LAND USE PLANNING & ZONING

Land Use Planning & Zoning: Communication Towers

Michael Linet, Inc. v. Village of Wellington,
408 F.3d 757 (11th Cir. 2005)

Aesthetic concerns alone are insufficient to justify the denial of a permit to construct a cellular phone tower; however, a local government may deny a permit when there is also evidence that the tower will have an adverse impact on property values and that reasonable alternative locations are available. Furthermore, it is not impermissible for a local government to preclude one cellular company from constructing a cellular tower, while allowing another to build a similar structure at a different location.

FACTS AND PROCEDURAL HISTORY

Michael Linet, Inc. served as the agent for a cellular phone company that wanted to erect a cellular tower in the Village of Wellington. Linet planned to build the 120-foot tower on a golf course within the Village. Construction of the tower required a permit and a public hearing. Residents of the Village opposed Linet's proposal on several grounds, primarily that from an aesthetic standpoint, the structure would negatively impact property values. In response to these concerns, the Village denied Linet's permit request. Linet brought suit, claiming that the Village had violated the Telecommunications Act of 1996 (TCA), 47 U.S.C. § 332, and 42 U.S.C. § 1983, because the resident's objections were based purely on aesthetics and the Village had allowed another cellular company to construct a larger structure at a different location. The trial court granted summary judgment on the TCA claim and dismissed the Section 1983 claim, stating that the TCA provided a comprehensive means to address Linet's challenge, precluding application of Section 1983.

ANALYSIS

Section 1983 Claim

Section 1983 is not a catch-all provision for relief from any grievance that arises under a federal law. *City of Rancho Palos Verdes, Cal. v. Abrams*, 125 S. Ct. 1453, 1458–1459 (2005). In

Rancho Palos Verdes, the United States Supreme Court noted that a specific remedy for challenges to the TCA is contained within the Act itself. *Id.*; *see* 47 U.S.C. § 332(c)(7)(v)(2002) (a party adversely affected by a state or local government's application of the Act may file an action within a court of proper jurisdiction under the Act within thirty days of the adverse action). Following this precedent, the Eleventh Circuit Court of Appeals affirmed the trial court's dismissal of this claim.

Telecommunications Act Claim

Local governments may not deny permits for cellular towers unless the denial is supported by "substantial evidence." 47 U.S.C. § 332(c)(7)(B)(iii). Linet argued that the Village had violated the TCA because there was no substantial evidence to support the denial of his permit application. Although generalized aesthetic concerns alone will not meet the "substantial evidence" standard, the Eleventh Circuit noted that aesthetic objections can amount to substantial evidence under the TCA when combined with evidence of a decrease in property values or safety concerns. *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1208–1209 (11th Cir. 2002). Also pertinent to justifying a permit denial is whether the residents' concerns may be reduced by constructing the tower at a reasonable, alternative location. *Prime Co. Personal Commun. Ltd. Partn. v. City of Mequon*, 352 F.3d 1147, 1151 (7th Cir. 2003).

In *Michael Linet, Inc.*, the Eleventh Circuit found that the evidence supporting the Village's decision was sufficient to meet the "substantial evidence" standard. Prior to rendering its decision, the Village listened to complaints that the cellular tower would adversely affect real estate values and that its location was too close to a local school. Linet attempted to introduce contradictory testimony, but the court determined that this evidence was distinguishable because it dealt with cellular tower sites in entirely different locations. Moreover, Linet failed to present any evidence that building the structure on an alternative location would have been impractical. Thus, the Eleventh Circuit found that there was substantial evidence to support the Village's denial of the permit.

The court then focused on Linet's other argument that the Village had unreasonably discriminated against it when the Vil-

lage permitted another cellular company to build a similar structure within in the community. The court explained that the TCA does not prevent a local government from treating two functionally equivalent cellular companies differently, provided the discrimination is reasonable. 47 U.S.C. § 332(c)(7)(B)(i)(I) ("local governments . . . shall not unreasonably discriminate among providers"). In this case, the discrimination was reasonable because the Village had not prohibited Linet from suggesting an alternative location for the structure and Linet had failed to show that an alternative location would hinder the company's cellular coverage. The court further reasoned that the other provider's location may not have created the same concerns as Linet's proposed site; therefore, the court found that the Village had not unreasonably discriminated against Linet.

SIGNIFICANCE

Michael Linet, Inc. clarifies what constitutes the "substantial evidence" needed to deny a permit to construct a cellular site under the TCA. This case also demonstrates that the TCA gives local governments the flexibility to discriminate among different cellular service providers, as long as it is not done unreasonably.

RESEARCH REFERENCES

- 83 Am. Jur. 2d *Zoning and Planning* §§ 895, 899, 914 (Westlaw database updated Aug. 2005).
- 55 Fla. Jur. 2d *Telecommunications* § 11 (Westlaw database updated Jan. 2006).

Michael R. Rocha

Land Use Planning & Zoning: Development Orders

Lake Rosa v. Board of County Commissioners,
911 So. 2d 206 (Fla. 5th Dist. App. 2005)

A local government's action on a development order, as opposed to a property owner's application, will trigger the consistency requirements of Section 163.3215(1) of the Florida Statutes. When a development order is issued, the comprehensive plan in place at the time of issuance controls the validity of the permit.

FACTS AND PROCEDURAL HISTORY

The Southeast District of the Christian Missionary Alliance (Alliance) owned property between Lake Swan and Lake Rosa in Putnam County since the 1920s. The Alliance operated an extensive camp and recreational facilities on the property. In an attempt to expand its revenue, the Alliance sought to expand the facilities of the camp. The initial stage of this expansion included construction of a dormitory for eighty campers. The homeowners along Lake Rosa formed a coalition to prevent this expansion (Coalition).

In November 2001, the Alliance applied for a building permit for the dormitory. The building plans were given contingent approval, subject to acquisition of a septic permit. The building permit for the dormitory was issued in April 2002. When the Alliance submitted its application, the land in question was designated as "Agricultural II" in the County's comprehensive plan. Camps such as the Alliance's complex were a permitted use in the Agricultural II district. Between the time the Alliance applied for the building permit and the time when the permit was actually issued, the County changed the future land use designation on the subject property to "Rural Residential," which did not permit camps.

After exhausting its available administrative remedies, the Coalition filed a complaint, asserting that the permit was invalid because it was not consistent with the County's comprehensive plan. The Coalition sought an injunction to prevent construction and to require revocation of the permit. The trial court denied the Coalition's request, holding that the permit was issued properly because the proposed use was consistent with the County's plan at the time the Alliance applied for a building permit. Because the future land use designation the subject property carried at the time of application permitted camps, construction of a dormitory was not inconsistent with the County's comprehensive plan. The Coalition appealed.

ANALYSIS

Local government approval of development activity must be consistent with the designations and policies included in the local government's comprehensive plan. *Lake Rosa*, 911 So. 2d at 209. An affected party may challenge a "development order" that "materially alters the use or density or intensity" of the subject prop-

erty for failure to comply with the local government's comprehensive plan. Fla. Stat. § 163.3215(1) (2001). A building permit qualifies as a "development order" under Section 163.3215. The Alliance argued that the triggering event requiring compliance with the County's comprehensive plan was the application for the building permit. Conversely, the Coalition argued that the relevant event was the actual issuance of the building permit by the County.

The Fifth District Court of Appeal found that issuance of the permit, not the property owner's application, was the operative event requiring consistency with the comprehensive plan. The court explained that Section 163.3215(1) requires government action on the development order. Application for a permit by a property owner does not constitute government action.

The County, in support of its claim that the application was the relevant event, cited *Garden Country Club, Inc. v. Palm Beach County*, 590 So. 2d 488 (Fla. 4th Dist. App. 1992), in which the Fourth District held that the comprehensive plan designation at the time of application for a development order controlled the decision. The Fifth District distinguished this case from *Garden Country Club* because, in that case, there was evidence that the local government "improperly stonewalled" the application until the comprehensive plan could be amended. *Lake Rosa*, 911 So. 2d at 209. The Fifth District concluded there was no evidence of collusion on the County's part to "sabotage" the issuance of the permit. *Id.*

The Alliance also argued that the permit was proper because the Coalition failed to show that the expansion would cause a "material change [in] the land use" as required under Section 163.3215(1). The court rejected this contention as well, explaining that the construction of a dormitory for eighty people would increase both density and intensity of the property and enhance a nonconforming use. Because the building permit authorized development activity that was inconsistent with the comprehensive plan land use designation in place at the time the permit was issued, the Fifth District found the permit to be invalid and reversed and remanded the case.

SIGNIFICANCE

This case clarifies the point at which a local government should make a comprehensive plan consistency determination for action taken on a development order. The comprehensive plan in existence at the time of the issuance of the permit, not at the time of application for permit, controls the validity of the permit.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 15 (Westlaw database updated Jan. 2006).

Roxanne Fixsen
Nicole Guillet

Land Use Planning & Zoning: Injunctions/Permitted Uses

Cole v. City of Deltona,
890 So. 2d 480 (Fla. 5th Dist. App. 2004)

For purposes of obtaining a temporary injunction, the special damages standard is not appropriate to determine whether irreparable harm has been proven. However, that standard is applied to determine standing, when standing of the party seeking relief is at issue.

FACTS AND PROCEDURAL HISTORY

The City of Deltona issued a Final Development Order to the developer of a Dollar General Store that was to be located just outside of Tony Cole's neighborhood. Cole challenged the order on procedural due process grounds and sought an emergency temporary restraining order to prevent construction of the store. The trial court denied Cole's motion for a temporary injunction, finding that Cole did not (1) exhaust all administrative remedies; (2) include all necessary parties; and (3) prove irreparable harm. Cole appealed.

ANALYSIS

The Fifth District Court of Appeal first addressed the issue of irreparable harm. The likelihood of irreparable harm and a lack of an adequate remedy at law are two essential elements for a

preliminary injunction. *Dragomirecky v. Town of Ponce Inlet*, 882 So. 2d 495, 497 (Fla. 5th Dist. App. 2004) (citing *Yardley v. Albu*, 826 So. 2d 467, 470 (Fla. 5th Dist. App. 2002)). Cole alleged irreparable harm in the form of increased traffic and decreased property values. The trial court found that the allegations did not meet the criteria for irreparable harm, comparing Cole's situation to a similar case in which the Second District Court of Appeal held that increased traffic and decreased business value did not equate to special damages. *See Skaggs-Albertson's Props., Inc. v. Michels Belleair Bluffs Pharm., Inc.*, 332 So. 2d 113 (Fla. 2d Dist. App. 2002). On appeal, Cole contended that the trial court's reference to *Skaggs-Albertson's* indicated that the court required him to demonstrate special damages in order to establish irreparable harm. Cole claimed that this was an inappropriate standard.

The Fifth District agreed with Cole, noting that the special damages standard applies only to whether standing exists to seek an injunction, and that standing was not an issue in this case. This position is consistent with holdings in the First, Second, and Third District Courts of Appeal.

With regard to the trial court's finding that Cole failed to exhaust his administrative appeals, the Fifth District has held that if a party has failed to exhaust all administrative remedies, dismissal is appropriate. *C. Fla. Inv. v. Orange County Code Enforcement Bd.*, 790 So. 2d 593, 596 (Fla. 5th Dist. App. 2001). In *Cole*, the Fifth District found this issue to be moot, as the Deltona City Commission had rejected Cole's appeal, and no other administrative remedies existed.

The Fifth District also rejected the trial court's ruling that the case should be dismissed with prejudice because Cole failed to join the developer of the Dollar General Store, finding that Cole should be permitted to amend his complaint and proceed with his suit.

The Fifth District reversed the order denying the injunction and remanded to the trial court for a determination of whether Cole suffered irreparable harm.

SIGNIFICANCE

Cole clarifies application of the special damages standard when parties seek injunctive relief. Special damages need not be proven to establish irreparable harm. Rather, special damages

must be proven when the standing of the party seeking the injunction is at issue.

RESEARCH REFERENCE

- 29 Fla. Jur. 2d *Injunctions* § 25 (2005).

Shannon A. Treadway

Land Use Planning & Zoning: Injunctions/Permitted Uses

Miami-Dade County v. Fernandez,
905 So. 2d 213 (Fla. 3d Dist. App. 2005)

A governmental entity has a significantly reduced burden in establishing its need to obtain a temporary injunction. Furthermore, neither res judicata nor collateral estoppel will bar enforcement of multiple zoning violation actions when the prior judicial decision was based on a separate and distinct code, even though the remedy would be the same for both violations.

FACTS AND PROCEDURAL HISTORY

Miami-Dade County sought to enjoin the Fernandezes from conducting a for-profit party business on their land for which they had not obtained the proper certificate of use. Prior to the commencement of the action for injunctive relief, the County had cited the landowners for violation of a separate provision of the zoning code, and an administrative hearing officer found the landowners guilty of the violation. The circuit court appellate division reversed that finding, determining that the finding was not supported by competent substantial evidence. The action for injunctive relief was brought under a different portion of the zoning code, and the trial court denied the County's motion for a preliminary injunction.

ANALYSIS

A temporary injunction generally may be granted only when

> (1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law, (2) a substantial likelihood of success on the merits, (3) the threatened injury to petitioner outweigh[s] any possible harm to the respondent, and (4) the

> granting of the preliminary injunction will not disserve the public interest.

Cosmic Corp. v. Miami-Dade County, 706 So. 2d 347, 348 (Fla. 3d Dist. App. 1998). Governmental entities, though, when seeking an injunction, are not burdened with the requirement of showing irreparable harm if the injunction is intended to enforce the government's police powers. *Metro Dade County v. O'Brien*, 660 So. 2d 364, 365 (Fla. 3d Dist. App. 1995). In such cases, harm is presumed. *Id.* The Third District Court of Appeal determined that because the County had established the remaining elements, the trial court had abused its discretion in not granting the injunction, and as such, the County had a clear legal right to relief.

Furthermore, for the Fernandezes' defense of res judicata to apply, the second proceeding sought by the County would have to have been for enforcement of the exact same code upon which the circuit court appellate division had ruled. *Holiday Inns, Inc. v. City of Jacksonville*, 678 So. 2d 528, 529–530 (Fla. 1st Dist. App. 1996). Because the circuit court appellate division was ruling on a separate provision of the County's zoning code, and made no finding as to the code provision under review by the Third District, the County's action was not barred by res judicata or collateral estoppel.

SIGNIFICANCE

This case emphasizes that a government entity has a reduced burden when making a showing of necessity for the issuance of a temporary injunction if the injunction is intended to enforce its police powers. The case also makes clear that, even though a court may have reviewed a comparable set of facts under one governing code provision, that court's determination will not operate to bar a later action, provided the later action is distinct in both governing law and the remedy sought.

RESEARCH REFERENCE

- 29 Fla. Jur. 2d *Injunctions* § 13 (2005).

Jay Daigneault

Land Use Planning & Zoning: Permitting—Challenges

Vanderbilt Shores Condominium Assn., Inc. v. Collier County,
891 So. 2d 583 (Fla. 2d Dist. App. 2005)

A party challenging the issuance of a building permit must exhaust all available administrative remedies before filing a lawsuit. Furthermore, if the challenging party neglects to seek a temporary injunction to enjoin construction and the construction proceeds to completion, the failure to exhaust administrative remedies will not simply render the challenge unripe, but shall bar the action altogether.

FACTS AND PROCEDURAL HISTORY

In November 2001, Collier County issued a building permit for the construction of a fifteen-unit condominium. The building was tiered with a ninety-five-foot inside tier and a lower, thirty-foot outside tier. The exterior walls of the lower tier were set back thirty feet from the property line.

The Vanderbilt Shores Condominium Association, along with seven neighboring homeowner associations (collectively, Vanderbilt), challenged the building permit. Vanderbilt alleged that the project violated the Collier County Land Development Code's (Code) requirements for side-yard setbacks. The Code required side-yard setbacks to be a minimum of "[o]ne-half the building height as measured from each exterior wall." Collier County Land Dev. Code (Fla.) § 2.2.8.4.3 (2001). A "yard" was defined in the Code as the "required open space, unoccupied and unobstructed by any structure or portion of a structure." Collier County Land Dev. Code (Fla.) Art. 6, div. 6.3 (2001).

The County contended that the thirty-foot setback was sufficient, explaining that the setback for the taller, inside tier was satisfied because the exterior wall for that tier was forty-seven and one-half feet from the property line. Vanderbilt alleged that this interpretation was insufficient and pursued a declaratory action and a writ of mandamus. The trial court dismissed the suit, deferring to the County's interpretation of the setback requirements and determining that Vanderbilt had not exhausted its administrative remedies. Vanderbilt appealed. Construction of

the condominium building commenced and was completed prior to the filing of the appeal.

ANALYSIS

Great deference should be given to an administrative agency's interpretation of its own code. *Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Commn.*, 427 So. 2d 716, 719 (Fla. 1983). However, when that interpretation is unreasonable or apparently incorrect, it should be disregarded. *Legal Envtl. Assistance Found., Inc. v. Bd. of County Commrs.*, 642 So. 2d 1081, 1084 (Fla. 1994). The Code's definition of "yard" required the open space to be unobstructed, but here, the forty-seven and one-half foot setback required for the taller tier of the building was occupied by the lower tier of the building. Therefore, the Second District Court of Appeal determined that the County's interpretation of its Code with regard to the method of measuring tiered buildings was contrary to the plain language of the Code.

However, the Second District noted that regardless of the inappropriate application of the Code, the trial court correctly dismissed Vanderbilt's case because it had not followed the proper administrative procedure before filing a lawsuit. All administrative remedies must be exhausted before a party files a lawsuit challenging a building permit. *Skaggs-Albertson's Prop., Inc. v. Michels Belleair Bluffs Pharm., Inc.*, 332 So. 2d 113, 115 (Fla. 2d Dist. App. 1976). The rationale behind this requirement is that because local governments are more familiar with local conditions, they are in a better position to resolve local land development conflicts. *Id.* at 114–115. The County Code provided a means for administrative appeal; however, Vanderbilt did not avail itself of this procedure. Collier County Land Dev. Code (Fla.) Art. 1, div. 1.6 (2001). Additionally, the court stated that during the course of a previous appeal to the Collier County Commission, which involved this same issue, the Commission had agreed with the challenger's position, demonstrating that utilization of the administrative appeals process would not have been futile. Finally, the Second District stated that failure to pursue administrative remedies would normally only render the suit unripe; however, in this case, the court stated that because Vanderbilt had not sought a temporary injunction prior to completion of the

building, any further action was barred. *See Med. Arts, Inc. v. Rohrbaugh*, 293 So. 2d 366 (Fla. 4th Dist. App. 1974).

SIGNIFICANCE

Vanderbilt Shores reiterates the necessity of following administrative procedures when challenging development permits. When a party who challenges the issuance of a building permit fails to exhaust administrative remedies, it is not usually fatal to the initiation of a lawsuit. However, when the party not only fails to bring its challenge before the proper administrative board, but also fails to seek an injunction to enjoin execution of the building permit and the challenged structure continues to completion, there may be no further legal action.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 233 (2006).

Suzanne Soliman
Nicole Guillet

Land Use Planning & Zoning: Permitting—Ripeness

National Advertising Co. v. City of Miami,
402 F.3d 1335 (11th Cir. 2005)

An administrative action is not ripe for judicial review unless such action constitutes a binding conclusive administrative decision. Verbal statements by zoning clerks or written notations on a zoning application indicating denial do not amount to a binding final decision, and therefore, these actions do not create a case or controversy of sufficient concreteness to allow judicial consideration.

FACTS AND PROCEDURAL HISTORY

National Advertising Co. (National) applied for permits from the City of Miami to erect seven billboards at different locations throughout the City. Six of the billboards were to be built on property that held a zoning designation of "C-1, commercial zone." Zoning clerks with the City refused to grant National's permit

applications and made written notations on the applications that the proposed billboards exceeded the zoning code's height limits for signs. A zoning clerk also told a National representative that billboards were not allowed on property zoned C-1.

National filed suit against the City of Miami, claiming that the City's zoning regulations concerning signs and billboards were unconstitutional as applied to National because (1) the provisions required the City to deny off-site signs in certain commercial zones in violation of the First Amendment; and (2) the regulations failed to set forth adequate procedural guidelines, thereby vesting City zoning clerks with excessive discretion to grant or deny sign permits. The district court granted summary judgment in favor of the City, holding that because National never received a formal written denial of its permit applications, National's claims against the City were not ripe for judicial review. National appealed to the Eleventh Circuit Court of Appeals.

ANALYSIS

The ripeness doctrine precludes review of "potential or abstract disputes" in order to avoid the issuance of improper advisory opinions and to prevent the waste of judicial resources. *Natl. Advert. Co.*, 402 F.3d at 1339. In making its ripeness determination, the Eleventh Circuit considered both "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148–149 (1967)).

In cases involving administrative decisions, an issue is not ripe for judicial review until the decision has been formalized by the agency and has caused some injury, or immediate threat of injury, to the plaintiff. The Eleventh Circuit applied the reasoning and holding from its opinion in *Digital Properties, Inc. v. City of Plantation*, in analyzing the ripeness of National's claims. In *Digital*, the plaintiff challenged the constitutionality of a zoning ordinance after a zoning technician made statements implying that Digital's permit application would be denied. *Id.* The Eleventh Circuit held that Digital presented no concrete controversy because it never obtained a "binding conclusive administrative decision." *Id.* at 590. The court stated that the plaintiff had an obligation to obtain at least a "conclusive response from someone

with the knowledge and authority to speak for the City regarding the application of the zoning scheme." *Id.* Applying this reasoning to *National Advertising*, the Eleventh Circuit held that because National never received a binding administrative decision from the City of Miami, there was no concrete dispute requiring judicial review.

National claimed that it did not seek written denial because the actions of the zoning clerks led it to believe with certainty that its application was going to be denied. The Eleventh Circuit rejected this argument, stating that neither oral statements by a zoning clerk, nor written comments on an application, could reasonably be construed as a binding conclusive denial of National's application. The court further asserted that without a written administrative denial, the court had insufficient facts to determine whether National had indeed been denied, let alone the reasons for that denial. The court pointed out that this situation exemplifies why meaningful judicial review cannot be rendered without a conclusive administrative decision in the record.

Turning to the second part of the ripeness analysis, the Eleventh Circuit ruled that National had failed to demonstrate that withholding judicial review would result in undue hardship. The court reasoned that any subsequent hardship to National would in fact be the result of National's failure either to obtain a formal denial or to properly exhaust available administrative remedies before "rushing to the federal courts." *Natl. Advert.*, 402 F.3d at 1341. Therefore, the Eleventh Circuit ruled that National's claims did not constitute a case or controversy ripe for judicial review, and remanded the case to the district court for dismissal without prejudice.

SIGNIFICANCE

National Advertising demonstrates the importance of counseling clients on the need to seek a formal, written administrative decision before pursuing judicial review of a zoning application denial. This case extends the application of the *Digital* decision by holding that oral and written statements by zoning clerks, indicating denial of an application, do not constitute a "binding conclusive administrative decision" that is subject to judicial review. Even when constitutional violations are alleged, parties must ob-

tain a formal denial and pursue all administrative avenues to protest that denial before taking the matter to court.

RESEARCH REFERENCES

- *Moore's Manual: Federal Practice & Procedure* vol. 1-1, §§ 1.41, 1.43 (Matthew Bender 2005).
- 2 Am. Jur. 2d *Administrative Law* §§ 456, 469 (West 2004).

Paula P. Bentley

Land Use Planning & Zoning: Standard of Judicial Review

Lewis v. Brown,
409 F.3d 1271 (11th Cir. 2005)

When reviewing claims of substantive due process violations, federal courts will use the "impact" test to determine whether a governmental action is executive or legislative in nature. This test examines the impact a governmental action has on the public. If only a few people will be affected by the act, it will be considered executive in nature, regardless of how the action may be characterized by state courts.

FACTS AND PROCEDURAL HISTORY

Earle, Button, and Terry Lewis (Lewis) jointly owned 272 acres of land in Bartow County, Georgia. Lewis sought to rezone the land from agricultural to residential, in an attempt to bring the zoning into compliance with the residential designation the property carried on the County's land use plan.

Clarence Brown, the one-member Bartow County Commission, denied Lewis' request, and Lewis sued, seeking an injunction on the grounds that Brown's decision was arbitrary and capricious and violated Lewis' substantive due process rights. The trial court dismissed Lewis' complaint for failure to state a claim, and Lewis appealed.

ANALYSIS

Substantive rights, such as land-use entitlements, that are created by state law alone do not receive substantive due process protection under the Constitution. *McKinney v. Pate*, 20 F.3d

1550, 1556 (11th Cir. 1994). An exception to this rule exists, however, when a legislative act compromises a state-created right. *Id.* at 1557 n. 9. Lewis argued that the County Commission's refusal to rezone the property fell into this exception, entitling Lewis to substantive due process protection.

The Eleventh Circuit rejected Lewis' argument, finding that Brown's action in his capacity as the County Commission was "executive" rather than "legislative" in nature. The court acknowledged that entities such as county commissions perform both legislative and executive functions, but found that the Bartow County Commission's refusal to rezone Lewis' property fell within the executive category. The determination of whether a governmental official is operating in an executive versus a legislative capacity lies in the "impact" the official's action has on the public. If the action taken by the official impacts a small, limited number of people, it will be considered an executive act. *Id.* Broad, far-reaching decisions that affect a large segment of the population typically will be characterized as legislative acts. *Id.*

Lewis argued that the court should, despite the standard established in *McKinney*, classify the rezoning as a legislative action because Georgia state courts classified rezonings as such. The Eleventh Circuit rejected this argument, explaining that when dealing with an individual's substantive due process rights under the federal Constitution, federal courts have an obligation to make an independent determination as to the executive or legislative nature of a governmental act.

Lewis also argued that the rezoning could be classified as "quasi-legislative," citing *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974). The *South Gwinnett* court classified governmental actions based on the "function" of the act. The Eleventh Circuit in *Lewis* dismissed this contention as well, explaining that the former Fifth Circuit's characterization was in the context of judicial review and not from a substantive due process standpoint.

The County Commission's decision to deny Lewis' request applied to only a few people, namely Lewis, rather than a large group, and therefore was an executive act under the *McKinney* "impact" test. Because the County Commission's decision did not fall into the "legislative act exception," Lewis' zoning request war-

ranted no substantive due process protection, and the court ultimately affirmed the district court's decision to dismiss the claim.

SIGNIFICANCE

This case clarifies what test a federal court will use in determining whether the actions of a governmental entity are executive or legislative in nature for the purposes of a substantive due process analysis. When reviewing whether a governmental action is executive or legislative, federal courts will apply the "impact" test established in *McKinney*, rather than the "function" test articulated in *South Gwinnett*. Acts that generally impact only a few people are executive in nature, and as such, will not be required to comply with the substantive due process requirements of the United States Constitution.

RESEARCH REFERENCE

- 16 Am. Jur. 2d *Constitutional Law* § 894 (2005).

Kathryn Grant
Nicole Guillet

Land Use Planning & Zoning: Standard of Judicial Review

Snyder v. City Council of the City of Palmetto,
902 So. 2d 910 (Fla. 2d Dist. App. 2005)

When reviewing the denial of a rezoning request, the appellate court will limit its review to the specific request that went before the local government. A first-tier certiorari review will not examine the propriety of previous acts, i.e., rezonings, that were not a component of the rezoning request currently under review.

FACTS AND PROCEDURAL HISTORY

In 1981, the City of Palmetto rezoned a large tract of land to a planned unit development (PUD) designation. This tract was later subdivided and then purchased by a variety of different owners. Subsequently, the Palmetto City Council passed several ordinances creating new density limitations on various parcels within the original PUD tract. After purchasing subdivided parcels of the tract, Gerald Snyder and other property owners realized that the

various ordinances had greatly reduced the development potential on the overall property. Snyder approached the City Council and proposed an ordinance that would increase the allowable density. At the public hearing for the rezoning ordinance, Snyder argued that the previous rezoning actions relative to his property were improper and that the existing zoning designation on his property was invalid. The City Council ultimately voted to disapprove the ordinance. Snyder filed a petition for a writ of certiorari with the circuit court, seeking judicial review of the City Council's decision. The circuit court found no reason to disturb the City Council's action and denied the petition. Snyder petitioned the Second District Court of Appeal for a second-tier certiorari review.

ANALYSIS

Although a party may seek judicial review of an administrative decision in a circuit court, the scope of review is limited. When conducting a first-tier certiorari review, the circuit court is restricted to determining "(1) whether procedural due process [was] accorded; (2) whether the essential requirements of law [were] observed; and (3) whether the administrative findings and judgment [were] supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). This review is limited to the action of the lower tribunal currently before the court. Snyder and the other property owners did not allege that the City had denied them procedural due process relative to the challenged rezoning denial. Therefore, the only questions under review at the circuit court were whether the City Council met the essential requirements of the law, and whether there was competent substantial evidence to support the City Council's decision. Snyder argued that the previous owners were denied due process when the original density-limiting ordinances were passed. Restricting the scope of its inquiry to the City's refusal to adopt the proposed rezoning ordinance, the circuit court found that the City had observed the essential requirements of the law and had substantial competent evidence to support its findings and judgment. Therefore, there was no legal reason to upset the decision to reject the proposed rezoning ordinance. The circuit court did not address the claims relative to the prior rezoning actions.

The Second District's review of the circuit court decision was limited to determining "whether the circuit court [1] afforded procedural due process and [2] applied the correct law." *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000). In a second-tier certiorari review, the court may not consider whether the circuit court had substantial competent evidence to support its decision. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003). The Second District held that the only issue that was properly before the circuit court was the proposed rezoning, and the due process issues related to the previous actions on the subject properties were properly excluded from consideration by the City and by the circuit court in its certiorari review. Because the circuit court followed the essential elements of the law and afforded the requisite procedural due process, the Second District denied Snyder's petition for a writ of certiorari.

SIGNIFICANCE

Snyder demonstrates that practitioners seeking to overturn administrative decisions through judicial review must show that the agency failed to offer its clients procedural due process, failed to observe the essential requirements of the law, or lacked substantial competent evidence to support its decision. When asserting a lack of due process, it is critical to allege that the due process violation occurred as part of the action currently under review, and not as a part of previous actions that led up to the existing situation.

RESEARCH REFERENCES

- 2 Fla. Jur. 2d *Administrative Law* § 406 (2005 & Supp. 2006).
- 3 Fla. Jur. 2d *Appellate Review* §§ 456, 471 (2005 & Supp. 2006).

William G. Giltinan

Land Use Planning & Zoning: Takings

Lingle v. Chevron U.S.A. Inc.,
125 S. Ct. 2074 (2005)

The question of whether governmental regulation of private property "substantially advances" a legitimate state interest is not a proper query for determining whether the regulation effects a taking.

FACTS AND PROCEDURAL HISTORY

The State of Hawaii enacted legislation that would limit the amount of rent an oil company could charge a lessee-dealer of its gasoline products to operate a dealership. The purpose of this legislation was to effectuate lower retail prices of gasoline by preventing concentration of the retail gasoline market and to protect the viability of independent gasoline dealers. Chevron, which controlled the majority of the wholesale gasoline market in Hawaii, challenged the legislation on its face claiming that it violated the Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment.

Chevron argued that the rent-cap provision of the statute amounted to a taking of its property, claiming that it failed to substantially advance any legitimate state interest. Chevron and Hawaii filed cross-motions for summary judgment, and the district court granted Chevron's motion after determining that the statute did not actually reduce costs to lessee-dealers or lower retail prices. Because of this failure, the court determined, the statute failed to substantially advance the state interest of reducing prices for consumers. Accordingly, the court concluded the statute effected an illegal taking under the Fifth and Fourteenth Amendments.

On appeal, the United States Court of Appeals for the Ninth Circuit, by divided panel, determined that the district court had used the correct legal standard, but the Ninth Circuit reversed because a genuine issue of material fact existed as to whether the statute actually benefited consumers. On remand, the district court, following a bench trial, found the statute's rent-cap provision, while reducing lessee-dealers' costs, would not create any ultimate cost savings for consumers. Accordingly, the court de-

termined that the statute effected an unconstitutional regulatory taking. This time on appeal, the Ninth Circuit affirmed, holding that its prior decision barred Hawaii from challenging the "substantially advances" test's application. Hawaii challenged that decision.

ANALYSIS

The United States Supreme Court used *Lingle* as an opportunity to clarify what test courts should apply when evaluating claims of regulatory takings. To do so, it examined the history of takings jurisprudence, including the origin of the "substantially advances" test, which arose from *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

The Court first identified two categories of per se regulatory takings: (1) those that result in a permanent physical deprivation of property; and (2) those that deprive the owner of "all economically beneficial use" of the property. These per se regulatory takings require just compensation. Most regulatory takings, however, fall outside of these categories and are governed by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Penn Central* announced several factors a court should consider in determining whether governmental regulation amounted to a taking, including the economic impact of the regulation, or "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. As the Court reiterated in *Lingle*, the *Penn Central* "inquiry turns in large part, albeit not exclusively, upon the *magnitude* of a regulation's economic impact and the *degree* to which it interferes with legitimate property interests." *Lingle*, 125 S. Ct. at 2074 (emphasis added).

In contrast, *Agins* stated that a regulatory taking occurs when legislation either (1) fails to substantially advance a state interest or (2) denies an owner economically viable use of his land. Because this test was stated in the disjunctive, courts read the language to "announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test." *Id.* at 2082. The Court concluded that such a reading was wrong and, furthermore, that the "substantially advances" language derived from due process precedent, not takings jurisprudence.

In addition to having its origin in due process cases, the "substantially advances" test is inconsistent with the inquiry into the

"*magnitude or character of the burden*" imposed on private property rights. *Id.* at 2084 (emphasis in original). Whereas the "substantially advances" test asks about the effectiveness of the legislation in achieving the government's purpose, the nature of a regulatory takings inquiry is to ask how far government may go in intruding upon private property rights before the intrusion becomes a taking. Such an inquiry has nothing to do with the effectiveness of legislation.

The Court also touched upon its use of the "substantially advances" language in land-use exaction cases such as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Court acknowledged its use of the "substantially advances" language but contended the use was different from that which was at issue in *Lingle*. In the land-use exaction context, the inquiry remains whether the exaction substantially advances the *same* interest that would have allowed the government to deny a permit without the exaction. Accordingly, the Court did not disturb those precedents and reversed the Ninth Circuit's decision.

SIGNIFICANCE

This case clarifies what standard is to be used in determining whether legislation effects a regulatory taking. Whether legislation "substantially advances" a state interest is no longer a viable test. Instead, regulatory takings fall into four categories: (1) physical, where the owner is physically deprived of the property's use; (2) economic, where the owner is deprived of all economically beneficial use; (3) land-use exactions; and (4) *Penn Central*-type, where the taking depends on the degree and character of governmental interference.

RESEARCH REFERENCE

- 26 Am. Jur. 2d *Eminent Domain* § 12 (Westlaw database updated Feb. 2006).

Bridget Remington
Visiting Instructor of Legal
Research and Writing