FLORIDA MUNICIPAL LAW REPORTER

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Editor's Note: The following case law summaries were reported from April 1, 2006, through June 30, 2006.

Section 1. Recent Decisions of the Florida Supreme Court

INITIATIVE PETITION – PROPOSED CONSTITUTIONAL AMENDMENT REQUIRING REFERENDA ON COMPREHENSIVE PLAN AMENDMENTS COMPLIES WITH SINGLE SUBJECT REQUIREMENT – BALLOT TITLE AND SUMMARY LANGUAGE MEET REQUIREMENTS OF STATUTE.

The Florida Supreme Court determined that a proposed amendment to the Florida Constitution, that would require a referendum on all amendments to local government comprehensive plans, complied with the single subject requirement of the Florida Constitution. In addition, the court found the proposed ballot title and summary language satisfied the requirements of section 101.161, F.S. The court rejected claims that the proposed amendment would alter the functions of school boards and the Legislature to comply with Article XI of the constitution, thereby affecting multiple functions of government in violation of the single subject requirement. The court implied that challenges to the ballot title and summary language in this instance might be barred by the doctrines of law of the case and res judicata (amendment sponsors had corrected deficiencies with ballot title and summary identified previously by the court), but also held the ballot title and summary were, nonetheless, sufficient. *Advisory Opinion to the Attorney General Re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 31 Fla. L Weekly S402 (Fla. June 22, 2006).

Section 2. Recent Decisions of the Florida District Courts of Appeal

EMINENT DOMAIN – SECOND LETTER FROM CITY ATTORNEY TO PROPERTY OWNERS CONSTITUTED PRE-SUIT OFFER PURSUANT TO SECTION 73.015.

The issue in this case was which of two letters from the city attorney to land owners operated as the pre-suit offer pursuant to section 73.015 for purposes of calculating attorney's fees. The first letter offered to purchase the property for a specific sum, subject to approval by the City Commission. The second letter offered a different specific sum, identified it as the city's written offer pursuant to section 73.015, but did not make the offer contingent on approval by the City Commission. The Fourth DCA concluded the second letter constituted the pre-suit offer pursuant to section 73.015 because it constituted a binding offer with no contingencies. *City of Boynton Beach v. Janots*, 31 Fla. L. Weekly D1233 (Fla. 4th DCA May 3, 2006).

ZONING – CANOE AND KAYAK RENTAL OPERATION WAS PERMISSIBLE USE UNDER COUNTY LAND-DEVELOPMENT REGULATIONS.

The First DCA reversed a trial court's final judgment on a complaint for declaratory judgment brought by a landowner who sought a permit to operate a riverfront canoe and kayak rental facility within an area designated by the county's land-development regulations ("LDRs") as "Environmentally Sensitive Area 2." Applying principles of statutory construction, the DCA found the county's LDRs specifically authorized development of "public resource based recreation facilities" and that the landowner's proposed development qualified as such a use. In addition, the court noted the landowner's proposed commercial use fell within the category of commercial activities ("water dependent commercial uses") specifically authorized for the area. *Stroemel v. Columbia County*, 31 Fla. Law Weekly D 1251 (Fla. 1st DCA May 4, 2006).

ATTORNEY'S FEES – COURT MAY PROPERLY AWARD FEES UNDER SECTION 57.105 EVEN THOUGH WHISTLE-BLOWER ACTION MAY NOT BE FRIVOLOUS.

The plaintiff filed an action for wrongful discharge against the clerk of court under the Whistle-blower Act. The clerk moved to dismiss for failure to comply with section 768.28(6)(a) (requiring notice of claim to agency and the Department of Insurance). Nevertheless, the plaintiff sought a default judgment. The trial court denied the motion for default, granted the clerk's motion to dismiss without prejudice, and granted the clerk's motion for fees pursuant to section 57.105 because the plaintiff pursued the motion for default even while admitting noncompliance with section 768.28(6)(a). The First DCA affirmed, concluding that 57.105 permits an award of

fees against a party who has asserted an unsupportable claim or defense, even though the party may prevail on some other ground. *Barthlow v. Jett*, 31 Fla. L. Weekly D1254 (Fla. 1st DCA May 4, 2006).

Bert Harris Act – It was not necessary to have filed a suit under the Harris Act in order to have the claim addressed in a settlement agreement.

A developer sued the county regarding a dispute over development rights, and the parties ultimately reached a settlement. Before reaching settlement, the developer notified the county of a potential Harris Act claim, began presuit procedures pursuant to the Harris Act, but never filed a Harris Act claim. The settlement agreement contained language that referenced Harris Act claims. The developer contended the settlement agreement was intended to settle the Harris Act claim and sought to have the settlement approved by a court pursuant to section 70.001(4)(d). The county disagreed, and the developer sought a writ of mandamus to compel the county to file the pleadings necessary to obtain court approval of the agreement and also sought a declaration of its rights under the Harris Act. The trial court dismissed the action, concluding the developer could not have had its Harris Act claim subject to the settlement agreement because its claim had never been filed in court. On appeal, the Second DCA determined that it was not necessary for the developer to have filed suit in order to have the Harris Act claim addressed in the settlement agreement, and remanded for further consideration of whether the settlement agreement was intended to have addressed the Harris Act claim. *Charlotte County Park of Commerce, LLC v. Charlotte County*, 31 Fla. L. Weekly D1270 (Fla. 2d DCA May 5, 2006).

Whistle-blowers – Probationary employee not entitled to use collective bargaining agreement appeals process prior to filing whistle-blower complaint.

The plaintiff, a probationary police officer, brought a complaint against the City of Boynton Beach alleging the city violated his rights under the Whistle-blower Act when the city terminated him in retaliation for a protected communication he made regarding a superior officer. The trial court dismissed his complaint because he failed to file it within the applicable statute of limitations period. The plaintiff contended his complaint was timely filed because he was entitled to first utilize collective bargaining agreement appeal procedures. The district court agreed with the trial court. It found that under the city's personnel manual, the plaintiff was a probationary employee that was not entitled to use the collective bargaining agreement appeal process. *Bridges v. City of Boynton Beach*, 31 Fla. L. Weekly D1328 (Fla. 4th DCA May 10, 2006).

Mandamus – Petition for writ of mandamus granted after city refused to perform ministerial act of forwarding application to Historic Preservation Board.

After the City of Fort Lauderdale informed the petitioners that the Historic Preservation Board would not proceed with their application to designate a historic landmark, the petitioners filed a petition for writ of mandamus seeking to require the city to accept, process and review their application. The circuit court denied the petition. The district court reversed. It found that under the city's Unified Land Development Code, the city's sole duty was to ensure the application was complete before submitting it to the Historic Preservation Board. The district court found the lower court confused the discretion of the Historic Preservation Board to designate a site with the city's nondiscretionary duty to forward completed applications to the Board. *Stranahan House, Inc. v. City of Fort Lauderdale*, 31 Fla. L. Weekly D1333 (Fla. 4th DCA May 10, 2006).

Zoning – City erroneously granted variance for residential development.

The City of Miami granted a major use special permit and a zoning variance to a developer for the construction of a residential project. A neighbor petitioned the Third DCA for second tier certiorari review of the circuit court's affirmance of the city's actions. The court denied the petition as to the major use special permit but granted it as to the variance. It found that an indispensable requirement for issuance of a variance – that no other reasonable use could be made of the property without it – did not exist. *Auerbach v. City of Miami*, 31 Fla. L. Weekly D1432 (Fla. 3d DCA May 24, 2006).

Injunctions – Mayor not entitled to temporary injunction preventing community redevelopment agency from prohibiting him from speaking from the dais.

The Riviera Beach City Council is a community redevelopment agency ("CRA") pursuant to the Community Redevelopment Act of 1969. After the CRA informed the city's mayor that he could only speak at CRA meetings from the podium rather than the dais, the mayor sought a declaratory judgment stating that, as a member of the city governing body, he was entitled to speak from the dais. In addition, the mayor sought a temporary injunction preventing the CRA from prohibiting him from speaking from the dais. The circuit court granted the temporary injunction. The Fourth DCA reversed, finding the record failed to demonstrate irreparable harm required for an injunction because the mayor was not prohibited from participating in discussions. *Wade v. Brown*, 31 Fla. L. Weekly D1438 (Fla. 4th DCA May 24, 2006).

County Charters – Proposed amendment language to county charter that would allow county to regulate future development in portions of county was not misleading, did not violate charter's single subject requirement, and did not violate state law.

Seminole County proposed an amendment to the county charter that would provide for county preemption of land use regulation in portions of the county designated as rural areas, even subsequent to any annexation of these areas by a municipality. After the proposed amendment was approved by voters, the City of Winter Springs sought to have the amendment invalidated on grounds that the ballot language was misleading, that the amendment violated the charter's single subject requirement, and that it was inconsistent with state law – particularly the "dual referendum" requirement of the transfer of powers provision in article VIII, section 4 of the Florida Constitution. The Fifth DCA rejected all of the city's arguments. Based on principles of statutory interpretation applied to various charter provisions, the court disagreed that the amendment affected county citizens' right to adopt and repeal land use ordinances related to the "rural area," and questioned whether citizens even possess the right to directly adopt and repeal land use ordinances under the Growth Management Act. Because the city's single subject claim was premised on similar arguments, the court rejected this claim, as well. As to the city's dual referendum argument, the court concluded that no transfer of power had occurred because the city had not yet assumed planning control over recently annexed properties within the rural area. Further, the court determined that even if the city had assumed planning responsibility (through amendments to the city's comprehensive plan) over the property, a dual vote was not required. It found that a charter county may preempt a city's land use powers by charter because land use powers are regulatory powers that do not trigger the constitution's dual referendum requirement. *Seminole County v. City of Winter Springs*, 31 Fla. L. Weekly D1465 (Fla. 5th DCA May 26, 2006).

Eminent Domain — Florida's Community Redevelopment Act not unconstitutional facially or as-applied.

Landowners of parcels subject to eminent domain petitions filed by the county pursuant to the Community Redevelopment Act ("Act") 163.330-.463, F.S., challenged the constitutionality of the Act. The landowners argued the Act's definition of "blighted area" in section 163.340(8) was unconstitutionally vague both as-applied and on its face. The Second DCA noted that some of the statutory blight factors were subjective and nonquantifiable, but that some were objective and quantifiable. Accordingly, the court concluded the Act was not facially unconstitutionally because it was not vague in all of its applications. Next, the court determined the blight definition was not unconstitutionally vague as applied to the landowners, and that statutory reference to "structures" encompassed more than just buildings; it included roads and supporting infrastructure, as well. Finally, the court reviewed the record and concluded there was substantial competent evidence supporting a finding that the statutory blight factors were established by the community redevelopment agency and not arbitrarily applied. *Fulmore v. Charlotte County*, 31 Fla. L. Weekly D1490 (Fla. 2d DCA May 31, 2006).

Charter Amendment – Proposed county charter amendment providing for "strong mayor" satisfies requirements of Florida Constitution and statutes.

Associations challenged the sufficiency of a proposed amendment to the Miami-Dade County Charter that expanded powers of the mayor and reduced the powers of the county manager. Associations alleged the proposed amendment violated the Florida Constitution because it removed the County Commission as "governing body" of the county. The Third DCA disagreed. It held the proposed amendment did not add to, or subtract from, the current powers of the County Commission. While the amendment transferred certain administrative powers from the county manager to the mayor, and altered the County Commission's power to dismiss the county manager, such transfer would not affect the County Commission's "governing body" powers. *Citizens For Reform v. Citizens For Open Government*, 31 Fla. L. Weekly D1512 (Fla. 3d DCA May 31, 2006).

School Impact Fees – School impact fee ordinance is not facially unconstitutional.

The plaintiffs filed an action seeking a declaratory judgment that a Lee County ordinance imposing a school impact fee constituted an unconstitutional impairment of their contract rights under the Florida Constitution. The trial court determined the ordinance was facially unconstitutional because it retroactively burdened contracts that were executed prior to its effective date. The district court rejected the facial challenge because it determined there were circumstances under which the school impact fee would be valid. It noted the ordinance's retroactive burden on certain contracts would be relevant on remand to the plaintiffs' as-applied challenge. In addition, the court rejected Lee County's argument that the contract clause is inapplicable when the interference is pursuant to the government's police powers. Finally, the court provided additional guidance to the lower court on remand for determining whether the ordinance constitutes an impairment of the plaintiffs' contract rights. *Lee County v. Brown*, 31 Fla. L. Weekly D1581 (Fla. 2d DCA June 9, 2006).

Eminent Domain – Error for court to reinstate void quick-take order.

After obtaining an order of quick-taking for property needed for a road project, Marion County was five days late in depositing the required good-faith estimate of the value of the property into the registry of the court. The landowners moved to vacate the quick-take order. After a hearing, the trial court reinstated the order. The Fifth

District Court of Appeal reversed. It found the county's failure to timely deposit the money voided the quick-take order, and that a void order cannot be reinstated because it is a nullity. The court found, however, that the county's action did not operate to void the entire eminent domain proceeding. *McMurrer v. Marion County*, 31 Fla. L. Weekly D1649 (Fla. 5th DCA June 16, 2006).

Section 3. Recent Decisions of the United States Supreme Court

Due Process – When notice of tax sale is mailed to owner and returned undelivered, government must take additional reasonable steps to provide notice before taking property, if practicable to do so.

The petitioner's property was certified as delinquent after he failed to pay property taxes. The state taxing authority mailed the petitioner a certified letter informing him that if taxes were not paid, the property would be sold in two years. The letter was returned to the state unclaimed. Two years later, the state published a notice of public sale in a local paper and the property was subsequently sold. Before the sale, the state mailed another certified letter to the petitioner, which was also returned unclaimed. The petitioner filed suit alleging the state's failure to provide adequate notice resulted in the taking of his property without due process. The Supreme Court held that when a mailed notice of a tax sale is returned unclaimed, the state is required to take additional reasonable steps to provide notice to the property owner before selling the property, if it is practicable to do so. The fact that the petitioner had a statutory obligation to provide an updated address, or that a property owner who failed to pay taxes might be on notice of possible forfeiture, did not relieve the state of its constitutional obligation to provide adequate notice. The court did not specify what the additional steps might be, although it rejected the petitioner's contention that the state was required to have searched for his new address in the phonebook or other government records. *Jones v. Flowers*, 19 Fla. L. Weekly Fed. S158 (Apr. 26, 2006).

Standing – Taxpayers lacked standing to bring claim in federal court that state franchise tax credit violated Commerce Clause.

The City of Toledo and State of Ohio offered financial incentives to encourage a corporation to expand its facility by offering it local property tax exemptions and a state franchise tax credit. Taxpayers brought suit in federal court, claiming the tax breaks violated the Commerce Clause. The Sixth Circuit upheld the municipal tax credit but found the state franchise tax credit violated the Commerce Clause. On petition for writ of certiorari, the Supreme Court held that because taxpayers lacked standing to maintain the action, it was improper for the lower courts to consider the merits. The court concluded that state taxpayers do not have standing under Article III simply by virtue of their status as state taxpayers, to challenge state tax or spending decisions. While municipal taxpayers may have standing to challenge illegal use of monies of the municipal corporation, the court found that a person's status as a municipal taxpayer could not be leveraged to confer standing for purpose of challenging the state franchise tax credit. *DaimlerChrysler Corp. v. Cuno*, 19 Fla. L. Weekly Fed. S185 (May 15, 2006).

Public Employees – First Amendment does not prohibit managerial discipline based on employee's communications made pursuant to employee's official duties.

The Supreme Court reversed a decision of the Ninth Circuit Court of Appeals, which had reversed a district court's grant of summary judgment against an employee who brought a section 1983 action alleging his employer retaliated against him in violation of the First Amendment based on a memorandum he wrote as part of his official duties as a deputy district attorney. The Supreme Court held that when public employees make communications as part of their official duties, the First Amendment does not protect such expressions from employer discipline because they are not speaking as citizens for First Amendment purposes. *Garcetti v. Ceballos*, 19 Fla. L. Weekly Fed. S203 (May 30, 2006).

Section 4. Recent Decisions of the United States Court of Appeals, Eleventh Circuit

Speech – Free speech and association rights of deputy sheriffs were not violated when deputies were terminated for off-duty conduct.

The Eleventh Circuit upheld a district court decision granting a motion to dismiss action brought by deputy sheriffs alleging their First Amendment rights were violated when they were terminated from employment. The deputies were terminated for off-duty conduct in which they participated in sexually explicit photographs and videotapes for dissemination on pay-per-view Web sites. The court determined the deputies violated a Sheriff's Office regulation that required prior approval of the sheriff before engaging in off-duty conduct. In addition, it found their conduct did not qualify for the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test because it did not involve a matter of public concern and could affect the efficiency and reputation of the Sheriff's Office. *Thaeter v. Palm Beach County Sheriff's Office*, 19 Fla. L. Weekly Fed. C561 (11th Cir. May 26, 2006).

Zoning – Church did not establish prima facie case that county's denial of request for variance violated Religious Land Use and Institutionalized Person Act – Church had standing to bring section 1983 action.

A church was denied a zoning variance by Broward County to operate in an agricultural estate zoning dis-

trict, which required a 1,000-foot separation between nonagricultural, nonresidential uses. The church sued the county under section 1983, the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Florida Religious Freedom Restoration Act (RFRA). The district court found the church did not have standing to bring a section 1983 action alleging violations of the First and Fifth Amendments. The Eleventh Circuit reversed, finding the church, a corporate entity, was a "person" for purposes of section 1983. In addition, the district court determined the church failed to establish a prima facie case that the county's action violated RLUIPA's "equal terms" provision to the extent the county treated the church on less than equal terms with an adjacent nonreligious school. The Eleventh Circuit agreed. It found the ordinance in question was facially neutral, that the separation requirement was in place prior to the church purchasing the property and the county had not engaged in religious "gerrymander" in a way that burdened almost only religious uses, and that the school was not a similarly situated comparator because the school had obtained a rezoning while the church sought a rezoning. *Primera Inglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 19 Fla. L. Weekly C603 (11th Cir. June 1, 2006).

SIGNS – PLAINTIFF'S CHALLENGE TO SIGN ORDINANCE MOOTED BY ENACTMENT OF SUBSEQUENT SIGN ORDINANCE — PLAINTIFF LACKED STANDING TO CHALLENGE PROVISIONS OF ORDINANCE THAT DID NOT PERTAIN TO PLAINTIFF.

After being denied an "off-premise" sign permit, the plaintiff challenged a Fayette County, Ga., sign ordinance as a violation of the First Amendment. The plaintiff contended the ordinance failed to circumscribe the time in which government officials must grant or deny a permit, that it granted county officials unbridled discretion in deciding whether a sign permit would be granted, and that it was a content-based prior restraint of speech that was not narrowly tailored to serve a compelling governmental objective. The plaintiff sought a permanent injunction, which was denied by the district court. On appeal, a panel of the Eleventh Circuit reversed the denial of the injunction. On a petition for rehearing en banc, however, the Eleventh Circuit vacated the panel decision and granted rehearing on the issue of whether an injury under one provision of the sign ordinance conferred standing to challenge other provisions. After the petition was granted, Fayette County repealed the sign ordinance and enacted a new ordinance. The only provision challenged by the plaintiff in the original ordinance that remained similar in the newly enacted ordinance was a provision that prohibited "attention-getting devices." The court determined that the subsequently enacted ordinance rendered all but one of the plaintiff's challenges moot. The court concluded that the plaintiff lacked standing to maintain its remaining claim (challenging the prohibition on "attention-getting devices) because it was not affected by that provision of the ordinance. In reaching this holding, the court avoided the need to address the plaintiff's overbreadth argument that standing under one provision confers standing to challenge all provisions of an ordinance. *Tanner Advertising Group, L.L.C. v. Fayette County*, 19 Fla. L. Weekly Fed. C631 (11th Cir. June 9, 2006).

ORDINANCES – PLAINTIFF LACKED STANDING TO CHALLENGE PROVISIONS OF FESTIVALS ORDINANCE THAT DO NOT AFFECT ITS ACTIVITIES.

The plaintiff challenged the constitutionality of the City of Atlanta's Outdoor Festivals Ordinance, which required an individual or organization to obtain a permit to hold an outdoor festival. The plaintiff was unable to apply for a permit under the ordinance because the city imposed a brief moratorium on the issuance of permits. The Eleventh Circuit considered whether the plaintiff had standing to challenge provisions of the ordinance that did not affect its activities; whether the plaintiff's challenge to the moratorium was mooted when the moratorium expired; whether provisions of the ordinance violated the First Amendment; and whether provisions of the ordinance violated the Georgia Constitution. The court held that the plaintiff lacked standing to challenge provisions of the ordinance that did not affect its activities, and that the overbreadth doctrine does not provide an exception to Article III standing requirements. In addition, it held that the plaintiff's challenge to the moratorium was not mooted by the expiration of the moratorium because the plaintiff had requested damages for that alleged violation. Further, the court held that neither the ability of city officials to comment on the permit application, nor the ability of the city chief of staff to impose special limitations on certain neighborhoods, conferred unbridled discretion to city officials in violation of the First Amendment. Also, it concluded the ordinance's 90-day advance application requirement, its liability insurance requirement, and the moratorium did not impose prior restraints in violation of the U.S. or Georgia constitutions. Finally, the court held that other provisions of the ordinance, which provided exemptions for city-sponsored events, granted unbridled discretion to city officials. *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 19 Fla. Weekly Fed. C648 (11th Cir. June 13, 2006).

ORDINANCES – WHAT CONSTITUTES A "SUBSTANTIAL OR MATERIAL" CHANGE TO AN ORDINANCE DURING THE ENACTMENT PROCESS.

The Eleventh Circuit certified the following question to the Florida Supreme Court: Whether, for purposes of Florida Statutes section 125.66(4)(b), a "substantial or material change" in a proposed ordinance during the enactment process (that is, the kind of change that would require a county to start the process over) is confined to a change in the "original general purpose" of the proposed ordinance, or whether a substantial or material change includes (1) a change to the "actual list of permitted, conditional, or prohibited uses within a zoning category," or (2) a change necessary to secure legislative passage of the ordinance? *Neumont v. Monroe County*, 19 Fla. L. Weekly Fed. C664 (June 14, 2006).

Section 5. Recent Decisions of the United States District Courts for Florida

Search and Seizure – Defendant not entitled to summary judgment in action alleging that deputy sheriff unreasonably seized and demolished residential property in order to abate a public nuisance.

The plaintiffs brought a section 1983 action against a sheriff's deputy alleging the deputy unreasonably seized their residential property in violation of the Fourth Amendment when the property was demolished in order to abate a public nuisance. The district court denied the defendant's motion for summary judgment on several grounds. The court found no question that demolition of the residence constituted a seizure within the meaning of the Fourth Amendment. It determined that defendant was not entitled to summary judgment on his defense of qualified immunity because several facts remained in dispute regarding whether the plaintiffs received adequate notice and the necessity for the demolition. Similarly, the court found that defendant was not entitled to summary judgment on his defense of quasi-judicial absolute immunity because the abatement order under which he acted was unclear and it could not be determined whether he complied with the terms of the order. In addition, the fact that post-deprivation remedies might have been available to the plaintiffs did not entitle the defendant to summary judgment where pre-deprivation process was feasible and no exigent circumstances existed that required immediate demolition of property. Finally, the court found the defendant was not entitled to summary judgment to the extent he argued his conduct only constituted negligence. *Tribue v. Hough*, 19 Fla. L. Weekly Fed. D650 (N.D. Fla. Jan. 6, 2006).

Employment – County entitled to summary judgment on Title VII and ADA claims alleging retaliation for filing charge with Equal Employment Opportunity Commission.

The plaintiff filed suit against Miami-Dade County alleging violations of the Americans with Disabilities Act ("ADA") and violations of Title VII of the Civil Rights Act of 1964. The plaintiff claimed the county retaliated against her for filing a charge with the EEOC and that she suffered discrimination based on Meniere's disease, a condition affecting balance and mobility. As to the plaintiff's Title VII claim, the district court found that the only action that the plaintiff had alleged that could have been classified as an adverse employment action was her allegation that she withdrew her job reclassification request because she was threatened with demotion. Even so, the court found that the plaintiff failed to create a genuine issue of fact that there was a causal link between this or any other action and the plaintiff's filing of the EEOC charge. As to the ADA claim, the court concluded that the plaintiff failed to create a genuine issue of fact that Meniere's disease substantially limited major life activities — her ability to move and balance, or to hear — or that it substantially limited her ability to work. *McGuire v. Miami-Dade County*, 19 Fla. L. Weekly D571 (S.D. Fla. Feb. 13, 2006).

Antitrust – City entitled to summary judgment on Equal Protection, Commerce Clause and antitrust claims arising from city's permitting of horse-drawn carriages.

A horse-drawn carriage operator brought an action against the City of St. Augustine, two city employees in their individual capacity, and another horse-drawn carriage operator, alleging, among other things, that the city's permitting scheme for horse-drawn carriages violated the Equal Protection Clause, the Commerce Clause, the federal Sherman Act and Florida antitrust law. The district court found the city and its two employees were entitled to summary judgment on all counts against them. The court concluded there was no violation of Equal Protection because the city ordinances at issue did not create a discriminatory classification and that the plaintiff failed to demonstrate the city intentionally discriminated against it. The court found there was no unreasonable burden on interstate commerce resulting from either the ordinances or city's alleged tacit approval of arbitrary and capricious rules. In addition, the court concluded the city was exempt from state and federal antitrust laws pursuant to the "state action doctrine" in that city was granted express authority pursuant to special legislative acts to control and regulate carriages. In so doing, the court distinguished this situation from that considered by the Florida district court of appeal in *Duck Tours Seafari, Inc. v. City of Key West*, 875 So. 2d 650 (finding no exemption under state action doctrine because general grant of Home Rule powers did not confer express authority upon local government to grant an exclusive franchise to tour operator). *Avalon Carriage Service, Inc. v. City of St. Augustine*, 19 Fla. L. Weekly Fed. D613 (M.D. Fla. Feb. 23, 2006).

Malicious Prosecution – Abuse of Process – City and city police officer entitled to summary judgment in action alleging city and police officer failed to "undo" plaintiff's arrest by disclosing exculpatory videotape.

Following a bank fraud investigation, a City of Tallahassee police officer obtained a warrant and arrested the plaintiff. The police officer subsequently discovered the existence of a surveillance videotape and fingerprints showing that the plaintiff was not the bank fraud suspect. The case against the plaintiff was later dismissed after an assistant state attorney viewed the videotape. The plaintiff brought an action against the police officer and the city for malicious prosecution and abuse of process for taking no action to "undo" the plaintiff's arrest upon discovery of exculpatory evidence, and for the city's alleged deliberate indifference to the officer's conduct. The district court granted the city and police officer's motions for summary judgment. It found the

officer was entitled to qualified immunity where he was fulfilling a legitimate job-related function, and that he engaged in no misconduct or malice, and communicated all exculpatory evidence to the state attorney's office. Further, assuming a lack of qualified immunity, the plaintiff failed to establish a prima facie case of malicious prosecution where the police officer had no control over prosecution of case. The plaintiff failed to establish a prima facie case for abuse of process because process in this case was used to obtain the result for which it was created. As to the city, the plaintiff failed to show the city was the "moving force" behind any alleged injury. *Bembry v. City of Tallahassee*, 19 Fla. L. Weekly Fed. D661 (N.D. Fla. Apr. 24, 2006).

Religious Land Use and Institutionalized Persons Act – City's motions to dismiss claims of synagogue and United States government pursuant to section 1983, RLUIPA, and other laws granted in part and denied in part.

A synagogue and the U.S. government filed complaints against the City of Hollywood, alleging violations of various rights and laws, including the Religious Land Use and Institutionalized Persons Act (RLUIPA). The complaints were based on actions of the city with respect to operation of the synagogue in a residential area, including a decision by the city's development review board to issue a special exception and the City Commission's reversal of such decision. The plaintiffs alleged the city, among other things, interfered with the synagogue's purpose of providing teaching and worship through arbitrary and capricious zoning enforcement, burdensome land-use regulations, and purposeful harassment of and selective enforcement against the synagogue. The district court granted in part and denied in part the city's motion to dismiss the synagogue's second amended complaint, and denied the city's motion to dismiss the complaint of the United States. First, the court found the synagogue alleged a sufficient injury in fact to create standing for the synagogue to maintain the action on its own behalf. Second, the court found that an alleged city policy of granting special exceptions for houses of worship, to the extent there was such a policy, was insufficient to establish municipal liability under section 1983. Nevertheless, the court found the city's single act of reversing the development review board's issuance of a special exception to the synagogue was sufficient to implicate municipal liability under section 1983 pursuant to *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986). In addition, the court found that allegations that the city had a policy and practice of harassment and selective enforcement against the synagogue, and that nothing was done to prevent such conduct despite fact that such policy was well known, were sufficient to state a claim against the city under section 1983. Third, the court dismissed claims that the city violated section (a)(1) of RLUIPA, finding that synagogue did not sufficiently demonstrate that the city's denial of a special exception permit "substantially burdened" its religious exercise, and that city's process of requiring a special exception did not constitute a substantial burden under RLUIPA section (a)(1). Fourth, the court denied the city's motions to dismiss the plaintiffs' claims under RLUIPA section (b)(1) and (b)(2). In so doing, the court concluded that a plaintiff need not allege a "substantial burden" on religious practice to state claims under RLUIPA sections (b)(1) and (b)(2), and that section (b) is "operatively independent of the jurisdictional prerequisites" of section (a). The court concluded that the plaintiffs' complaints alleged sufficient facts, including the denial of a special exception and selective enforcement, to state a claim under RLUIPA sections (b)(1) and (b)(2). Fifth, the court dismissed the synagogue's claims under the Florida Religious Freedom Restoration Act ("RFRA"), finding the synagogue failed to demonstrate a "substantial burden" on religious practices. Sixth, the court denied the city's motion to dismiss the synagogue's Equal Protection claims, finding the synagogue's complaint contained several allegations sufficient to demonstrate that a similarly situated establishment was treated differently. Seventh, the court denied the city's motion to dismiss the synagogue's Substantive Due Process and Promissory Estoppel claims, finding the complaint contained allegations showing that synagogue established claims for equitable estoppel and promissory with respect to the issuance and subsequent reversal of the special exception permit, and the synagogue's detrimental reliance on actions of the city. Eighth, the court denied the city's motion to dismiss the synagogue's claim that the city's special exception provisions were void for vagueness, finding the regulations in question used terms that were vague and imprecise, and allowed the development review board and commission to make special exception determinations based on criteria not set forth in the regulations. *Hollywood Community Synagogue, Inc. v. City of Hollywood*, 19 Fla. L. Weekly Fed. D627 (S.D. Fla. May 10, 2006).

Moratoria – Plaintiff not entitled to summary judgment on challenge to city ordinance imposing moratorium on industrial development.

The plaintiff entered a contract to purchase a tract of land contingent on obtaining the City of Gainesville's approval to site an asphalt or concrete plant on the property. After preliminary meetings led to concerns about the number of industrial uses in the area, the city adopted a six-month moratorium on industrial permits to give it time to study the existing industrial uses and their impact on the surrounding area. The plaintiff sued the city under a variety of theories, including takings, procedural and substantive due process, equal protection, and tortious interference with a contract or business relationship. The court assumed, for purposes of summary judgment, that the plaintiff possessed a property interest in relevant portions of the property sufficient to maintain standing. The court found that because the adoption of the ordinance was a legislative act, the plaintiff was not entitled to relief under its procedural due process claim. The court rejected the plaintiff's equal protection and substantive due process claims, finding the city's actions satisfied the "rational basis"

test: the city showed existence of a legitimate governmental purpose (to enable it time to study the impact of existing industrial uses) that was furthered by adoption of the moratorium, and that it did not act arbitrarily. The court rejected the plaintiff's takings claims because the plaintiff failed to exhaust its state remedies. While the court noted some hostility on the city's part toward the plaintiff's project, the plaintiff did not demonstrate that the City Commission as an entity acted with an unconstitutional motive, and, therefore, the court rejected the plaintiff's claims of tortious interference. *Watson Construction Co., Inc. v. City of Gainesville*, 19 Fla. L. Weekly Fed. D693 (N.D. Fla. May 23, 2006).

Oath of Office – Oath of allegiance contained in municipal charter is not unconstitutionally vague.

A municipal councilman filed a complaint seeking a declaratory judgment that the oath of allegiance required of council members by the municipal charter was facially unconstitutional under the First Amendment. The oath requires council members to swear or affirm to "support . . .the . . .government of the United States and the State of Florida." The council member took issue with being required to support the "government" as opposed to supporting the "constitution and laws" of that government, arguing that it was either unconstitutionally vague or impermissibly infringed on his First Amendment right of free speech. The court found the language was not unduly vague and it did not violate the First Amendment. It concluded the phrase "support the government" simply was a recognition of the legitimacy of constitutional institutions rather than a requirement to swear agreement with particular governmental policies or leaders. *Dalack v. Village of Tequesta*, 19 Fla. L. Weekly Fed. D654 (S.D. Fla. May 25, 2006).

Section 6. Announcements

Government Liability Seminar

Defense Research Institute's ("DRI") 2007 Government Liability Seminar will be held in Orlando, Fla., at the J. W. Marriott, Grande Lakes on February 1 and 2. This year's seminar will feature popular favorites Professors Blum and Nahmod speaking, respectively, on Qualified Immunity and the recent Supreme Court term. Also, this year's program will feature a variety of both practical and high-level legal topics including defense of asphyxiation cases, critical incident interviews of police officers and the unique issues that arise when defending school districts. An experienced plaintiff's police misconduct attorney will give us insight into the perspective of a plaintiff's attorney on presenting a pursuit case. In addition to the high-level legal education, the seminar will once again offer the opportunity for idea sharing and networking with in-house and outside counsel from across the country. Don't miss this opportunity to join your colleagues for two days of top notch legal education and networking. Please go to *www.dri.org* or contact *RMeyers@KiesewetterWise.com* for more information.

FMAA Web Site

Please visit the FMAA Web site at *www.fmaa.us* for municipal attorney news, an online version of this newsletter, and discussion boards.

Florida Municipal Laws Manual Available

The *2005 Florida Municipal Laws Manual*, created by Municipal Code Corporation in cooperation with the Florida League of Cities, provides a convenient statutory reference source for local government personnel in Florida. Statutory provisions most relevant to municipal government, current through the 2005 legislative sessions, are included. The manual is available in both paperbound and electronic formats at the cost of $78 each, or both formats can be purchased for $104. To purchase the manual, call Municipal Code Corporation at (850) 576-3171.

FMAA Seminar Notebooks Available

Notebooks from the 2006 FMAA Seminar are available for $40. Please contact Tammy Revell at (850) 222-9684 or *trevell@flcities.com* for information.

Mark Your Calendar

The 2007 Florida Municipal Attorneys Association Seminar will be held July 19-21, 2007, at Amelia Island Plantation.