county government has the power to seek injunctive relief.

FACTS AND PROCEDURAL HISTORY

Malibu Lodging Investments LLC (Malibu) owned a multi-story hotel next to Interstate 95 in Miami-Dade County (County) and had been selling exterior space on three sides of its building to display advertising signage. The County filed suit seeking injunctive relief, among other things, and alleging that Malibu's advertising signage violated several provisions of the County's Code of Ordinances.

The trial court denied the County's motion for preliminary injunctive relief and dismissed the County's amended complaint. The court found, in part, that the Ordinances were unconstitutional, largely because they eliminated the possibility of obtaining a variance. Further, it found that the County had failed to maintain a cause of action for preliminary injunctive relief because the County was not a party qualified to seek enforcement of an agency action. The County then appealed to the Third District Court of Appeal, seeking review of the trial court's dismissal with prejudice and the denial of preliminary injunctive relief.

ANALYSIS

The Third District began its analysis by considering the basis of the County's broad home-rule and police powers to determine whether those powers allowed enactment of the Ordinances. Florida Statutes Section 125.01(1) establishes that counties are granted broad authority to exercise any power necessary to carry on a county government to the extent that the power is not incon-

sistent with established law. This power specifically includes the authority to enact and enforce zoning regulations that are deemed necessary to protect the public. Sections 33-121.10 and 33-121.12 permitted the display of only certain signs within six hundred feet of any expressway. The County passed the regulation to outlaw signs that presented a danger to public safety, created a distraction to pedestrian or vehicular traffic, or impaired the County's aesthetic qualities. The court noted that both Florida courts and the Supreme Court of the United States have recognized the protection of public safety and aesthetic interests as legitimate exercises of police power. Thus, the court held that the County's enactment of the Ordinances was proper under its broad home-rule and police powers.

The court then considered the constitutional validity of the Ordinances as applied to Malibu and noted that, since the enactment of the Ordinances was proper, they would be afforded every reasonable presumption of validity unless proven otherwise. The court rejected the trial court's finding that the Ordinances were unconstitutional because they did not provide the opportunity to obtain a variance. To reach its holding, the trial court had relied on the case of *Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach*, 460 So. 2d 379 (Fla. 5th Dist. App. 1984), but had misinterpreted that case's reasoning. The Third District clarified that the portion of *Innkeepers* relied upon by the trial court was merely dicta. Further, that dicta only indicated that an ordinance is unconstitutional as to a particular party when there is no possibility of obtaining a variance, which presents a unique hardship, making the ordinance "arbitrary, oppressive, or confiscatory" to that party.

The Third District then distinguished *Innkeepers* from the case at hand. The court held that the Ordinances were not arbitrarily adopted because their stated purposes of "preventing signage that could endanger public safety . . . or impair the County's aesthetic qualities, tourism, or the general welfare of its public, are all legitimate governmental concerns supporting their validity under the County's broad home[-]rule and police powers." *Malibu Lodging*, 64 So. 3d at 721. Nor was there any evidence that Malibu experienced a unique hardship as a result of the Ordinances, since the hotel was not prohibited from continuing to operate as a hotel, as was the major issue in *Innkeepers*. There

being no evidence to the contrary, the court held that the Ordinances, as applied to Malibu, were constitutionally valid.

The court then scrutinized the trial court's denial of the County's motion for preliminary injunctive relief. Upon considering the counts of the County's amended complaint against Malibu, the court determined that the trial court's denial of injunctive relief was in error. Because the County was only seeking to have its own Ordinances enforced, and not that of an agency action, the court held that the County did not have to abide by the requirement that it be a substantially interested party in order to bring an enforcement action. Then the court considered the trial court's assertion that the County was not entitled to injunctive relief because it had failed to show that the harm caused by the signs would outweigh the harm to Malibu. The court held that this "relative harm" did not amount to a proper basis for the denial of injunctive relief because merely complying with existing law cannot be said to cause Malibu undue harm. Accordingly, the court reversed the trial court's rulings and remanded the case for entry of a preliminary injunction in the County's favor.

SIGNIFICANCE

Malibu Lodging reaffirms the breadth of authority that a county government is afforded via its home-rule and police powers under Florida law. To the extent that they are not preempted by or inconsistent with general law, local ordinances, including sign ordinances, enacted due to legitimate governmental concerns, are a proper exercise of these powers. Trial courts should give these regularly enacted ordinances every reasonable presumption of constitutional validity unless shown proof to the contrary. Additionally, a county government has the power to seek injunctive relief as a means of enforcing compliance with these ordinances.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* § 173 (WL current through Feb. 2012).

Lindsey Houser

Ordinances & Regulations: Construction Licensing

***MGM Construction Services Corp. v. Travelers Casualty & Surety Co. of America*,**
57 So. 3d 884 (Fla. 3d Dist. App. 2011)

To determine the enforceability of a contractor-subcontractor contract when one party is not licensed as required by local ordinance, the court will evaluate the interests of enforcing the contract against the public policy of the local ordinance.

FACTS AND PROCEDURAL HISTORY

MGM Construction Services Corporation (Subcontractor) brought an action against Maleta Construction Company, Travelers Casualty & Surety Company of America, and the University of Miami (collectively, "Moving Parties"). The Contractor had hired the Subcontractor to complete drywall and stucco work on four projects throughout Miami-Dade County, two of which were on the University of Miami's campus; however, the Subcontractor did not have a local contractor's license, which was a violation of Miami-Dade County Code of Ordinances Section 10–3 (2009) (the Local Ordinance). Problems arose during the completion of the work, and the Subcontractor refused to finish the jobs, filing liens on the four projects.

The defendants filed affirmative defenses for illegality/unenforceability of contract because the Subcontractor was not licensed under the Local Ordinance. The Moving Parties sought summary judgment based upon the Local Ordinance as well as Florida Statutes Section 489.128(1), which makes a contract with an unlicensed contractor unenforceable. Section 489.128(1)(a) also provided that an individual would be considered licensed if neither the state nor the local government required a license. The Moving Parties contended that the Local Ordinance required a license, the Subcontractor was unlicensed, and the contract was thus unenforceable under Section 489.128.

While the summary judgment motions were pending, the Florida Legislature amended the last sentence of Section 489.128(1)(a). The Legislature removed the local-license language: an individual would be considered licensed if no state license was required, regardless of any local license requirement. Regardless,

the Moving Parties continued to press for summary judgment. The trial court granted the summary judgment motion, finding that the Subcontractor's unlicensed work was against public policy, and therefore, the contracts could not be a basis for legal action. The Subcontractor appealed.

ANALYSIS

The question on appeal was whether the unlicensed Subcontractor was precluded from recovery because it violated the Local Ordinance, which dictated certain penalties but was silent on the enforceability of the underlying contract. The court held that "where the applicable legislative body does not choose to add the penalty of non-enforceability to a licensing provision, the courts may do so, but must take care to ensure the prevention of injustice." *MGM Constr.*, 57 So. 3d at 891. As such, the court adopted the Restatement (Second) of Contracts' approach and ruled that failing to comply with a licensing requirement would invalidate a contract only if the requirement has a regulatory purpose and the public policy behind the requirement clearly outweighs the interests in enforcing the contract.

The trial court correctly found that the Local Ordinance had a regulatory purpose: contractors must maintain a certain level of experience, aptitude, and liability insurance. It also correctly found that the Local Ordinances aimed to prevent shoddy workmanship and to promote public safety. But the trial court failed to consider any evidence that might have weighed in favor of enforcing the contract. The Third District was concerned that an unlicensed subcontractor—after it has fully performed its contractual obligations—may be left uncompensated by an unscrupulous contractor who knew that the subcontractor was unlicensed, and the contract would therefore be void.

On remand, the Third Circuit instructed the trial court to consider the following factors to determine if the interests in enforcing the contract were clearly outweighed by the public policy behind the Local Ordinance: the parties' justified expectations, any forfeiture if the enforcement was denied, public interest in enforcement of the term, strength of the policy, likelihood that a refusal of the contract will further the policy, seriousness of misconduct and its deliberateness, and the nexus between the misconduct and the contract. Although the Third District permitted the trial court to come to the same result, it instructed the

trial court to consider the interests in enforcing the contract in addition to the public policy behind the Local Ordinance.

SIGNIFICANCE

MGM Construction adopts the Restatement (Second) of Contracts' approach for determining when violating a local ordinance will void a contract. This approach avoids a bright-line rule and allows courts to decide whether to enforce an unlicensed contract based upon the situation. As a result, courts will look at the totality of the factors to decide whether or not to enforce the contract.

RESEARCH REFERENCE

- 8 Fla. Jur. 2d *Businesses & Occupations* § 255 (2011).

Erik M. Hanson

Ordinances & Regulations: Due Process

***Ciolli v. City of Palm Bay*,**
59 So. 3d 295 (Fla. 5th Dist. App. 2011)

A local government, in providing notice and complying with due process considerations, must prove receipt of notice by an out-of-state party to enforce a code enforcement board's order. An unauthenticated return receipt that is signed by an individual other than the addressee is insufficient to satisfy notice requirements.

FACTS AND PROCEDURAL HISTORY

Frank Ciolli owned real estate within the City of Palm Bay (City). The City conducted a hearing, and on November 12, 2003, it found that Ciolli's property had not been maintained in accordance with the City's code. Ciolli was required to comply within fifteen days, or Ciolli would face a civil fine of $250 for each day the violation continued after the fifteen-day deadline.

Ciolli—a resident of New York—was not present at the hearing. To notify Ciolli of the City's order, an "article" was sent to his New York address. A return receipt from the United State Postal

Service reflected that the "article" addressed to Ciolli was delivered on October 28, 2003 and signed for by Anita Ciolli.

On February 12, 2004, the City sought a lien on the property and filed a copy of the Code Enforcement Board's (CEB) order in the public records. Over a year later, the City filed a formal complaint seeking to foreclose on the lien, which had accumulated to $10,475 as of January 21, 2005. Ciolli was served with a copy of the complaint in June 2005; in response, Ciolli pled an affirmative defense asserting that he never received proper notice of the CEB's proceedings and order.

Around December 2008, the City filed a motion for summary judgment with an "Affidavit of Indebtedness" signed by the City Manager. In response, Ciolli filed his own affidavit asserting that he never received proper notice of the hearing and order and that the City had misled him into thinking the proceedings would be handled differently.

The City filed an amended motion for summary judgment and attached an unauthenticated copy of the return receipt reflecting delivery of the "article" sent to Ciolli and signed by Anita Ciolli. The City contended that the receipt conclusively illustrated that Ciolli had received notice of the City's hearing.

ANALYSIS

The sole question on appeal was whether the City satisfied the notice requirements by producing an unauthenticated copy of a return receipt from the United States Postal Service signed by an individual other than the addressee. Florida Statutes Section 162.06 (2003) requires the City to provide Ciolli with written notice of the CEB's hearing by either hand-delivery or mail.

In response to the City's amended motion for summary judgment, the court found a genuine issue of material fact existed as to whether Ciolli was notified of the CEB's hearing. "The unauthenticated copy of the postal service receipt was woefully inadequate to rebut Ciolli's affirmative defense and certainly did not 'conclusively' establish that Ciolli [had] received notice of the Code Enforcement Board proceedings." *Ciolli*, 59 So. 3d at 297. The return receipt did not establish what "article" was sent to Ciolli, whether the address provided was Ciolli's, or what, if any, relationship existed between Ciolli and Anita Ciolli. Furthermore, the unauthenticated return receipt was incompetent evidence to support a motion for summary judgment.

Finally, the City argued that Ciolli's defenses should have been barred because Ciolli failed to follow proper procedures to appeal a CEB order. The court denied the City's second contention because, similar to the City's failure to provide notice of the CEB's hearing, the City failed to provide adequate notice of the ensuing order. The court also denied the City's amended motion for summary judgment because a genuine issue of material fact existed as to whether the City violated Ciolli's due process rights by failing to provide adequate notice of both the City's hearing and order.

SIGNIFICANCE

Ciolli expands the due process burdens for local government. An unauthenticated copy of a United States Postal Service return receipt, signed by an individual other than the named person, is insufficient to prove notice and satisfy due process requirements. Rather, evidence satisfying notice requirements must prove that notice was mailed to the correct address of the individual to whom notice is due.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* § 81 (2005 & Supp. 2011).

Erik M. Hanson

Ordinances & Regulations: State Preemption

City of Palm Bay v. Wells Fargo Bank, N.A.,
57 So. 3d 226 (Fla. 5th Dist. App. 2011)

A municipality's exercise of home rule powers must yield to existing state statutory law. Thus, a municipal ordinance granting priority to code enforcement liens over mortgages recorded before the liens is invalid because the ordinance conflicts with the state statute codifying the common law rule of "first in time, first in right."

FACTS AND PROCEDURAL HISTORY

In 1997, the City of Palm Bay (Palm Bay) enacted ordinance 97-07, which established the city's code enforcement board and provided that any liens created by the board would be coequal to other state and local government liens and superior to all other liens and claims. In 2007, Wells Fargo Bank, N.A. (Wells Fargo) filed an action to foreclose a residential mortgage recorded in 2004 on a Palm Bay property. Palm Bay held two code enforcement liens on the property recorded after the Wells Fargo mortgage and argued those liens were superior to the mortgage under ordinance 97-07. The trial court granted Wells Fargo's motion for summary judgment, concluding that the Florida Legislature's failure to grant priority to code enforcement liens over a previously recorded mortgage indicated a contrary intent. The Fifth District Court of Appeal affirmed the summary judgment order.

ANALYSIS

The Fifth District explained that while Article VIII, Section 2(b) of the Florida Constitution gives municipalities substantial powers to conduct local government, the exercise of those powers may not conflict with state statutes. Florida Statutes Section 695.11 dictates that instruments requiring recordation are considered recorded when an official register number is affixed. Moreover, the statute codifies the common law rule of "first in time, first in right," declaring that priority will be given to recorded instruments with lower official numbers. The court reasoned that compliance with ordinance 97-07 would require violating state law. "Ordinance 97-07 conflicts with this mandate by granting Palm Bay's code enforcement liens priority over a mortgage, even when the mortgage was recorded before the lien. . . . Consequently, ordinance 97-07 must yield to the statute." *City of Palm Bay*, 57 So. 3d at 227.

Thus, the Fifth District rejected Palm Bay's appeal and affirmed the trial court's grant of summary judgment for Wells Fargo.

SIGNIFICANCE

City of Palm Bay illustrates one limitation on otherwise extensive home rule powers. Specifically, the case confirms that, under the Florida Constitution, local governments cannot adopt

laws that directly conflict with a state statute. *City of Palm Bay* also protects lienholder rights by reaffirming the traditional first-in-time rule.

RESEARCH REFERENCES

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* §§ 180–181 (WL current through Jan. 2011).
- 37 Fla. Jur. 2d *Mortgages and Deeds of Trust* § 123 (WL current through Jan. 2011).

Derek Larsen-Chaney

Ordinances & Regulations: State Preemption

***Hoesch v. Broward County*,**
53 So. 3d 1177 (Fla. 4th Dist. App. 2011)

A county ordinance conflicts with a state statute if that ordinance alters a statutorily defined term. Additionally, a county ordinance may not circumvent a statutory scheme without conflicting with that scheme.

FACTS AND PROCEDURAL HISTORY

Brian Hoesch owned a dog, Mercedes, that escaped from Hoesch's property and killed a cat. This was the first such incident involving Mercedes. Broward County (County) took Mercedes and gave Hoesch a "Dangerous Dog Disposition," informing Hoesch of the County's intent to kill the dog. A hearing officer upheld the County's decision to destroy Mercedes. Hoesch sought a judgment from the circuit court declaring that the County's ordinance concerning dangerous dogs conflicted with Florida's state animal control statutes. Both Hoesch and the County filed cross motions for summary judgment, and the trial court found for the County. Hoesch appealed to the Fourth District Court of Appeal.

ANALYSIS

The Fourth District began by examining the statutes and ordinances at issue in the case. First, the County's ordinances designated a dog as dangerous if it killed another animal after

escaping from its owner's property on one occasion. Florida Statutes Section 767.11(1)(b), however, defined a dog as dangerous if it killed or severely injured another animal on more than one occasion. Second, a County ordinance called for the destruction of any dog that killed another animal regardless of whether it had been previously declared a dangerous dog. But Florida Statutes Section 767.13(1) only called for destroying a dog if it had been previously declared a dangerous dog and killed another animal unprovoked. Additionally, Florida Statutes Section 767.13(2) only required killing a dog after one incident if that incident involved serious injury or death to a human being. The parties stipulated that there was no issue of preemption, making the only issue whether the statutes and ordinances conflicted.

The County first tried to avoid any question of conflict by citing Florida Statutes Section 767.14, which allows counties to enact additional regulations on the owners of dogs already declared dangerous. But the Fourth District found that the issue partially turned on the definition of dangerous dog as defined in the Florida Statutes, not as defined by the Broward Ordinance. Therefore, the court concluded that Section 767.14 was not dispositive because it did not address a county's ability to impose regulations on dogs, such as Mercedes, that had not been previously declared dangerous under the state definition.

The court then began analyzing the conflict issue by noting that "an ordinance and statute are in conflict when compliance with the ordinance violates the state law, or makes compliance with state law impossible." *Hoesch*, 53 So. 2d at 1179. The Fourth District addressed whether the County's definition of a dangerous dog conflicted with the state's definition. The court found such a conflict because nothing in the Florida Statutes authorized the County to change the definition of a dangerous dog. The court determined that the County's definition could not co-exist with the state's definition. Thus, the County's ordinance was invalidated.

Next, the Fourth District turned to the County's ordinance calling for the destruction of dogs that had not been previously declared dangerous. Florida Statutes only required the destruction of a dog after a single attack if that dog caused serious injury or death to a human. Acknowledging that counties may pass more stringent ordinances, the court found that the County's ordinance regulated a matter that was already covered by state law. By

allowing the destruction of a dog after a single incident not involving a human, the County had circumvented the framework set forth by state law regarding dogs that attack other animals. Because the County could not find a dog to be dangerous after a single incident, the court found that the County could not require destruction for the same incident. Therefore, the ordinance conflicted with Florida statutes because it avoided the procedure set forth by state law. The Fourth District reversed and remanded, ordering the trial court to enter summary judgment for Hoesch.

SIGNIFICANCE

Hoesch establishes that counties, while free to enact regulations that supplement state statutes, are not free to alter statutory definitions or enact ordinances that avoid the procedural requirements of a statutory scheme.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties & Municipal Corporations* § 181 (WL current through Jan. 2011).

Christian Leger

POLICE

Police: Forfeiture

***Campbell v. Racetrack Bingo, Inc.*,**
75 So. 3d 321 (Fla. 1st Dist. App. 2011)

The Florida Contraband Forfeiture Act (FCFA) does not authorize the seizure of money that was merely associated with violations of gambling laws. Whether money was used in connection with violations of gambling laws or was merely associated with those violations is a question of fact for the trial court to decide.

FACTS AND PROCEDURAL HISTORY

The Sheriff of Leon County, Florida (Sheriff), obtained a Forfeiture Seizure Warrant directed toward several bank accounts owned by members of the Masino family, including the accounts of Racetrack Bingo, Inc., a business owned by the Masinos. Pursuant to the FCFA, the Sheriff notified the account owners of the action and their right to a hearing. The sole issue at the forfeiture hearing was whether probable cause existed to believe that the accounts were used, attempted to be used, or intended to be used in violation of the FCFA. Although the Sheriff presented evidence indicating probable violations of Florida gambling laws, the trial court did not find any evidence of FCFA violations, and it ordered the Sheriff to return the seized property. The Sheriff appealed the ruling.

ANALYSIS

In a *per curiam* opinion, the First District Court of Appeal began by noting that, because forfeitures are disfavored, forfeiture statutes are to be strictly construed against the government. Interpreting the FCFA, the court explained that forfeiture may be triggered by any of the actions enumerated in the statute, but violating bingo or other gambling laws was not among the enumerated actions. The court next addressed the sheriff's argument that the subject accounts contained "contraband," possession of which violates the FCFA. Although the statutory definition of "contraband" included money that was "used" in violation of gam-

bling laws, the court strictly construed the statute to exclude money that was merely "associated" with such violations. The court stated that whether certain property was "used" in violation of gambling laws was a factual question for the trial court, and the trial court had answered in the negative in this case. Accordingly, the court held that "a showing of probable cause that the owners of the bank accounts in question may have violated [gambling laws] does not automatically establish that the accounts are 'contraband' as defined by the FCFA, subject to forfeiture under [Florida Statutes S]ection 932.703." *Campbell*, 75 So. 3d at 323. Significantly, the court distinguished the forfeiture of money linked to illegal gambling from forfeitures linked to narcotics activity. While the former requires a showing of actual use in committing the gambling violation, the latter requires only a nexus between the seized property and the narcotics activity.

In a concurring opinion, Justice Marstiller concluded that the court should have dismissed the appeal as moot rather than deciding the issue on the merits because the sheriff had already returned the seized money and it had been removed from the subject accounts. The majority rejected this concern, however, based on a separate provision of the FCFA allowing for the seizure of an equal value of any other property owned by the claimant if the subject property could not be located. The majority reasoned that this provision would have allowed the sheriff to seize other property of the Masinos if he had prevailed in the forfeiture action.

SIGNIFICANCE

Campbell emphasizes the strict construction of forfeiture laws by the courts. To seize property under the FCFA, the government must show a violation of one of the actions enumerated in the statute. When the statute requires the subject property to be actually "used" in committing the violation, such as with a violation of gambling laws, the government must show that the property was more than merely "associated" with the violation.

RESEARCH REFERENCE

- 14A Fla. Jur. 2d *Criminal Law—Procedure* §§ 920, 925–926 (WL current through Feb. 2012).

Daniel R. Strader

Police: Forfeiture

Miami-Dade Police Department v. In re Forfeiture of $15,875.51,
54 So. 3d 595 (Fla. 3d Dist. App. 2011)

A finding of probable cause to maintain a civil forfeiture action against an alleged narcotics dealer requires only sufficient evidence in the aggregate to support a reasonable link between the seized currency and illegal narcotics activity.

FACTS AND PROCEDURAL HISTORY

Two Miami-Dade Police detectives stopped a vehicle, driven by Cedric Davenport, for having illegally tinted windows. Upon smelling a strong odor of raw marijuana, the detectives searched the vehicle and found a bag containing one gram of marijuana in the rear passenger seat. Additionally, the detectives found $10,000 in cash in a black bag in the center console, which was separated by rubber bands into "quick count bundles," a common packaging technique used in the drug trade. Upon searching Davenport's person, the detectives discovered an extra $5,000 in one pocket and $875.51 in a second pocket. The detectives arrested Davenport for possession of marijuana. A trained narcotics canine identified the odor of raw marijuana on the money, which indicated a near certainty that it had recently been near a large quantity of marijuana. Davenport told the detectives that the money had come from his lawn service business and that he intended to use the money to buy a new vehicle, but he could not provide any corroborating information.

Under the Florida Contraband Forfeiture Act (FCFA), the Miami-Dade Police Department (MDPD) filed a motion for civil forfeiture of the $15,875.51. This motion triggered an adversarial preliminary hearing in which the trial judge ruled that no probable cause existed to justify the forfeiture, so the money must be returned to Davenport along with $500 in attorney's fees. MDPD appealed the ruling.

ANALYSIS

The Third District Court of Appeal began by explaining that to sustain a forfeiture proceeding past the preliminary hearing

stage, the government must make a showing of probable cause to believe that the seized property was used to violate the FCFA. Probable cause existed if MDPD relied upon adequate and sufficiently reliable information to support a reasonable belief that a violation occurred. The FCFA requires the seized property to be considered a "contraband article," which includes currency that can be reasonably linked to illegal drug activity. The court noted that this standard does not require a link to any specific illegal activity or transaction, as long as the aggregation of facts and circumstantial evidence supports a reasonable nexus between the currency and illegal drug activity.

Looking at the totality of circumstances present in the case, the Court held the evidence supported a finding of probable cause for a forfeiture action. The Court considered several factors in finding probable cause, including the smell of raw marijuana in the vehicle, the separation of the money into "quick count bundles," Davenport's inconsistent explanation about the money's source, and the detection of a marijuana smell on the money by a trained narcotics canine. The Court concluded that "'[w]hile each of these facts, standing alone, may be insufficient to meet [MDPD's] probable cause burden, we find that the aggregation of facts based on the totality of the circumstances is legally sufficient to satisfy [MDPD's] burden.'" *Miami-Dade Police*, 54 So. 3d at 598 (quoting *State Dep't of Hwy. Safety and Motor Vehs. v. Holguin*, 909 So. 2d 956, 959 (Fla. 3d Dist. App. 2005)) (brackets in original).

SIGNIFICANCE

Miami-Dade affirms that law enforcement agencies have a low burden at the preliminary hearing stage to maintain a civil forfeiture action under the FCFA. The agency need only show that the totality of facts and circumstantial evidence, in the aggregate, demonstrates a reasonable link between the seized property and illegal narcotics activity.

RESEARCH REFERENCE

- 14A Fla. Jur. 2d *Criminal Law-Procedure* §§ 927–928, 945 (2009 & Supp. 2011).

Daniel Strader

PRACTICE & PROCEDURE

Practice & Procedure: Exhaustion of Administrative Remedies

***City of West Palm Beach v. Roberts*,**
72 So. 3d 294 (Fla. 4th Dist. App. 2011)

Demolishing a structure deemed unsafe by a government agency without proper notice to the property owner may excuse the owner from exhausting administrative remedial options in pursuit of compensation for the structure's taking. Later enforcement of a judgment adverse to the agency, however, is automatically stayed when a notice of appeal is filed.

FACTS AND PROCEDURAL HISTORY

Olenza and Venita Roberts owned a wood-frame house in West Palm Beach's (City) "historic district." Following a 2002 fire, which caused smoke damage to the house's interior, the Robertses obtained a permit to repair the house. Demolition of the house's interior revealed that the damage required work beyond the permit's scope, as well as the creation of a comprehensive plan to remodel the entire house. In the interim, the Robertses obtained a permit to secure the property by boarding the doors and windows. Due to the historic nature of the neighborhood, the City required the Robertses to submit the remodeling plans to the historic preservation division (Division) of the City's planning department.

In May 2004, the City inspected the house and declared it a nuisance under the City's unsafe building abatement code (Code). The Code allows the City to protect the community's safety and general welfare by repairing, securing, or demolishing structures that meet the Code's definition of "unsafe." The Robertses maintained that they received no notice of the City's determination or its intent to demolish the house. In response to the City's declaration, the Division issued a "do not demolish" order pending completion of its consideration of the renovation plans. On March 5, 2005, the City's chief building official issued an order overriding the Division's order. Although the Division granted the approval necessary for the Robertses to obtain a permit to complete

their renovation on May 10, the City ultimately demolished the house on August 5.

The Robertses sued the City for inverse condemnation, claiming that the City's demolition constituted a taking that entitled them to compensation. The Circuit Court for the Fifteenth Judicial Circuit agreed, finding that the evidence showed the City had failed to provide the Robertses with notice as required by the Code. Without notice, the Robertses had no opportunity to contest the determination that the property was a nuisance requiring demolition, despite their concurrent cooperation with the Division. Following a jury trial on the damages, the trial court entered judgment in favor of the Robertses, who then sought a writ of mandamus to compel the City to pay the judgment. The trial court dismissed the mandamus action, and both parties appealed their respective adverse rulings to the Fourth District Court of Appeal, which consolidated the appeals.

ANALYSIS

The appellate court affirmed the lower court's determination that the City did not issue proper notice to the Robertses, agreeing that it defies logic that property owners requesting permits to repair a structure would not contact the City if notice to destroy the structure was received. The Fourth District found that the record supported the conclusion that the city failed to send the Robertses notice by regular mail or post notice on the structure as required by the Code when the certified letters were returned unclaimed. As such, the City denied the Robertses the chance to challenge the City's nuisance declaration.

The appeals court also rejected the City's argument that the circuit court improperly considered evidence concerning the propriety of the City's demolition. The court noted that while precedent typically requires that the agency action be determined correct before a party can file an inverse condemnation claim, circumstances can dictate a deviation from that rule. "[T]he doctrine of exhaustion of administrative remedies is a judicial doctrine which must yield where a party's constitutional rights are infringed in such a manner that the party has no administrative remedy." *Roberts*, 72 So. 3d at 298. Accordingly, the Fourth District affirmed that the City's demolition of the house without proper notice constituted a taking requiring compensation.

Finally, the appellate court upheld the trial court's dismissal of the Robertses' request for a writ of mandamus to compel the City to satisfy the judgments. The court explained that Florida Rule of Appellate Procedure 9.310(b)(2) mandates that adverse judgments appealed by a governmental agency are subject to an automatic stay.

SIGNIFICANCE

Roberts cautions government agencies that failure to exercise diligence in providing proper notice of intent to demolish a structure may result in a taking that requires compensation. Moreover, the aggrieved property owner may bypass standard avenues of administrative relief if the agency's actions eliminate the possibility of an administrative remedy.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* §§ 128, 195 (WL current through Feb. 2012).
- 3 Fla. Jur. 2d *Appellate Review* § 158 (WL current through Feb. 2012).

Derek Larsen-Chaney

Practice & Procedure: Filing

***Department of Revenue v. School Board of Hillsborough County*,**
62 So. 3d 686 (Fla. 2d Dist. App. 2011)

Statutory filing procedures and deadlines apply equally to individuals and local government entities, including school districts, otherwise entitled to a refund of motor-fuel taxes.

FACTS AND PROCEDURAL HISTORY

The School Board of Hillsborough County (School Board) requested a motor-fuel tax refund for taxes paid during the last quarter of 2006 and the first quarter of 2007, pursuant to Florida Statutes Section 206.41. The Florida Department of Revenue (DOR) denied the requests as time-barred because they were not made by the last day of the month following the quarter for which

the refund was claimed, as required by Subsection 206.41(5)(c)(1). The School Board successfully contested the denial in the circuit court, securing summary judgment when the court found that the School Board was not required to follow Subsection 206.41(5)(c)(1). The DOR appealed to the Second District Court of Appeal.

ANALYSIS

First, the Second District explained that Florida Statutes Section 206.41(4) governs motor-fuel tax refunds and carefully noted the language appearing in each subsection. For example, Subsections 206.41(4)(b) and (c) state that certain people are "entitled to a refund" when they use motor fuel for certain purposes, whereas Subsection 206.41(4)(d) states that for municipalities and counties, motor-fuel taxes "shall be returned." Similarly, Subsection 206.41(4)(e)(1) provides that when the motor fuel is used for certain purposes the tax payments "shall be returned to the governing body of such school district or to such nonpublic school."

The Second District noted that the School Board's requests were clearly untimely under Subsection 206.41(5)(c)(1). The Second District explained that the circuit court found that provision inapplicable to the School Board based on the specific language appearing in Section 206.41. Specifically, the lower court held that the phrase "shall be returned"—rather than the phrase "is entitled to a refund"—required the DOR to return motor-fuel tax payments to government entities regardless of compliance with the statutory filing guidelines.

The appeals court disagreed with the lower court's interpretation and explained that Section 206.41 uses the phrases "shall be returned" and "is entitled to a refund" interchangeably. Moreover, the law provides no mechanism for the return of funds other than the refund process detailed in Subsection 206.41(5). The Second District reasoned that the circuit court's interpretation providing for an automatic return of tax payments to the School Board "is not plausible given the plain meaning of the statute." *Sch. Bd. of Hillsborough Co.*, 62 So. 3d at 689. The appellate court reversed the lower court's judgment in favor of the School Board and remanded the case to the circuit court for entry of summary judgment in favor of the DOR.

SIGNIFICANCE

School Board of Hillsborough County reiterates the basic statutory construction rule discouraging a literal interpretation of a statutory provision that would abrogate the plain meaning of the statute. More specifically, the case clarifies that government entities hoping to exercise their entitlement to a refund of motor-fuel taxes must comply with the stated application requirements.

RESEARCH REFERENCE

- 53A Fla. Jur. 2d *Taxation* § 2477 (WL current through Aug. 2011).

Derek Larsen-Chaney

Practice & Procedure: Jurisdiction

***Bennett v. Wells*,**
55 So. 3d 666 (Fla. 2d Dist. App. 2011)

Courts cannot rely on the averments of a party's attorney when dismissing a complaint for lack of jurisdiction. Instead, the court must conduct an evidentiary hearing to determine whether the defendant has carried his or her burden in moving to dismiss.

FACTS AND PROCEDURAL HISTORY

On January 7, 2008, the Pasco County Value Adjustment Board (VAB) upheld the denial of a homestead exemption for Ernest Bennett. Bennett filed a lawsuit against the Pasco County Property Appraiser, Mike Wells (Wells), who originally denied Bennett's homestead exemption in 2007. Bennett also sued the chairman and clerk of the VAB.

All defendants moved to dismiss the complaint under Florida Rule of Civil Procedure 1.420(b), arguing both that Bennett failed to file suit in the sixty-day period required by Florida Statutes Section 194.171 and that the complaint's service was untimely. The defendants argued that the August 2008 date-stamp placed on the court file by the clerk proved that the plaintiff failed to file suit by the March 2008 deadline. In response, Bennett alleged that the clerk's office had improperly processed his case file.

After a brief non-evidentiary hearing, the trial court granted the motion to dismiss based on the sixty-day period but denied dismissal on the service issue. Bennett appealed to the Second District Court of Appeal.

ANALYSIS

The Second District began by noting that the defendants had moved to dismiss under the improper Florida Rule of Civil Procedure. Rule 1.420(b) allows the involuntary dismissal of a plaintiff's claim after the plaintiff has presented his or her case-in-chief. Conversely, Rule 1.140 permits dismissal for lack of subject matter jurisdiction, which may be raised at any time during the proceedings. Therefore, Rule 1.420(b) was the improper vehicle for challenging the sixty-day statutory filing requirement because the plaintiff was never afforded an opportunity to present his case-in-chief.

The court then moved to the merits. Wells argued that the court was required to dismiss the claim for lack of jurisdiction because the sixty-day filing requirement was a jurisdictional element. Florida Rule of Civil Procedure 1.080(e) stated that the date entered on the file by the judge or clerk is the date of filing. The Second District, however, found that Rule 1.080(e) created only a rebuttable presumption about the date of filing, and a plaintiff must have the opportunity to challenge that presumption.

The court held that "[i]n evaluating factual matters, 'unproven utterances documented only by an attorney are not facts that a trial court . . . can acknowledge.'" *Bennett*, 55 So. 3d at 669 (quoting *Schneider v. Currey*, 584 So. 2d 86, 87 (Fla. 2d Dist. App. 1991)). As such, the Second District refused to accept the assertion of Wells' attorney that the date-stamp revealed the true date of filing.

The trial court made no evidentiary findings to aid the Second District. Because the only basis for the trial court's conclusion was Wells' version of the facts, the Second District found that he had failed to carry his burden in seeking dismissal. The court further noted that Bennett would have a full opportunity to rebut the evidence presented if Wells were to meet his burden on remand. Therefore, the Second District reversed the dismissal and remanded the case to the trial court instructing it to conduct

an evidentiary hearing if Wells re-filed a motion to dismiss for lack of subject matter jurisdiction.

SIGNIFICANCE

Bennett clarifies that a trial court may not summarily dismiss challenges to lawsuits on disputed jurisdictional grounds without conducting an evidentiary hearing. Furthermore, it stresses that Florida Rule of Civil Procedure 1.080(e) creates a rebuttable presumption, not an absolute conclusion, as to the date of filing.

RESEARCH REFERENCE

- 51 Fla. Jur. 2d *Taxation* § 545 (WL current through Jan. 2011).

Christian Leger

Practice & Procedure: Jurisdiction

***Miami-Dade County v. Second Sunrise Investment Corp.*,**
56 So. 3d 82 (Fla. 3d Dist. App. 2011)

After entering a final judgment, a trial court loses jurisdiction over a case and thus has no authority to alter, modify, or vacate the judgment absent a narrow range of circumstances providing an exception under Florida Rule of Civil Procedure 1.540.

FACTS AND PROCEDURAL HISTORY

In a February 2007 tax-deed sale, Second Sunrise Investment Corporation (Second Sunrise) secured a deed to a parcel subject to $59,294.38 in Miami-Dade County (County) code enforcement liens. At the time, the court registry held $22,383.23 in surplus funds from the tax-deed sale. Despite this apparent deficit, Second Sunrise filed a quiet-title action on March 13, 2007, alleging that the surplus amount was sufficient to satisfy the County's code liens. On October 30, 2007, the circuit court granted summary judgment that quieted title and instructed the Clerk of the Court to disburse the surplus funds to the County. The judgment confirmed that the amount held in the court registry was insufficient to satisfy the code liens and that the liens would remain in effect to the extent of the shortage.

Almost two years later, Second Sunrise filed a motion seeking a return of a portion of the surplus funds from the County. The motion alleged that Second Sunrise had reached a settlement agreement with the County seven months before the quiet title judgment in which the County had agreed to satisfy the code liens in exchange for $14,276.59 from the surplus. Second Sunrise produced an internal County settlement-request form, containing figures and the initials of County employees, as evidence of the agreement. The County did not dispute that meetings and settlement discussions had taken place, but it maintained that no agreement had ever been reached.

On November 5, 2009, the circuit court granted the motion and "amended" the judgment of October 2007 to require the County to return $3,462.83 to the court registry. That amount would then be released and applied to outstanding liens held by the County's solid waste department. The County appealed the court's order to the Third District Court of Appeal.

ANALYSIS

The Third District held that the trial court had no jurisdiction to grant Second Sunrise's motion. The court explained that after entering a judgment, a trial court loses jurisdiction to alter, modify, or vacate the judgment except as provided by Rule 1.540. The appellate court found no basis under Rule 1.540 for the lower court to entertain the motion. First, the Third District summarily dismissed any possible application of provisions (b)(1), (2), or (3) of Rule 1.540, which allow for alteration based on mistakes, newly discovered evidence, or fraud. The court explained that these provisions did not apply because the motion was made more than one year after the entry of judgment. The court also found that the motion failed to allege the judgment was void under 1.540(b)(4).

Rule 1.540(b)(5) allows for relief from a judgment if it has been satisfied, released, or discharged, or if it is no longer equitable that the judgment should be applied prospectively. The Third District concluded that the supposed settlement did not satisfy the judgment because no settlement agreement ever actually existed. The court explained that the notations and initials appearing on the settlement-request form did not indicate a meeting of the minds and accordingly did not constitute a valid, enforceable agreement. The appellate court further reasoned that because the County was entitled by statute to the entirety of the

surplus, it would make no sense for the County to agree to accept less. The funds in the registry were not Second Sunrise's funds to give to the County because the County was entitled to the entire surplus. Thus, the court held that the judgment could not have been satisfied as contemplated by 1.540(b)(5).

Finally, the court noted that the "prospective application" clause of Rule 1.540(b)(5) was not applicable to circumstances that came to fruition before the judgment. "The law is clear that something must have happened after the entry of final judgment that should 'equitably limit[ ]' the judgment's application to satisfy this condition; here the alleged agreement occurred months before the October 30, 2007 final judgment." *Second Sunrise*, 56 So. 3d at 86 (quoting *Baker v. Baker*, 920 So. 2d 689, 692 (Fla. 2d Dist. App. 2006) (brackets in original). With no appropriate provision of Rule 1.540 under which to amend the judgment, the trial court lacked authority to grant the relief sought by Second Sunrise. Accordingly, the Third District reversed the lower court's order.

SIGNIFICANCE

Second Sunrise confirms that a judgment, order, or decree is ordinarily entitled to absolute finality. To receive relief from a judgment by the originating court based on a claim of satisfaction under a settlement agreement, a party must prove the existence of mutual assent to the purported agreement, and the satisfaction must have occurred after the entry of judgment.

RESEARCH REFERENCE

- 32A Fla. Jur. 2d *Judgments and Decrees* § 312 (WL current through Jan. 2011).

Derek Larsen-Chaney

Practice & Procedure: Scope of Review

***City of Sunny Isles Beach v. Publix Super Markets Inc.*,**
2011 Fla. App. LEXIS 16371 (Fla. 3d Dist. App. Oct. 19, 2011)

A circuit court appellate ruling on a local administrative agency's final decision may be subject to a second tier of review in

limited circumstances. In evaluating a secondary review petition, the district court only considers whether the circuit court afforded procedural due process and applied the correct law.

FACTS AND PROCEDURAL HISTORY

In 2006, Publix Super Markets, Inc. (Publix) submitted a Site Plan Application (Site Plan) to the City Commission (Commission) for the City of Sunny Isles Beach (City). The Site Plan initially proposed a 3.57-acre development that would include a supermarket and a condominium complex with 284 units. In response to concerns raised by the Commission, including a lack of a survey of the land, Publix revised and enlarged the plan to include 378 units and a marina with 140 boat slips built across 17.13 acres. The Commission then raised additional concerns, suspecting that Publix had tried to avoid the City's density requirements by including submerged land acreage, which should not have been included in density calculations. After Publix submitted another application, still without a land survey, the Commission found that Publix's evasive conduct was fraud and nullified the application.

The Third District Court of Appeal prohibited the Circuit Court for Miami-Dade County, while acting in its appellate role, from issuing a declaratory judgment interpreting a land development ordinance. The circuit court later granted Publix's petition for certiorari regarding the Commission's determination that the Site Plan application was null and void. The circuit court quashed the Commission's decision, but the Third District vacated and remanded the order because the lower court neglected to explain why it granted certiorari.

On remand, the circuit court again quashed the application's rejection, stating that the Commission denied Publix procedural due process, that the decision departed from the essential requirements of law, and that the decision lacked the support of substantial competent evidence. The City returned to the Third District, requesting second-tier certiorari review of the circuit court's most recent ruling.

ANALYSIS

The Third District first explained that second-tier certiorari should be granted only under very limited circumstances in which the lower court has failed to apply the correct law or afford proce-

dural due process. The correctness of the lower court's legal conclusion is not a factor. This standard differs from first-tier certiorari consideration, which reviews whether the parties were afforded due process, whether the decision under review met the essential requirements of law, and whether competent substantial evidence supported the decision below. The Third District scrutinized the circuit court's three-pronged analysis to determine if the lower court ruling violated a clearly established legal principle.

The Third District began by rejecting the circuit court's finding that the Commission denied Publix due process by limiting the scope of allowable discussion in a June 21, 2007 hearing concerning Publix's appeal of the Commission's decision. Publix claimed, and the circuit court agreed, that the hearing notice indicated that only certain issues were to be discussed. The district court found no such restriction to exist in the notice. "Publix was told that the hearing was to occur, and that it could present any objections it had raised regarding the decisions made concerning its application. Due process demands no more." *Publix*, 2011 Fla. App. LEXIS 16371 at *6. The Third District also dismissed the lower court's determination that the city attorney's dual role as advisor to the Commission and the City violated the requirements of procedural due process. Therefore, the district court concluded that the circuit court erred in finding a due-process infringement.

The Third District also questioned the lower court's holding that the Commission failed to observe the essential requirements of law when it ruled that Publix did not fully and truthfully disclose required information in its application. The circuit court held that the Commission's voiding of the application was an attempt to punish actions not specifically forbidden in the governing code. Here, the district court explained that the lower court's determination that Publix's conduct was not fraudulent, and thus not prohibited by the code, amounted to fact-finding by the circuit court. Fact-finding by a circuit court is proscribed under the principles of first-tier certiorari review.

Finally, the district court addressed the lower court's finding that the Commission lacked the evidence necessary to establish fraud as described in the city code. In support of its ruling, the circuit court held that the Commission had no evidence suggesting that Publix did not own the 17.13 acres in question. In response, the district court explained that the Commission's fraud

allegation arose from Publix's repeated failure to provide complete disclosure, rather than from a fraudulent claim to title of the property. Additionally, the district court noted, the Commission had questioned Publix's apparent attempt to skirt density requirements by buying and including in its revised Site Plan almost 14 acres of submerged land. Accordingly, the Third District declared that the circuit court's failure to recognize the true nature of the Commission's objection to Publix's behavior resulted in a subsequent failure to apply the correct law.

Having found error in each prong of the lower court's review, the Third District found a grant of second-tier certiorari appropriate in order to quash the decision below.

SIGNIFICANCE

Publix illuminates the distinctive standards of review used to consider primary and secondary certiorari. Although narrower in scope, the second-tier standard may provide astute practitioners with an additional opportunity to appeal an adverse ruling by a circuit court sitting in review of an administrative decision.

RESEARCH REFERENCE

- 3 Fla. Jur. 2d *Appellate Review* § 475 (WL current through Feb. 2012).

Derek Larsen-Chaney

Practice & Procedure: Service of Process

***Public Health Trust of Miami-Dade County v. Acanda*,**
71 So. 3d 782 (Fla. 2011)

Florida Statutes Section 768.28(7) does not require a plaintiff to perfect service on an agency and the Department of Financial Services as a condition precedent to or an element of a negligence action against the state or its agencies.

FACTS AND PROCEDURAL HISTORY

Odette Acanda prematurely gave birth to her son, Ryan, by nearly two months. Jackson Memorial Hospital placed Ryan in an intensive care unit, where he died of a severe bacterial infection.

A year later, Ryan's estate filed a complaint of negligence against the Public Health Trust of Miami-Dade County (Public Health Trust), Jackson Memorial Hospital's governing body. Public Health Trust filed an answer asserting that Acanda failed to state a cause of action because she did not serve process on the Florida Department of Financial Services (DFS) according to Florida Statutes Section 768.28(7).

Public Health Trust did not bring a dispositive motion under Florida Statutes Section 768.28(7); rather, it let the issue remain dormant until Acanda completed her case-in-chief. At that time, Public Health Trust moved for a directed verdict because Acanda did not perfect service on DFS in compliance with Section 768.28(7). The trial court denied the motion for directed verdict, and the Third District Court of Appeal affirmed. The Florida Supreme Court granted certiorari on the question of whether Acanda's failure to perfect service on DFS precluded her negligence action.

ANALYSIS

To bring a negligence action against the state, its agencies, or its subdivisions, the plaintiff must perfect process upon the agency and DFS. But Section 768.28(7) does not require service of process on DFS as a condition precedent to a cause of action. The conditions precedent to maintain a cause of action for negligence against the state or its agencies are found in Section 768.28(6), which requires a plaintiff to provide notice to the agency and requires that the agency deny the claim. The Court held the following:

> [g]iven the express requirement of notice in subsection (6), and the express statement that notice and denial of the claim are conditions precedent to maintaining a negligence cause of action, we find it instructive that subsection (7) does not further require service of process on DFS as a condition precedent to maintaining the cause of action.

Acanda, 71 So. 3d at 785. Furthermore, service of process on DFS was not an element that Acanda was required to prove at trial: Subsection (6) states that notice and denial "shall not be deemed to be elements of the cause of action." Fla. Stat. § 768.28(6) (2011).

The Court required plaintiffs to perfect service on DFS according to Florida Statutes Section 768.28(7) but condemned the practice of raising the issue in a motion for directed verdict. The state or its agency must notify the plaintiff of his or her noncompliance with Section 768.28(7), and then the state or agency must properly raise the issue in a pretrial motion. The Court "reject[ed] the use of noncompliance with [S]ection 768.28(7) as a 'gotcha' tactic to dispose of potentially meritorious causes of action." *Acanda*, 71 So. 3d at 785. Accordingly, the Court affirmed the denial of Public Health Trust's motion.

SIGNIFICANCE

Acanda prevents government defendants from using the service requirements in Florida Statutes Section 768.28(7) as a surprise at trial to defeat a meritorious claim. The State or its agency must plead noncompliance with Section 768.28(7) in a pretrial motion, not in a motion for directed verdict.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 71 (WL current through Feb. 2012).

Erik M. Hanson

Practice & Procedure: Standing

***St. Johns Riverkeeper, Inc. v. St. Johns River Water Management*,**
54 So. 3d 1051 (Fla. 5th Dist. App. 2011)

For a third party to establish substantial-interest standing, it must demonstrate that the agency's proposed action could reasonably cause an injury in fact of sufficient immediacy to require a hearing, and that the injury's nature is within the intended ambit of that hearing. For an association to establish such standing, it must also show that a significant number of its members will be substantially affected by the challenged provision and that the action's subject matter is within the association's general scope of interest and activity.

FACTS AND PROCEDURAL HISTORY

Seminole County applied to the St. Johns River Water Management District (District) for a consumptive use permit (CUP) to withdraw 5.5 million gallons of surface water per day from the St. Johns River. St. Johns Riverkeeper, Inc. (Riverkeeper), an organization that advocates for the protection and enjoyment of the river, requested a formal hearing to challenge the CUP's issuance.

At the hearing, Riverkeeper employee Neil Armingeon testified that Riverkeeper has 1,500 individual and group members, including more than 230 in Seminole County. Armingeon explained that more than 1,100 members had participated in three-day ecological boat tours running each way between Jacksonville and Sanford. The tours passed the proposed withdrawal site. Armingeon testified that the water's removal would increase the River's nutrient load, causing long, intense algal blooms. He explained that in 2005, such a bloom rendered the River unsuitable for boating or fishing.

The administrative law judge (ALJ) recognized the potential increase in biomass from water withdrawal and accepted that Riverkeeper members used and enjoyed the River for a variety of activities. Regardless, in his recommended order to the District, the ALJ held that Riverkeeper lacked standing to challenge the permit because it failed to prove the issuance would affect member's use and enjoyment of the River. The District adopted the ALJ's recommendation, with minor changes, as part of its final order approving the CUP. Riverkeeper appealed the District's final order to the Fifth District Court of Appeal.

ANALYSIS

The Fifth District reversed the District's final order regarding Riverkeeper's standing to challenge the permit but affirmed all other issues without comment. First, the court explained that Florida Statutes Section 403.412(5) addressed the issue of a citizen's ability to initiate a formal proceeding to oppose a proposed administrative action. In pertinent part, the statute dictated that a third party had standing to request a hearing if it demonstrated it may suffer a sufficiently immediate injury of the type or nature which the hearing is designed to protect. Here, the court referenced Armingeon's accepted testimony establishing that removing water will cause longer algal blooms, which can prevent recreational use of the River.

Further, the court pointed to the First District Court of Appeal's decision in *Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services.*, 417 So. 2d 753, 754–755 (Fla. 1st Dist. App. 1982), which held that an association may establish standing for its members by showing that a significant number of members, though not necessarily a majority, are substantially affected by the opposed action. Moreover, the challenged provision's subject matter must be within the association's mission and principal activities. Again, the court cited the hearing record to confirm that Riverkeeper's mission to promote the River's enjoyment could be affected by the District's approval of the CUP application and that the hearing was for the purpose of protecting such interests.

The court determined that in denying standing, the ALJ improperly mixed the merits of the challenge with Riverkeeper's standing. "[T]he ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing." *St. Johns Riverkeeper*, 54 So. 3d at 1055. Though the Fifth District held that Riverkeeper established substantial interest standing, the court affirmed the remainder of the District's order.

SIGNIFICANCE

St. Johns Riverkeeper reaffirms a third party's ability to challenge an administrative regulation by demonstrating that the proposed action could reasonably affect the challenger's substantial interests. Further, this case clarifies that considering a third party's standing is independent from analyzing the challenge's merits.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Administrative Law* §§ 244–245 (WL current through Jan. 2011).

Derek Larsen-Chaney

Practice & Procedure: Subject Matter Jurisdiction

***Atwater v. City of Weston*,**
64 So. 3d 701 (Fla. 1st Dist. App. 2011)

The proper defendant in a challenge to a statute's constitutionality is the state official charged with enforcing the statute. Subject-matter jurisdiction requires a justiciable controversy between adverse parties and does not exist merely because improperly named defendants fail to appeal their inclusion.

FACTS AND PROCEDURAL HISTORY

Several Florida cities and counties sued to invalidate a growth-management statute, alleging that the law violated the Florida Constitution's single-subject and unfunded-mandate provisions. The named defendants, Governor Charlie Crist, Senate President Jeff Atwater, House Speaker Larry Cretul, and Secretary of State Kurt Browning maintained they were not proper parties to the action because they did not enforce the challenged law. Nonetheless, the trial court entered summary judgment declaring the statute an unconstitutional, unfunded mandate and ordered the law expunged from the State's official records.

Atwater and Cretul appealed both the trial court's denial of their motion to dismiss them from the suit as improper parties and the court's invalidation of the law in its entirety. Crist and Browning, however, did not appeal. The First District Court of Appeal reversed the summary judgment and remanded the matter to the trial court to dismiss the complaint for lack of subject-matter jurisdiction.

ANALYSIS

The First District pointed to a lengthy precedential chain declaring that the state official charged with enforcing a statute is the proper defendant in a lawsuit challenging the statute. The governor and individual lawmakers are not proper parties in such a declaratory action unless the controversy involves a specific responsibility or interest of those parties that would put them in an antagonistic position to that of the challenger. The court did not find such a condition in this case and determined that the Secretary of Community Affairs, the head of the state land-

planning agency, appeared to be the proper defendant. Consequently, the appeals court concluded that the trial judge erred in refusing to dismiss the four improper defendants.

The First District also rejected the argument that Atwater and Cretul's failure to appeal the denial of their motion to dismiss precluded the reversal of the summary judgment. The court explained that the acquiescence of improper parties does not remedy an absence of subject-matter jurisdiction. "[T]he trial court in this case [did] not obtain jurisdiction it never had simply because two of the four defendants who should have been dismissed from the action have elected not to appeal." *Atwater*, 64 So. 3d at 705. Thus, the First District found that the circuit court lacked the jurisdiction necessary to determine the constitutionality of the challenged law.

SIGNIFICANCE

Atwater reiterates the proper procedure for challenging the constitutionality of a Florida statute. Accordingly, challengers must carefully determine and name as defendant the state official with the designated responsibility to enforce the offensive provision. Moreover, an improper party's consent, regardless of the party's stature, does nothing to establish subject-matter jurisdiction.

RESEARCH REFERENCE

- 19 Fla. Jur. 2d *Declaratory Judgments* § 48 (WL current through Aug. 2011).

Derek Larsen-Chaney

PUBLIC EMPLOYMENT

Public Employment: Benefits

***Communications Workers of America v. City of Gainesville*,**
65 So. 3d 1070 (Fla. 1st Dist. App. 2011)

State and local governments may not unilaterally change retirement benefits without collective bargaining, even if the benefits were not negotiated under a formal collective agreement. When a past practice of providing an employment benefit is unequivocal, continues for a substantial length of time, and gives employees reason to believe the benefit will continue to be provided, state and local governments must negotiate with public-employee labor unions before altering or changing the benefit.

FACTS AND PROCEDURAL HISTORY

Four labor unions representing employees of the City of Gainesville (Unions) brought suit against the City of Gainesville (City) for violations of their right to collectively bargain a change in retiree benefits. Although the existing collective bargaining agreements between the City and the Unions did not discuss health-insurance premiums for retirees, the City had paid for such benefits for years. Until 1995, the City fully paid health insurance premiums for the Unions' retirees, including premium increases. After 1995, the City reduced the percentage of its contribution to the retirees' health-insurance premiums, but continued to pay a portion of both the health-insurance premiums as well as premium increases following retirement. The City enacted the 1995 change in contributions by a city ordinance; although there was no formal collective bargaining, the Unions did not waive collective bargaining rights going forward.

In 2008, another city ordinance was enacted, but this ordinance drastically changed the method for calculating contributions to retirees' health-insurance premiums. This superseding city ordinance fixed the City's contributions to health-insurance premiums to a set dollar amount, which shifted the burden to the retiree to pay the full amount of any increase in the premium occurring after retirement.

The Unions filed unfair labor practice charges according to Florida Statutes Section 447.501(1). The Unions scheduled a hearing before the Public Employees Relations Commission (PERC). The hearing officer recommended that PERC find that the City had committed an unfair labor practice by unilaterally altering the health insurance benefits for retirees; however, PERC declined to adopt the hearing officer's recommendation and dismissed the Unions' unfair labor practice charges. The Unions appealed to the First District Court of Appeal.

ANALYSIS

The First District first addressed the issue of whether the City's new ordinance—contributing a set dollar amount to retirees' health-insurance premiums—was an unfair labor practice when it was enacted unilaterally. The Florida Constitution establishes a right for public employees to collectively bargain that is similar to the right of private employees, except public employees do not have the right to strike. As such, the Public Employees Relations Act (PERA) requires state and local governments to bargain with agents certified to represent the public employees. Florida Statutes Section 447.201 requires a public employer to bargain collectively for wages, hours, and other terms and conditions of employment with public unions. Job-related benefits, such as health-insurance premiums, may constitute terms and conditions of employment even though they are not included in an existing bargaining agreement.

"[A] public employer's unilateral alteration of the status quo of a mandatory subject of bargaining, i.e., wages, hours, and terms and conditions of employment of its employees, is a per se violation of" the collective bargaining rights of public employees. *Commc'n Workers*, 2011 WL 1744371 at *2 (quoting *Miami Beach Fraternal Or. of Police, William Nichols Lodge No. 8 v. City of Miami Beach*, 36 Fla. Pub. Employee Rep. 127 at 275–276 (2010)). The status quo depends upon past bargaining agreements as well as past practices; accordingly, public employees have a right to collectively bargain for changes to past practices even though not mentioned in bargaining agreements. When it is established that the past practice was unequivocal, existed substantially unchanged for a significant time, and the employees had reason to believe the practice would continue unchanged, altering this practice results in an unfair labor practice.

The hearing officer found that the City's past practice of contributing percentages to retirees' health-insurance premiums had continued for over a decade, and, therefore, the employees had reason to believe that the benefit would continue unchanged. Indeed, PERC had previously found a past practice after only two years. Like PERC, a court is bound to a hearing officer's determinations of fact unless they are not supported by competent substantial evidence. Further, deference to PERC is inappropriate when the agency has quickly changed its interpretation of a statute with little or no justification. Therefore, the court upheld the hearing officer's findings: The past practice of contributing a percentage amount to retirees' health insurance premiums did not substantially change for more than a decade, and the City's unilateral change to benefits was an unfair labor practice.

SIGNIFICANCE

Communications Workers of America places a burden on state and local governments to bargain collectively with public employees for benefits or changes to benefits that are not covered by an express bargaining agreement if (1) the benefit was a past practice that was unequivocal, (2) the past practice existed for a substantial period of time, and (3) employees had reason to believe the practice would continue. State and local governments must communicate with public labor unions before altering employment benefits on which employees rely.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d, *Labor and Labor Relations* § 151 (2007).

Erik M. Hanson

Public Employment: Collective Bargaining

***Manatee Education Association, FEA, AFT (Local 3821), AFL-CIO v. School Board of Manatee County*,**
62 So. 3d 1176 (Fla. 1st Dist. App. 2011)

A public employer may declare financial urgency to modify a collective-bargaining agreement before giving specific reasons substantiating the urgency; however, a union does not waive its

right to file an unfair-labor-practice charge by refusing to negotiate as required by statute.

FACTS AND PROCEDURAL HISTORY

In 2007, the Manatee Education Association (MEA), a union representing teachers and paraprofessionals, entered into a three-year collective-bargaining agreement (CBA) with the School Board of Manatee County (School Board). The CBA contained certain annual-salary-increase requirements, among other provisions, and further provided that compensation negotiations could reopen each year on June 1. On May 5, 2008, the Manatee County Superintendent informed the MEA that the School Board wanted to modify the CBA under Section 447.4095 of the Florida Statutes by declaring a "financial urgency." The School Board based its claim of urgency on a drop in legislative funding levels. MEA rejected the School Board's claim of financial urgency but still agreed to reopen compensation negotiations on June 1 under the CBA. Regardless, the School Board proceeded unilaterally under Section 447.4095, proposing CBA modifications on May 20 over MEA's objections. On May 23, the School Board notified the Public Employees Relations Commission (PERC) of an impasse based on MEA's refusal to bargain under Section 447.4095 and the parties' failure to reach agreement within the fourteen-day negotiation limit provided by the statute.

PERC appointed a special magistrate to hear the dispute, but MEA refused to participate on the grounds that no financial urgency existed and that the School Board had improperly invoked Section 447.4095. The special magistrate accepted all of the School Board's changes on July 11 but declined to rule on whether financial urgency existed. At an August 4 special meeting, the School Board approved the CBA modifications, and MEA then filed an unfair-labor-practice charge with PERC against the School Board. The essence of MEA's claim was that Section 447.4095 required the School Board to substantiate its declaration of financial urgency by demonstrating a compelling state interest before seeking modification of the CBA. In a hearing on October 3, PERC rejected MEA's position without ruling on the merits of whether financial urgency did in fact exist. PERC further held that MEA's refusal to negotiate under Section 447.4095 had waived its right to subsequently bring an unfair-labor-practice charge. MEA appealed.

ANALYSIS

The First District Court of Appeal began by noting that, although caselaw generally gives significant deference to PERC's factual findings and conclusions of law, the court's review was still de novo. No deference is required if PERC's conclusions of law conflict with the statute's plain and ordinary meaning. Next, the court flatly rejected MEA's contention that the School Board was required to prove financial urgency before proceeding with modification under Section 447.4095. By doing so, the court partially affirmed PERC's ruling, noting that to require a preliminary showing of financial urgency would cause substantial delays, interfere with the School Board's ability to address the urgent problem, and frustrate the statute's obvious purpose.

But the court was equally unequivocal in criticizing PERC's determination that MEA was required to participate in Section 447.4095 negotiations as a prerequisite to filing an unfair-labor-practice charge. The court found no basis in the statute for such a requirement, and to hold otherwise would have allowed public employers to modify a collective-bargaining agreement unilaterally without providing a union an opportunity to contest the financial urgency declaration. The court said that this "would render collective[-]bargaining agreements illusory and the collective bargaining process nugatory." *Manatee Educ. Ass'n*, 62 So. 3d at 1181. Therefore Section 447.4095 did not require the union to negotiate the question of whether financial urgency existed, and its failure to do so did not waive its contractual rights or its right to file an unfair-labor-practice charge. The court declined to define the circumstances that would constitute financial urgency, instead remanding the issue to PERC for its initial determination.

SIGNIFICANCE

Manatee Education Association clarifies the requirements for public employers and public-employee unions under Section 447.4095 of the Florida Statutes. Under this law, public employers may declare financial urgency and seek to modify an existing collective-bargaining agreement without first substantiating their grounds for doing so. Although the statute requires a negotiation period and a later declaration of an impasse before a union may file an unfair-labor-practice charge, a union does not waive its right to file a charge by refusing to participate in negotiations.

Notably, this decision offers no guidance on what exactly constitutes financial urgency such that Section 447.4095 may be properly invoked.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor and Labor Relations* §§ 171, 176 (WL current through Feb. 2012).

Daniel Strader

Public Employment: Collective Bargaining

School District of Polk County v. Polk Education Association,
2011 Fla. App. LEXIS 12890 (Fla. 2d Dist. App. Aug. 17, 2011)

A public employer may not make unilateral changes to the health-insurance coverage of employees represented by a certified bargaining agent without either a clear and unmistakable waiver of bargaining rights, exigent circumstances requiring immediate action, or legislative action to break an impasse in negotiations.

FACTS AND PROCEDURAL HISTORY

The Polk Education Association (PEA) served as the certified bargaining agent for teachers and other educational personnel employed by the Polk County School District (District). The existing collective-bargaining agreements between employees represented by PEA and the District required the District to provide a health-insurance program to all full-time employees. Additionally, the agreements mandated the existence of the Superintendent's Insurance Committee (SIC) to study and evaluate possible modifications to the provided coverage.

In January 2009, facing a third consecutive year of cuts in state funding, the District and the SIC began discussing potential money-saving changes to the existing employee-health-insurance plan. On January 9, the SIC, which counted six PEA members among its twenty-eight members, created a six-person steering committee to consider thirteen alternative plans and make recommendations to the SIC. The steering committee, which included the PEA president, narrowed the options to three, and, on

April 29, the SIC selected one of those options for a May 12 presentation to the Polk County School Board (School Board).

Because PEA was not directly involved in selecting the thirteen original options or the final option sent to the School Board, on June 4 the PEA president sent a letter to the School District's Director of Employee Relations. This letter requested an expedited meeting of the collective-bargaining teams to discuss the effects of the proposed changes and all available options. The Director rejected this request, stating that the SIC had already addressed the proposal and further explaining that collective bargaining over the health-insurance plan would hopelessly stall the process because of the rapidly changing healthcare market. The School Board's superintendent similarly rebuffed a subsequent letter. On June 23, the School Board approved a modified version of the proposed plan along with two additional plans that were never presented to the SIC or the steering committee. Because the new plans were to go into effect on October 1, employees had to select and enroll in their new plan no later than August.

On July 23, PEA filed a complaint with the Public Employees Relations Commission (PERC), alleging that by unilaterally changing the health-insurance plan, the District had violated Florida Statutes Sections 447.501(1)(a) and (c). PERC ultimately issued an order in favor of PEA, finding that PEA's involvement in the SIC and the steering committee did not constitute a waiver of its collective-bargaining rights and the School District failed to establish that exigent circumstances existed to allow for circumventing the collective-bargaining process. The School District appealed to the Second District Court of Appeal.

ANALYSIS

In affirming PERC's decision, the Second District explained that the certified bargaining representative must make a waiver of collective-bargaining rights clear and unmistakable. The court rejected the argument that PEA waived its right to bargain by failing to act upon the knowledge of the proposed changes it obtained through its involvement in the SIC and the steering committee. The Second District noted that two proposals approved by the School Board were never discussed by the SIC or the steering committee and thus could not have been waived by PEA's involvement in those groups. The court determined that

PEA had clearly not abandoned its right to bargain by participating in the SIC, explaining that PEA requested collective-bargaining sessions more than two weeks before the scheduled vote, but the School District denied the request based on a fear of an impasse. "[T]here is nothing under [*S*]*ection 447.501(1)(c)* absolving the School District of its obligation to collectively bargain over proposed changes in health insurance merely because the subject matter is contentious and complex." *Polk Educ. Ass'n*, 2011 Fla. App. LEXIS 12890 at *11.

The court also dismissed the argument that the School District's budget shortfall amounted to an exigent circumstance permitting the School District to circumvent the statutory right to collective bargaining. The district court explained that the affirmative defense of exigent circumstances exists to protect employers who may need to quickly and unilaterally modify working conditions in an emergency, such as a weather-related catastrophe, that threatens public safety. The court rejected the assertion that the School District's actions qualified for the defense. In support, the court noted that the School District's budgetary problems started years earlier and thus did not require immediate action. Additionally, the record showed that the delays that pushed the final vote on the proposed changes to late June and hastened implementation and enrollment were caused by the School District, not PEA. Accordingly, the court affirmed the PERC ruling.

SIGNIFICANCE

Polk Education Association stresses that a waiver of bargaining rights over a final proposed change to public employees' work conditions must be unmistakable, regardless of the bargaining agent's participation in the formation of the proposed change. The case also clarifies that exigent circumstances meriting excusal from collective bargaining are limited to emergency situations, such as weather conditions, that may affect public safety, not to an ongoing budget shortfall.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor and Labor Relations* § 151 (WL current through Feb. 2012).

Derek Larsen-Chaney

Public Employment: Discharge

***Abrams v. Seminole County School Board*,**
73 So. 3d 285 (Fla. 5th Dist. App. 2011)

To terminate a teacher for misconduct in office as a matter of law, a school board must show that the misconduct impaired the teacher's effectiveness. The school board must look to both the misconduct itself and to the larger context of the teacher's performance throughout his or her career, and it may not set aside an administrative law judge's findings of fact unless such findings are not supported by competent and substantial evidence.

FACTS AND PROCEDURAL HISTORY

The Seminole County School Board (School Board) employed Cydney Abrams as a special-education teacher at Winter Springs High School. On March 11, 2009, Abrams and a student (JP) had a long, unprofessional altercation, during which both Abrams and JP used profane and offensive language. A fellow student recorded twenty-six minutes of the exchange. The School Board initially suspended and later terminated Abrams because the shouting match was misconduct in office and it was unbecoming of an employee of the School Board.

Abrams filed for a due-process hearing before an administrative law judge (ALJ). Both parties presented witness testimony, and the student's recording was admitted into evidence. School Board witnesses testified that Abrams' conduct was unbecoming a School Board employee, and because of the prolonged nature of the argument between Abrams and JP, the School Board had rightfully terminated her employment. Abrams admitted that the verbal exchange was unprofessional but introduced evidence illustrating her satisfactory teacher evaluations and close teaching relationships with students, including JP. Abrams agreed that her conduct warranted suspension but denied that it

deserved termination. A mental health counselor agreed and testified that Abrams accepted responsibility, showed regret, and cooperated in counseling; therefore, it was unlikely Abrams would repeat her misconduct.

The ALJ agreed that Abrams' conduct was unprofessional and inappropriate. But the ALJ did not find that Abrams' conduct was so egregious that her effectiveness in the school system had been impaired; therefore, the School Board had inappropriately terminated Abrams. The ALJ recommended that the School Board uphold Abrams' suspension to date, reinstate her teaching privileges, and place her on two years of probation. Both Abrams and the School Board filed exceptions to the ALJ's recommended order.

In response to the ALJ's recommendation, the School Board made additional findings of fact, rejected others, and substituted new conclusions of law. The School Board concluded that "conduct unbecoming a School Board Employee" and "misconduct in office" were independent grounds for termination and that Abrams' misconduct was so serious as to degrade her effectiveness as a teacher. Based on the ALJ's findings, supplemented by the School Board's own findings of fact, the School Board concluded it could terminate Abrams.

ANALYSIS

School Board employees may be terminated for just cause, including misconduct in office, which is defined as a violation "so serious as to impair the individual's effectiveness in the school system." Fla. Stat. § 1012.33 (2009); Fla. Admin. Code. Ann. r. 6B-4.009 (2011). Impaired effectiveness can be decided as a matter of law if the misconduct is egregious, but Abrams argued that her past job performance and other facts mitigated the egregiousness of this incident.

To replace the ALJ's findings of fact, the School Board must show with particularity that the ALJ's findings of fact were not based upon competent substantial evidence. After the ALJ found that Abrams' effectiveness in the school system had not been impaired, the School Board substituted its own conclusion of law and held that it had proven that the misconduct impaired Abrams' effectiveness in the school system. In so holding, the School Board rejected two of the ALJ's findings: (1) the altercation, although heated, was marked with instances demonstrating

the long and close relationship between Abrams and JP; and (2) the School Board's executive director of human resources lacked knowledge of specific facts when he recommended Abrams' termination.

The court noted that the School Board could neither reject the ALJ's finding of fact by disguising it as a legal conclusion nor add new findings of fact. "[T]he question of the seriousness of the misconduct in relation to impairment of a given teacher's effectiveness is most often a question of fact. The issue of impaired effectiveness can be decided as a matter of law in an appropriate case, but should be decided on a[n] individualized basis." *Abrams*, 73 So. 3d at 295. Considering the recorded altercation in the larger context of Abrams' career performance, the court could not—as a matter of law—hold that Abrams' misconduct required termination. Thus, the court reversed the School Board's termination of Abrams' employment.

SIGNIFICANCE

Abrams demonstrates the egregiousness of misconduct required for the dismissal of a teacher as a matter of law. A school board must not only evaluate the seriousness of the teacher's behavior, but must also view the impropriety in the context of the teacher's overall career. Additionally, a school board may not disregard an ALJ's findings of fact when competent substantial evidence supports such findings.

RESEARCH REFERENCE

- 46 Fla. Jur. 2d *Schools, Universities, and Colleges* § 193 (WL current through Feb. 2012).

Erik M. Hanson

Public Employment: Due Process

***Gardner v. School Board of Glades County*,**
73 So. 3d 314 (Fla. 2d Dist. App. 2011)

A teacher does not waive his or her right to an administrative hearing when a school board, before taking disciplinary action

against the teacher, fails to notify the teacher of the right to request such a hearing and the time frame for doing so.

FACTS AND PROCEDURAL HISTORY

The School Board of Glades County (the Board) placed one of its teachers, Alice Gardner, on probationary status for the 2011–2012 school year and withdrew her professional services contract as discipline for an alleged incident. The Board did not provide Gardner with written notice of her right to a hearing or the deadline for requesting such a hearing. Instead, Gardner's principal sent her an email concerning the investigation and recommendation. After the Board placed Gardner on probation, her attorney requested that the Board reconsider the action and allow for an administrative hearing. The Board conducted a limited hearing, considering only whether Gardner had waived her right to request a formal administrative hearing by not making a timely request. The Board concluded that Gardner had waived her right to a hearing and refused to reverse its action.

ANALYSIS

The Second District Court of Appeal stated that only notice informing Gardner of both her right to request a hearing and the time limit for doing so would have triggered the beginning of the administrative process. Without providing this notice, Gardner could not waive her right to a formal hearing. As the court explained, a teacher is entitled to a formal hearing before losing the contractual property interest in his or her job. She could only waive this right if the Board could demonstrate that she had "'been advised of the action to be taken and the basis thereof, the right to an administrative hearing, a clear point of entry into the administrative process, and a deadline by which a hearing must be requested.'" *Gardner*, 73 So. 3d at 316 (quoting *McIntyre v. Seminole Co. Sch. Bd.*, 779 So. 2d 639, 641–642 (Fla. 5th Dist. App. 2001)). Because the undisputed factual record showed that Gardner had not been advised of these important facts, the administrative process had never commenced. Therefore, the court held that Gardner had not waived her right to request a formal administrative hearing.

The court was careful to distinguish the facts of this case from those of *Krischer v. School Board of Dade County*, 555 So. 2d 436 (Fla. 3d Dist. App. 1990). In *Krischer*, a court upheld a

teacher's dismissal for repeated performance deficiencies despite the school board's technical noncompliance with the statutory notice requirements. The issue in *Krischer* was the lack of notice of the underlying performance deficiencies and not of a hearing to address those deficiencies. The court also noted that the teacher in *Krischer* had been repeatedly warned about her performance, which satisfied the underlying purpose of the statutory notice requirements. Specifically, the school board told the teacher about the deficiencies and gave the teacher a chance to correct them. In contrast, Gardner's discipline was based on a single instance, she had received no notice of her right to a hearing, and she was prejudiced as a result.

SIGNIFICANCE

Gardner reinforces the strict necessity of providing written notice to a public, contractual employee of his or her right to request an administrative hearing and the time frame for doing so before taking disciplinary action against that employee. Once provided with notice, the employee may waive this right, and any action taken in the absence of such notice will be deemed void.

RESEARCH REFERENCE

- 46 Fla. Jur. 2d *Schools, Universities, and Colleges* § 201 (2006).

Daniel R. Strader

Public Employment: Impact Bargaining

***School District of Indian River County v. Florida Public Employees Relations Commission*,**
64 So. 3d 723 (Fla. 4th Dist. App. 2011)

Public employers have unilateral authority to enforce existing laws, rules, and regulations; however, if implementing a new management decision affects employment hours, wages, terms, or conditions, the public employer is required to engage in impact bargaining.

FACTS AND PROCEDURAL HISTORY

The School District of Indian River County (District) implemented a new policy requiring all secondary school teachers to electronically submit lesson plans through a program called eSembler or by other electronic means. When the District failed to bargain with Indian River County Education Association, Local 3617, American Federation of Teachers, Florida Education Association, AFL–CIO (Union) concerning the impact the new policy would have on teachers' terms or conditions of employment, the Union brought an unfair labor practices charge to the Florida Public Employees Relations Commission (Commission).

The Union argued that the new procedures substantially impacted the terms and conditions of employment. Teachers would have been required to work longer hours, access computers at home, use methods that were more complicated and less convenient, and subject themselves to disciplinary action if they failed to follow the new procedure. The District replied that the new procedures were management prerogatives under Florida Statutes Section 447.209, and the District permitted teachers to submit lesson plans by means other than eSembler, which might address some of the Union's concerns. The District thus contended that impact bargaining was inappropriate because the Union failed to establish that the new requirement would substantially impact the teachers' terms and conditions of employment.

The Union presented its case to a hearing officer. The hearing officer filed a recommended order finding that the Union had satisfied its burden to establish the need for impact bargaining and that the District's failure to so bargain was an unfair labor practice. The hearing officer noted the policy's several effects on teachers: a need for training, new equipment, and standardization of lesson plan content; an increase in workloads; a reduction in classroom budgets; and the potential for discipline. In response, the District objected to the hearing officer's recommendation, but the Commission affirmed the hearing officer's impact findings. The Commission found that the District's new procedure substantially impacted the teachers' employment; therefore, the District was required to engage in impact bargaining. The District appealed.

ANALYSIS

On appeal, the District argued that the Union failed to make its prima facie case. To establish a prima facie charge for impact bargaining, the Union was required to identify the names of the individuals involved in the unfair labor practice, the time and place of the occurrences, and the specific impacts the requirement would have had on wages, hours, terms, or conditions of employment. The Court relied upon paragraphs in the charge that summarized letters and emails between the District and Union to establish the names of the individuals involved, as well as the time and place of the occurrences. Furthermore, the Union had described specific impacts through other correspondence with the District also described in the charge. As a result, the Union had established a prima facie charge for unfair labor practices. The District also alleged that the charge was premature because the requirement had yet to be implemented; however, the proper time for impact bargaining is before the change occurs.

While public employers have discretion in managerial decisions such as enforcement of existing procedures, the public employer must still bargain over the impact that the decision has on the terms or conditions of employment. The Court adopted the Commission's precedent: "'[a]lthough an employer may act unilaterally on these issues, a public employer may not implement its management decision in a manner that affects wages, hours, or terms and conditions of employment without giving the union notice and an opportunity to bargain over the impact of the decision.'" *Indian River*, 64 So. 3d at 729 (quoting *City of Lake Worth Pub. Employees Union*, 28 Fla. Pub. Employee Rep. ¶ 33242, 440 (2002)) (brackets in original). The District would have changed an existing procedure by requiring teachers to electronically submit lesson plans, and the Union had a right to impact bargain once it identified substantial impacts on hours, wages, terms, or conditions of employment. For instance, the District's change in lesson-plan submissions would require additional work hours to comply with the requirement. As a result, the Union was entitled to impact bargaining.

SIGNIFICANCE

Indian River clarifies the level of discretion public employers are given to unilaterally change managerial policies. Although a public employer merely alters an existing procedure or require-

ment, if the change has a substantial impact on the wages, hours, terms, and conditions of employment, the employer will be required to engage in impact bargaining to avoid an unfair labor practice.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor & Labor Relations* § 136 (WL current through Feb. 2012).

Erik M. Hanson

PUBLIC RECORDS

Public Records: Electronically Stored Communications

***Butler v. City of Hallandale Beach*,**
68 So. 3d 278 (Fla. 4th Dist. App. 2011)

Emails sent by municipal officers in their private capacity—absent intent to further official municipal business—are not public records under Florida Statutes, Section 119.011 (2009). To qualify as a public record subject to the disclosure requirements of Article I, Section 24(a) of the Florida Constitution, such an email must have been sent in connection with transacting municipal business in the sender's capacity as a municipal officer.

FACTS AND PROCEDURAL HISTORY

Joy Cooper, the mayor of Hallandale Beach, contributed in her personal capacity to the South Florida Sun Times (Times) for four years as a weekly columnist. Cooper sent an email to some of her friends and supporters with three articles that she wrote for the Times attached. Cooper sent the email from her personal computer and email account. The email attachments included two transcripts of the 2009 State of the City Address and an article about certain tax questions that arose during previous city-commission meetings. Michael Butler sought a list of the names and email addresses of those who had received the email from Cooper. Butler argued that he was entitled to such a list because it was a public record under Florida Statutes Section 119.011 (2009).

The trial court found that, because Cooper's decision to send the email was not required by statute or influenced by the City, Butler was not entitled to a list of the email recipients' names and email addresses. The court issued a declaration that the list of recipients was not a public record under Florida Statutes, Chapter 119 because the email was not sent to execute any municipal duty. Butler appealed.

ANALYSIS

To determine whether Cooper's email was subject to disclosure, the Fourth District Court of Appeal first considered the lan-

guage of Chapter 119 of the Florida Statutes, in which the legislature clarified Article I, Section 24(a) of the Florida Constitution. Section 119.011(12) defines a "public record" as any document that is created or received pursuant to law or in connection with the transaction of an agency's official business, and "agency" includes any person acting on behalf of a public agency. Because, as Mayor, Cooper was a municipal officer who acted on behalf of the municipality, the court concluded that Cooper fell within this definition of "agency" and thus came within Section 24(a).

The court next looked to the Florida Supreme Court's opinion in *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003), to determine whether Cooper's email was a public record. In that case, the Court had to determine whether emails that two city employees transmitted over the city computer network were public records. The Court concluded that classifying an email as a public record depended on whether it was prepared in connection with official agency business and was intended to perpetuate, formalize, or communicate some type of knowledge. *City of Clearwater* emphasized that, when determining whether a communication is a public record, courts should use common sense and focus on the nature of the record itself instead of its physical location.

The Fourth District similarly recognized that the physical location of Cooper's email, which had been sent from her personal computer and email account, did not determine its status as a public record. Instead, it noted that the determining factor was "whether the [email had been] prepared in connection with the official business of an agency and [was] intended to perpetuate, communicate, or formalize knowledge of some type." *Butler*, 68 So. 3d at 280 (internal quotations omitted). The court noted that the City did not have any part in Cooper's decision to write for the Times or to distribute her articles; instead, she had acted under her own discretion. Thus, the court held that Cooper did not create the email in her capacity as Mayor because it "was not intended to perpetuate, communicate, or formalize the City's business." *Id.* Additionally, the court noted that the published articles were available for anyone to access or inspect. Thus, the Fourth District affirmed the trial court's conclusion that the email, the names and email addresses of its recipients, and the article attachments were not public records under Chapter 119 of the Florida Statutes.

SIGNIFICANCE

Butler reaffirms the Florida Supreme Court's conclusion that, when considering whether an email sent by an "agency" constitutes a public record, the focus must be on the record's nature rather than it's physical location. Although a mayor, as a municipal officer, is an "agency" under Florida Statutes, Section 119.011(12), emails that are not prepared in the official capacity of that office or intended to further city business are not public records. They are therefore not subject to the disclosure requirements of Article I, Section 24(a) of the Florida Constitution.

RESEARCH REFERENCES

- 44 Fla. Jur. 2d *Records and Recording Acts* § 1 (WL current through Feb. 2012).
- 44 Fla. Jur. 2d *Records and Recording Acts* § 39 (WL current through Feb. 2012).

Lindsay D. Houser

Public Records: Journalist's Privilege

***WTVJ-NBC 6 v. Shehadeh*,**
56 So. 3d 104 (Fla. 3d Dist. App. 2011)

A party seeking to overcome a journalist's qualified privilege to protect sources or information must clearly and specifically show the following: discovery is relevant and material for resolving an issue in a legal proceeding, no other means of getting the information exist, and disclosure is supported by a compelling interest.

FACTS AND PROCEDURAL HISTORY

Television reporter Jeff Burnside covered an employment-termination dispute between the City of Homestead's City Council and its former city manager, Mike Shehadeh. During his coverage, Burnside got a disc containing text messages and emails of city officials regarding an investigation of Shehadeh. Shehadeh filed a motion to compel Burnside and his employer, WTVJ-NBC 6 (WTVJ), to appear for a deposition limited to questioning about whether Burnside obtained the disc through a public-records re-

quest or from a city employee or contractor involved in the investigation. WTVJ and Burnside filed a cross-motion for a protective order under Florida Statutes Section 90.5015, which provides professional journalists with limited protection against forced disclosure of sources and information obtained while actively gathering news.

The trial court held that Burnside could be compelled to reveal whether he filed a public-records request because it was a question about a "public act." WTVJ and Burnside petitioned for a writ of certiorari from the Third District Court of Appeal to quash the lower court's order.

ANALYSIS

The Third District granted the petition and explained that WTVJ and Burnside were clearly entitled to invoke the protection of Section 90.5015. The issue was whether Shahadeh had overcome the limited statutory protection by making a clear and specific showing of three required elements: relevance and materiality of the information to unresolved issues in the underlying proceeding, an absence of alternative sources of the information, and the existence of a compelling interest for requiring the disclosure of the information.

Shehadeh first argued that he could file additional claims against the city if the disc, which included personal and private messages, was leaked to the press. The Third District conceded that Burnside's response to the question of whether he obtained the disc through a public-records request was relevant and possibly material to Shehadeh's claims against the city.

The Third District found Shehadeh's arguments about the two remaining elements less convincing. The court noted that sources other than WTVJ and Burnside could provide information leading to the source of the disc. For example, the City of Homestead could answer questions about public-records requests. Additionally, Shehadeh could depose the private individuals he claimed were also privy to the disc. As such, the court determined that Shehadeh failed to demonstrate a compelling interest in questioning professional journalists engaged in news-gathering rather than pursuing other avenues of discovery. "Shehadeh has an array of discovery procedures available to determine whether any of the Commissioners or Homestead employees 'leaked' information to Burnside or WTVJ, as an alternative to ques-

tioning professional journalists." *WTVJ-NBC 6*, 56 So. 3d at 106. Accordingly, the Third District quashed the trial court's order.

SIGNIFICANCE

WTVJ-NBC 6 upholds the journalist's privilege in matters concerning local government officials and public-records requests. Further, it encourages practitioners to fully explore available discovery options before trying to overcome the statutory and common law protections given to journalists.

RESEARCH REFERENCES

- 24 Fla. Jur. 2d *Evidence and Witnesses* § 762 (WL current through Aug. 2011).
- 19A Fla. Jur. 2d *Discovery and Depositions* § 21 (WL current through Aug. 2011).

Derek Larsen-Chaney

TORT LIABILITY & GOVERNMENTAL IMMUNITY

Tort Liability & Governmental Immunity: Duty of Care—Sovereign Immunity

***Public Health Trust of Miami-Dade County. v. Rolle*,**
2011 Fla. App. LEXIS 15287 (Fla. 3d Dist. App. Sept. 28, 2011)

A court's analysis of whether a duty of care exists is separate and distinct from the determination of a governmental defendant's sovereign immunity from liability. For example, medical professionals providing emergency care enjoy a measure of protection from civil liability under Florida's Good Samaritan Act, but are not sovereignly immune from suit.

FACTS AND PROCEDURAL POSTURE

On August 16, 1996, Shaniah Rolle was born at Broward County's Memorial Regional Hospital (Broward) with numerous physical and medical abnormalities, including a life-threatening gastric condition that required immediate surgery. Rolle's lengthy stay at Broward was followed by extensive treatment by a multitude of pediatric and gastroenterology specialists. On July 11, 1999, Rolle arrived in the emergency room of Miami's Jackson Memorial Hospital (Jackson). She was suffering from several viral conditions, including an infection preventing blood flow to her extremities. After consulting Rolle's mother, Jackson surgeons removed significant portions of Rolle's arms and legs.

Although the surgery saved Rolle's life, her mother filed suit against more than twenty doctors, as well as both hospitals and the respective governmental entities that managed them, the Broward County Hospital District (District) and the Public Health Trust of Miami-Dade County (Trust). Rolle's complaint alleged negligent treatment by the medical professionals beginning the day Rolle was born and, more specifically, that the amputations would not have been necessary had Jackson doctors provided immediate treatment upon Rolle's arrival in the emergency room. The District and the Rolle family reached a settlement.

The Trust filed a motion for summary judgment with the Circuit Court for Miami-Dade County, claiming sovereign immunity and immunity under Florida's Good Samaritan Act (Act). Following the circuit court's denial of the motion, the Trust petitioned the Third District Court of Appeal for certiorari relief.

ANALYSIS

The Third District denied the Trust's motion for certiorari review. First, the appellate court dismissed the Trust's argument that it was immune from suit under Florida Statutes Section 768.28(5) because the statutory limit on damages that the government entities could be required to pay in the case was already met in the Broward settlement. The court explained that, at this stage of the action, Rolle had not proven that the alleged Trust negligence and the alleged Broward negligence arose out of the same occurrence. The Third District further noted that, regardless of a possible determination that the damages limit had been met, the lower court could still enter a judgment against the Trust to support a future claim to the legislature for payment.

Next, the appellate court rejected the Trust's assertion that it enjoyed immunity from suit under the Act, which states, in part, that healthcare providers shall not be liable for damages resulting from emergency care unless such treatment demonstrates a reckless disregard for the life or health of another. "[T]he Act, by its terms, provides the Trust with a defense to liability if it meets the exculpatory requirements of the Act, but it does not provide it sovereign immunity from suit." *Rolle*, 2011 Fla. App. LEXIS 15287 at *6. The Third District echoed recent Florida Supreme Court language clarifying that determining the existence of a duty is distinct from discussing whether the government waived sovereign immunity under Florida Statutes Section 768.28. The court confirmed that the Trust's assertion of sovereign immunity notwithstanding the statutory waiver was a fact-specific defense requiring affirmative proof at trial. Accordingly, the Third District denied the Trust's certiorari petition.

SIGNIFICANCE

Rolle distinguishes between the absence of a duty of care, which renders the defendant's actions non-tortious, and sovereign immunity, which, though narrowly applied, provides the government entity with complete protection from being sued without

consent. *Rolle* consequently warns that the Third District will not afford certiorari review when the sovereign argues non-liability because no duty is shown.

RESEARCH REFERENCES

- 38 Fla. Jur. 2d *Negligence* §§ 21–22 (WL current through Feb. 2012).
- 28 Fla. Jur. 2d *Government Tort Liability* § 2 (WL current through Feb. 2012).

Derek Larsen-Chaney

Tort Liability & Governmental Immunity: Sovereign Immunity

***Brown v. Jenne*,**
2011 WL 5375045 (Fla. 4th Dist. App. Nov. 9, 2011)

Rescue personnel are entitled to qualified immunity from civil liability in a wrongful death action if they act solely to provide medical treatment, even if they are grossly negligent, because doing so does not violate a defendant's clearly established constitutional right under the Fourth or Fourteenth amendments.

FACTS AND PROCEDURAL HISTORY

Oral George Brown (Brown) was involved in a serious car crash. A total of nine rescue personnel, including sheriff's deputies and fire rescue personnel, responded to the crash scene. After removing Brown from the wrecked car, the rescue personnel saw that he was dazed, incoherent, and unable to talk. For five minutes, Brown ignored police commands as he tried to walk away from the scene. In response, several officers threw Brown to the ground and hogtied him with his hands behind his back. In the ambulance en route to the hospital, rescue personnel strapped Brown face down to prevent him from choking on vomit. Close to the hospital, Brown had a grand mal seizure accompanied by violent physical activity.

Ultimately, Brown died of positional asphyxia leading to respiratory and cardiac failure. The medical examiner testified that many factors contributed to the asphyxia, mostly relating to the

position in which Brown was restrained, which prevented him from breathing. Broward County Fire Rescue reviewed the incident and issued a report in which it identified nine failures made by the rescue personnel that caused Brown's death. The court cited no evidence to conflict with these findings. Brown's personal representative filed a lawsuit against Broward County and the nine rescue personnel individually, alleging that their negligence caused Brown's death. The circuit court granted summary judgment to all nine individual defendants on grounds of qualified immunity, and the plaintiff appealed.

ANALYSIS

The Fourth District Court of Appeal noted that qualified immunity protects government officials from liability when they commit a tort as part of their discretionary duties. A plaintiff can overcome this immunity only by showing that the defendant's conduct violated the plaintiff's clearly established constitutional or statutory right. To prevail, the plaintiff must show both that the official violated a right and that at the time of the incident the right was clearly established.

The court ultimately concluded that the defendants had not violated one of Brown's clearly established constitutional rights. The first potential violation involved the Fourth Amendment prohibition on unreasonable seizure, but the court held that the amendment did not apply to restraints for the purpose of medical treatment, as opposed to the purpose of law enforcement. The court indicated that the Fourth Amendment might apply had Brown refused medical attention and been restrained anyway, but Brown was not mentally capable of refusing treatment, and his physical resistance did not constitute refusal in his incoherent state.

Likewise, the Court found that the Fourteenth Amendment protection from cruel and unusual punishment was inapplicable because there must first be a Fourth Amendment seizure to allow such a claim to proceed. Because the defendants had not attempted to detain Brown for a law enforcement purpose, no Fourth Amendment seizure had occurred, and thus, no constitutional protection from cruel and unusual punishment applied. Therefore, while the Court found that the defendants' "actions/inactions appear[ed] to fit the parameters of deliberate indifference and gross negligence . . . there [was] no clearly estab-

lished constitutional right that they violated," and the Court held that qualified immunity protected the defendants from liability. *Jenne*, 2011 WL 5375045 at *4.

SIGNIFICANCE

Jenne upholds qualified immunity for government officials involved in a rescue operation so long as the plaintiff does not consciously refuse treatment and the officials act with the purpose of providing medical treatment rather than enforcing the law. Thus, *Jenne* affirms the qualified immunity of those government officials, in the absence of a violation of an established constitutional right, even if their conduct may be grossly negligent.

RESEARCH REFERENCE

- 9 Fla. Jur. 2d *Civil Servants* § 73 (WL current through Mar. 2012).

Daniel R. Strader

Tort Liability & Governmental Immunity: Sovereign Immunity

***Furtado v. Yun Chung Law*,**
51 So. 3d 1269 (Fla. 4th Dist. App. 2011)

Potentially life-threatening circumstances excuse a law-enforcement officer's duty to provide reasonable accommodations required by the Americans with Disabilities Act (ADA). Further, inadequate police training may support Section 1983 liability claims or Florida wrongful death claims only if the plaintiff shows the municipality knew of a need for additional training and deliberately chose inaction.

FACTS AND PROCEDURAL HISTORY

Richard Furtado requested that the Palm Beach County Sheriff's Office transport his wife, Marilou Forrest, to a mental-health facility for involuntary observation under a Baker Act certificate. The certificate indicated that Forrest was agitated, delusional, and likely armed. Upon the officers' arrival at his home,

Furtado told Deputy Jason Yun Chung Law and two other deputies that his wife was suicidal and carried knives with her for protection.

The deputies made several unsuccessful attempts to communicate with Forrest before and during their search of the home. Upon entering the master bathroom, Yun Chung Law announced the deputies' presence and their intention to help Forrest. Forrest appeared from behind a door and lunged at Yun Chung Law while holding a knife over her head. An attempt to subdue Forrest with a Taser failed, and she continued to approach Yun Chung Law. Yun Chung Law then fired his weapon, killing Forrest.

Furtado filed a complaint against Yun Chung Law individually and Palm Beach County Sheriff Ric Bradshaw in his official capacity. The complaint alleged Section 1983 excessive force violations, a Florida wrongful death claim, and an ADA claim against Bradshaw. Following discovery, the defendants filed a joint motion for summary judgment, which included sworn statements and affidavits describing the Sheriff's policies and training procedures for situations involving the suicidal or mentally ill. The plaintiff countered with an expert affidavit of a retired police chief claiming Bradshaw was deliberately indifferent to Forrest's safety and that of other mentally ill persons. The affidavit further alleged Yun Chung Law created the danger by violating numerous standard protocols for dealing with the mentally ill.

The trial court granted summary judgment in favor of the defendants on all claims. Furtado appealed the decision to the Fourth District Court of Appeal.

ANALYSIS

The court first established that qualified immunity shields law-enforcement officers from suits seeking civil damages for torts committed while performing discretionary duties unless the officers' actions were objectively unreasonable. The court found Yun Chung Law's use of deadly force under the circumstances was not a Fourth Amendment violation giving rise to a Section 1983 claim because Forrest posed an imminent danger to the deputies. Absent a constitutional infringement by Yun Chung Law, the Section 1983 wrongful death claim against Sheriff Bradshaw was also without foundation. The court used similar reason-

ing to uphold the summary judgment on the Florida wrongful death claim against the Sheriff.

The court further explained the limited circumstances in which inadequate police training may justify Section 1983 liability. The plaintiff must show that the law-enforcement agency exhibited deliberate indifference to a known need for particularized training. A single incident is not sufficient to put a municipality on notice of a need for more instruction. The court noted evidence that Yun Chung Law completed voluntary crisis intervention training made available by Sheriff Bradshaw to his deputies. Notwithstanding the retired police chief's opinion, the court held the isolated incident was not enough to alert the Sheriff to a need for training beyond what was already in place. Accordingly, the failure to prove the required deliberate indifference derailed the plaintiff's Section 1983 claims.

Finally, the court rejected Furtado's claim that Bradshaw failed to adequately adjust policies or procedures in consideration of Forrest's disability. The ADA forbids discrimination based on disability against qualified individuals by public entities. Discrimination includes failure to reasonably accommodate the individuals' known physical or mental limitations. But, the court explained, the presence of exigent circumstances relieves public entities of their responsibility to provide reasonable accommodations. The court highlighted similar cases from the United States Fourth and Fifth Circuit Courts of Appeals in which unstable situations involving mentally ill individuals justified the use of deadly force despite the ADA requirements. The court held Forrest's delusional state coupled with her armed posturing absolved the deputies of their duty under the ADA. "At that moment in time, the deputies' lives were threatened. Exigent circumstances existed to excuse compliance with the ADA." *Furtado*, 59 So. 3d at 1278. The court dismissed Furtado's assertion that the deputies created the exigency. Thus, the court affirmed summary judgment on all claims.

SIGNIFICANCE

Furtado excuses the duty on law-enforcement officers to provide reasonable accommodations to mentally disabled individuals when ADA compliance would pose an imminent risk to their own safety or that of fellow officers and innocent by-standers. Further, *Furtado* confirms an isolated incident of officer misconduct is not

sufficient to establish Section 1983 liability based on deliberate indifference to a need for more complete police training.

RESEARCH REFERENCES

- 14A Fla. Jur. 2d *Criminal Law—Procedure* § 780 (WL current through Aug. 2011).
- 9 Fla. Jur. 2d *Civil Rights* §§ 2 (WL current through Aug. 2011).

Derek Larsen-Chaney

Tort Liability & Governmental Immunity: Sovereign Immunity

***Miami-Dade Co. v. Rodriguez*,**
67 So. 3d 1213 (Fla. 3d Dist. App. 2011)

Police action in emergency situations is immune from judicial scrutiny. In addressing potential government liability under Florida law, a duty of care must exist before a court can determine whether sovereign immunity precludes the suit regarding the alleged breach.

FACTS AND PROCEDURAL HISTORY

Just before midnight on February 14, 2008, Miami-Dade County (County) police officers Jesus Hernandez and Javier Albides responded to a burglary in progress at an automobile-detailing business. Hernandez jumped from the passenger side of the moving police cruiser as it approached the location and immediately spotted the burglar through the front window of the store. At the same time, Lazaro Rodriguez, who owned the store and was alerted to the crime by his alarm company, rushed into the store parking lot in his pickup truck. As Rodriguez left his truck, gun in hand, Hernandez ran toward the storefront, approaching Rodriguez from behind. When Rodriguez turned and pointed his gun at Hernandez, Hernandez shot Rodriguez four times. The store surveillance camera recorded the incident, which spanned thirteen seconds from the moment the police arrived to the firing of the last shot.

Rodriguez's later negligence action against the County alleged that the officers responded recklessly to the situation and should have conducted a more detailed investigation of the situation before acting. The circuit court denied the County's motion to dismiss, which asserted that sovereign immunity barred Rodriguez's suit. The County requested certiorari review by the Third District Court of Appeal.

ANALYSIS

The Third District began by addressing whether the exercise of certiorari jurisdiction was appropriate under the circumstances. To that end, the court first noted that the question of whether a duty of care exists is distinct from and comes before any later analysis of sovereign immunity. As such, the court agreed with its sister appellate courts that certiorari review of denied motions arguing only an absence of duty of care is inappropriate because appellate review would be possible at the end of the case.

But the Third District declined to join other courts in refusing to consider all certiorari requests concerning denials of sovereign immunity arguments at the motion-to-dismiss or summary-judgment stage. In support of this decision, the court explained that sovereign immunity emanated from the separation-of-powers doctrine, which prohibits the judicial branch of government from intervening in the fundamental decision-making of the executive and legislative branches. Accordingly, the court observed, the State of Florida and its counties were immune from all legal action until 1973, when the legislature enacted Florida Statutes Section 768.28, which expressly waived sovereign immunity with respect to tort liability. The Third District explained that, absent consent by waiver, sovereign immunity continues to protect from suit government actions that are inherent in the act of governing. More specifically, the courts have no authority to pass judgment on discretionary functions of the executive and legislative branches, including the passage of laws or the issuance or revocation of licenses or permits, unless those actions violate a constitutional or statutory provision. Therefore, the Third District determined that it should continue to exercise its certiorari jurisdiction in cases such as *Rodriguez* in which immunity from suit rather than from liability is at issue.

In this case, the appellate court rejected the plaintiff's assertion that the Florida Supreme Court, in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), required the defendant to wait until a final judgment before appealing the issue of sovereign immunity. The Third District clarified that *Roe* merely declined to extend the right of interlocutory review available to state employees to the state and its political subdivisions. The court explained that an appeal following final judgment would fail to prevent the irreparable harm caused by forcing the County to go to trial when it should have enjoyed immunity.

Next, the court noted that sovereign immunity analysis based on the separation-of-powers doctrine focuses on the nature of the government conduct and the government category in which the particular activity falls. Here, the Third District explained that police actions in emergency situations involve a level of urgency rendering them discretionary rather than operational and thus deserving of special deference. "This is the type of fundamental law enforcement decision[] about which courts in this state have consistently said should be left to the expertise of law enforcement rather than being put to a referendum by the courts and juries." *Rodriguez*, 67 So. 3d at 1222. The court determined that the circumstances surrounding the burglary constituted a serious emergency that was thrust upon Hernandez and Albides and required the officers to make split-second decisions. The court reasoned that harm and an accompanying negligence action were no less likely than if the officers had followed the more deliberate course of action supported by Rodriguez. Accordingly, the court concluded that sovereign immunity protected the officers' actions from scrutiny after the fact and precluded the suit.

The Third District further certified its conflict with the First and Second District Courts of Appeal over the exercise of certiorari jurisdiction when a government entity claims immunity from suit rather than immunity from liability for lack of a duty of care.

SIGNIFICANCE

Rodriguez reaffirms the well-established principle that the discretionary actions of the executive and legislative branches of government are not subject to hindsight review by courts or juries. This immunity from suit necessarily protects fundamental government activity, such as the enforcement of the law in pressing situations, from scrutiny as to the wisdom of perfor-

mance. *Rodriguez* also creates a schism within the district courts with respect to interlocutory requests for review of denied motions founded on sovereign immunity.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 1 (WL current through Feb. 2012).

Derek Larsen-Chaney

Tort Liability & Governmental Immunity: Swimming Area

***Brown v. City of Vero Beach*,**
64 So. 3d 172 (Fla. 4th Dist. App. 2011)

Florida Statutes Section 380.276(6) overrides common law precedent and earlier caselaw holding local governments liable for death and injuries resulting from natural conditions on their beaches. The statute immunizes local governments from liability for death and injuries resulting from changing currents and natural conditions on Florida's coast.

FACTS AND PROCEDURAL HISTORY

The parents of Eric T. Brown, Jr., as personal representatives of his estate (Estate), brought suit against the City of Vero Beach (City) and the Indian River Board of County Commissioners (Board) for wrongful death. Brown died at the age of fourteen after attempting to save his friend from a deadly rip current at South Beach Park in Vero Beach, Florida.

In its amended complaint, the Estate alleged that the City and Board held the park out as a public swimming facility or led the public to believe the beach was a designated swimming area. According to the Estate's complaint, the City and Board were negligent because they both had a duty to warn the public of a dangerous condition and breached that duty by failing to give notice of the dangerous rip currents. The City and Board moved to dismiss the complaint based upon Florida Statutes Section 380.276(6), which provides:

> Due to the inherent danger of constantly changing surf and other naturally occurring conditions along Florida's coast, the state, state agencies, local and regional government entities or authorities, and their individual employees and agents, shall not be held liable for any injury or loss of life caused by changing surf and other naturally occurring conditions along coastal areas, whether or not uniform warning and safety flags or notification signs developed by the department are displayed or posted.

Fla. Stat. § 380.276(6) (2011).

The trial court agreed with the City and Board and dismissed the amended complaint with prejudice. The Estate appealed for a determination as to whether Section 380.276(6) grants local governments immunity from liability for death and injury resulting from rip currents.

ANALYSIS

Rules of statutory construction require that when a statute is clear and unambiguous, the court should give the statute its plain and obvious meaning unless doing so would create an absurd result. The court found that the statutory language here was clear and unambiguous. The statute acknowledges that the constantly changing surf and natural conditions are inherently dangerous. Because of this inherent danger, the legislature gave local governments immunity from liability for death and injuries resulting from changing surf and natural conditions along Florida's coast. "This protection from liability is given to government entities regardless of whether or not there are warning flags or notification signs displayed. . . . [T]he statute clearly and unambiguously shows the legislature's intent to limit the statutory waiver of sovereign immunity it created in [S]ection 768.28, Florida Statutes." *Brown*, 64 So. 3d at 175. While the Estate contended that Section 380.276 does not use the term "immunity" or preclude a common law cause of action against local governments for negligence, the court was unwilling to contravene the statute's clear and unambiguous language.

Finally, the Estate alleged that the City and Board owed an operational duty of care to warn swimmers of rip current dangers. Relying upon precedent from the Florida Supreme Court, the Estate alleged that the City and Board held the beach out to the

public as a swimming area and therefore had an operational-level duty of care to warn swimmers in the area; once the City and Board decided to operate the swimming facility, they had a duty to operate the facility safely.

The Fourth District distinguished the precedent because, at the time of the decision, Section 380.276(6) had yet to become effective. Section 380.276(6) became effective on July 1, 2005, over three months after the Florida Supreme Court's decision. As such, local governments are now immune from suit for death and injuries resulting from changing surf and natural conditions on Florida's coastline.

SIGNIFICANCE

Brown confirmed that Florida Statutes Section 380.276(6) has abolished caselaw and common law precedent that local governments may be held liable for negligence resulting from surf conditions on their beaches. The statute provides immunity for local governments from death and injuries resulting from changing surf and natural conditions along Florida's coast.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 63 (2011).

Erik M. Hanson