

Florida Caselaw Update

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Supreme Court reverses previous decision on rehearing regarding authority for local governments to issue bonds without voter approval. *Strand v. Escambia County*, 33 Fla. L. Weekly S680 (Fla. Sept. 18, 2008).

In *Strand*, the Florida Supreme Court reconsidered, and reversed in its entirety, its earlier decision that would have mandated voter approval for bonds payable from ad valorem taxes, even where there was no pledge of ad valorem taxing power. The Court ultimately held that local governments, special districts, and school boards can issue bonds repayable from ad valorem monies without going through a referendum approval if the bond covenants contain clear language that the taxing authority is not pledging its taxing power to pay the bonds and, by implication, the bondholders cannot then sue the government to raise taxes to repay the bonds.

The Court premised its reversal on the strong role of stare decisis and noted that the Court's holding in *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, (Fla. 1980) had: (1) not proven unworkable; (2) been widely relied upon for the past twenty-seven years by local governments; and (3) not experienced any factual changes that would leave the central holding without legal justification. Furthermore, it noted that here, as compared to a number of past cases, the non-ad valorem revenues will only be used to supplement funding in the event that Trust Fund revenues prove insufficient for debt service, and that the County did not covenant to maintain services or programs for the purpose of generating income to repay the bonds.

The Beach and Shore Preservation Act does not on its face unconstitutionally deprive upland owners of littoral rights without just compensation. *Walton County v. Stop the Beach Renourishment, Inc.*, 33 Fla. L. Weekly S761 (Fla. Sept. 29, 2008).

Following numerous hurricanes

that eroded beaches in the City of Destin and Walton County, the City and County applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (JCP) to renourish the beaches under the Beach and Shore Preservation Act, Chapter 161, Florida Statutes.

Stop the Beach Renourishment (STBR), a group of oceanfront property owners, filed petitions challenging the issuance of the JCP and the establishment of the Erosion Control Line (ECL). According to the Act, an ECL is established that becomes the permanent property boundary between the upland owned property and the sovereign submerged land. This ECL replaces the Mean High Water Line as the natural property boundary.

In the administrative hearing, STBR argued that the governments were not entitled to the JCP because they did not meet the requirements of Rule 18-21.004(3), F.A.C., which requires the applicant to show it has ownership interest in the upland property that is riparian to the sovereign submerged lands where the work is proposed. In this case, the project was about seven miles long traversing more than 400 parcels of property. The governments argued that it was entitled to the exception in Rule 18-21.004(3), F.A.C., that provides a governmental entity does not have to provide evidence of upland ownership interest for beach nourishment projects "provided that such activities do not unreasonably infringe on riparian rights."

The ALJ found that at least two littoral rights of STBR's members (specifically the right to accretion and the right to have one's property remain in contact with the water) had been expressly eliminated by the Act. ' 161.191, Fla. Stat. The ALJ, however, did not consider the elimination of these two rights to be an "infringement" under Rule 18-21.004(3), F.A.C., because it was the Act that eliminated the rights and not DEP's activity in issuing the JCP. DEP adopted the ALJ's order.

On appeal, the First District re-

versed finding that the Act, as applied to STBR's members, eliminated at least two littoral rights which not only "unreasonably infringed" on their littoral rights in violation of Rule 18-21.004(3), F.A.C., but also resulted in a taking of constitutionally protected littoral rights without compensation. Thus the Court remanded the case for the applicants to demonstrate sufficient upland interest as required by Rule 18-21.004(3), F.A.C. If the applicants could not provide evidence of upland ownership then it would have to comply with section 161.141, Florida Statutes, of the Act which provides "[i]f an authorized . . . beach nourishment . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." Finally, the Court invalidated the ECL survey in the public records to the extent it showed a boundary different than that in the deeds of the STBR members.

The First District then certified the following question as one of great public importance:

Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

After accepting jurisdiction on this question, the Supreme Court changed the certified question. In so doing, the Court suggested that the First DCA essentially considered a "facial" challenge and not an as-applied challenge. The Court then modified the certified question as follows:

On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?

The Court's opinion, after discussing the intent of the Act, provides a history of the relationship between upland owners of beach property and the public. The Court then concludes

that the Act is facially constitutional because it "reasonably balances" public and private interest like the common law was intended. After reaching this policy conclusion, the Court addresses the merits finding no facial taking by the Act.

The Court then found the doctrine of avulsion was pivotal, yet ignored by the First District and the parties below. The Court reaffirmed the doctrine of avulsion which holds that the property boundary between sovereign submerged lands and upland properties does not change as a result of an avulsive event (e.g., hurricane). In such an avulsive event, the MHWL as it existed prior to the avulsive event remains the boundary and the party losing land has the right to reclaim that land. The Court then concluded that the Act, on its face, like the common law, allows the State to reclaim the land and is thus facially constitutional. The Court noted however, that the facts of the case do not indicate whether the ECL set in this case was the pre-hurricane MHWL. If the ECL does not represent the pre-hurricane MHWL (which it typically would not as the beaches being renourished were eroded by the hurricane), the state could be claiming property that belongs to the upland owner under common law. The Court however, declined to decide that as-applied issue.

The Court next found that STBR's members' littoral right to accretion is "not implicated" by the Act. The Court states "the common law rule of accretion, which is intended to balance private and public interests, is not implicated in the context of this Act." While acknowledging that the Act eliminates the right to accretion, the Court appears to conclude that the Act's provisions relating to nourishment procedures are sufficient to replace the common law need and purpose for the right to accretion.

The Court next concluded that an upland property owner no longer has the right to have its property remain in contact with the MHWL. Rather, so long as the owner has some "right of access" to the water or MHWL (which the ACT facially provides after the nourishment), then right to have the property remain in contact with the MHWL is ancillary. As such, the Act does not facially result in a taking of the littoral right to have the property

remain in contact with the water or MHWL.

Finally, the Court distinguished its holding in *Belvedere Dev. Corp., v. Department of Transp.*, 476 So.2d 649 (Fla. 1985), which held that littoral rights cannot be severed from the uplands, as applying only in the context of condemnation proceedings. Interestingly, the Court did not rule on the validity of the JCP issued by the DEP, as it only held the Act was facially constitutional. The Court only quashed the First DCA order. It did not remand the case leaving the validity of the JCP in question.

Agency is required to perform its own analysis in determining whether a city's application for waterway marker permit meets one of six relevant rule criteria and cannot delegate its final order authority to its executive director. *Collier County Bd. of County Comm'rs v. Fish & Wildlife Conservation Comm'n*, 33 Fla. L. Weekly D2181 (Fla. 2d DCA Sept. 12, 2008).

After adopting an ordinance establishing new slow speed zones in Naples Bay, the City of Naples applied for a waterway marker permit to mark these zones with signs pursuant to the requirements of Florida Administrative Code Rule 68D-23.105(1)(b). The Florida Fish and Wildlife Conservation Commission (FWC) issued a notice of intent to issue the permit and several entities/individuals filed timely petitions for administrative hearing. Following an administrative hearing, the ALJ entered a recommended order to deny the permit. Despite repeated requests for the seven member FWC commission to consider and issue the Final Order, the FWC commission expressly declined to consider the issue and reaffirmed its "delegation of authority" to its executive director. Thereafter, the executive director entered a Final Order rejecting the ALJ's findings and conclusions of law.

On appeal, the Second DCA only discussed two issues in reversing the FWC Final Order: (1) whether the FWC's interpretation of the F.A.C. rule, referenced above, was erroneous and (2) whether FWC's delegation of authority to its executive director was improper.

The court found that FWC's interpretation of Rule 68D-23.105(1)(b) (i.e. that FWC was not required to make an independent factual determination on whether the application and supporting documentation met one of six enumerated criteria in the Rule) was clearly erroneous. The court rejected FWC's position "that it cannot question the validity of the City's statements in its permit application that it meets the fact-based criteria of rule 68D-23.105(1)(b)." Accordingly, the Court found that the rule requires the FWC to make an independent determination of whether the City's application meets the Rule criteria. The Court further rejected the FWC's argument that it had no jurisdiction to consider the wisdom, validity or purpose of a city ordinance noting that the FWC was confusing the administrative challenge to the permit with a challenge to the ordinance.

The Court also found that the Administrative Procedures Act requires the "agency head" to enter final orders. Thus, it found the FWC's practice of delegating final order authority to its executive director "improper and not supported by the applicable law." The final order was set aside and remanded to FWC commission for proceeding consistent with the opinion.

Consideration of private property rights is part of comprehensive development goals and should be taken into consideration. *CNL Resort Hotel, L.P. v. City of Doral*, 33 Fla. L. Weekly D2265 (Fla. 3d DCA Sept. 24, 2008).

After CNL purchased several hundred acres of land within later-incorporated Miami-Dade County for use as the Doral Golf Resort and Spa, the City adopted a comprehensive development plan ("Plan"). The Department of Community Affairs (DCA) filed a petition challenging the Plan to which CNL intervened. After the City and DCA settled, CNL filed a petition challenging the settlement and revised Plan. CNL stated three claims: (1) the Plan was inconsistent because it abrogates CNL's private property rights while benefiting surrounding private landowners and the Plan impermissibly utilizes "reverse spot" and "specific use" planning; (2) the Plan exacerbates urban sprawl; and (3) the plan is internally inconsistent.

The City moved to dismiss the first and a portion of the third claim contending the claims were constitutional takings claims outside the jurisdiction of the Administrative Law Judge. Following dismissal of the claim, CNL sought certiorari review. The Third DCA reversed the ALJ's order. First, the Court held that CNL demonstrated irreparable injury because it would be unable during the pendency proceeding to obtain a permit to develop its property, while its surrounding neighbors will develop their properties and consume the available, but limited, roadway capacity.

Turning to the merits, the Court found the ALJ's dismissal of the claims improper. The Court first concluded that Florida "protects these sacrosanct private property rights when evaluating a comprehensive development plan" through the State's Comprehensive Plan. See ' 187.201(14)(a), Fla. Stat. Because the State comprehensive Plan requires consideration of private property, the ALJ erred in dismissing CNL's claims. The court further explained that CNL was not asserting a claim against the City for taking its property without just compensation; rather, it wanted City consideration of private property rights before enacting the Plan.

A claim for inverse condemnation based on an illegal exaction more than 13 years ago is time barred. *New Testament Baptist Church, Inc. of Miami v. Dep't of Transp.*, 33 Fla. L. Weekly D2462 (Fla. 4th DCA Oct. 22, 2008)

In 1992, Broward County required the New Testament Baptist Church ("Church") to dedicate 7.5 of its 19 acres for city streets in order to obtain plat approval. When the DOT went to condemn more of the church's property in 2005, the church cross complained that the earlier dedication was an illegal exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and void.

The trial court granted summary judgment against the Church finding its claim was barred by the statute of limitations. On appeal, the Church argued that the dedication was "void" in 1992 because it was an illegal exaction. In affirming, the Fourth DCA rejected this argument holding that the dedication (to the extent it was an illegal exaction) was only voidable,

and not void ab inito because it only affected the Church and did not harm the general public.

In addition, the Court noted that the church had ratified the conveyance by not objecting to it or taking any action to challenge it since 1992, despite the availability of administrative and judicial remedies to challenge the alleged illegal exaction. Therefore, the statute of limitations would apply to bar the claim.

Fact finder is bound by party stipulations to facts. *Seminole Elec. Co-op., Inc. v. Fla. Dep't of Env'tl Protection*, 985 So. 2d 615, 33 Fla. L. Weekly D1560 (Fla. 5th DCA 2008).

Pursuant to particular Florida Electrical Power Plant Siting Act ("Siting Act") provisions, Seminole Electric Cooperative, DEP, and all other parties to a power plant certification proceeding entered into a joint stipulation that there were no disputed issues of fact or law and that the Conditions of Certification provided reasonable assurances that the construction and operation of the proposed electricity generating unit would comply with all applicable agency standards. The parties stipulated that the Application for Site Certification, DEP's Staff Analysis Report, and other documents would comprise the record for which the DEP Secretary would enter his final order. With all issues of law and fact fully stipulated, the parties then canceled the planned certification hearing in accordance with the Siting Act.

Despite the joint stipulation and agreed-upon evidentiary record, the Secretary of DEP attempted to remand the case to DOAH, citing a need to obtain "more facts." When the administrative law judge declined to accept this attempted remand, DEP entered a final order denying certification. Seminole appealed.

Upon appeal, the Fifth District Court of Appeal found the stipulations complete and binding. The court noted DEP's order failed to mention or acknowledge the DEP Staff Analysis or other agency reports, nor did it mention the PSC's Determination of Need, the stipulated record, or the detailed findings of fact set forth in the statutorily authorized stipulated proposed final order. The court ruled that

the Secretary cannot reject stipulated facts as insufficient when the agency and relevant parties deem them complete and, based on the stipulations, no remaining issues were left as a basis to deny the permit.

Standing to challenge a County Comp Plan only requires a particularized interest and not a particularized harm. *Save the Homosassa River Alliance, Inc. v. Citrus County*, 33 Fla. L. Weekly D2490 (Fla. 5th DCA Oct. 24, 2008).

Save the Homosassa River Alliance and other area property owners appealed the trial court dismissal, with prejudice, of their second amended complaint against Citrus County. The Plaintiff's filed suit challenging County's approval of the Resort's application: the Resort owned property adjacent to the Homosassa River and desired to develop and redevelop 87 condominium dwelling units, retail space, amenities and parking. Plaintiff's challenged on the ground that the application was inconsistent with County's Comprehensive Land Use Plan.

The trial court dismissed the suit with prejudice, citing Plaintiff's failure to allege concrete and specific adverse interests that exceeded in degree the general interest in the community good shared by the public at large. The fifth DCA, however, reversed and remanded, citing Plaintiff's Second Amended Complaint as containing sufficient allegations of specialized interests. The court said that the Plaintiff's demonstrated their interests were greater than a general interest shared by all persons in the community because each had a direct and demonstrated concern for the protection of the interests furthered by the comprehensive plan that would be adversely affected by allowing a development that violates the plan. The court clarified the statutory requirement, holding that the statute requires *interests*, and not *harm*, different in degree from other citizens. To hold otherwise, said the court, would eviscerate the reason for the statute and put the public back in the common law standing realm. Thus, according to this court, the applicable statute, section 163.3215, Florida Statutes, simply requires a citizen to have a particularized in-

terest of the kind contemplated by the statute, not a legally protectable right.

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