FLORIDA MUNICIPAL ATTORNEYS ASSOCIATION

FLORIDA MUNICIPAL LAW REPORTER

301 South Bronough Street, Suite 300 (32301) ● P.O. Box 1757
Tallahassee, Florida 32302-1757 ● (850) 222-9684

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Editor's Note: The following case law summaries were reported from January 1, 2007, through March 31, 2007.

Section 1. Recent Decisions of the Florida Supreme Court

None reported.

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

Mandamus – Elections – Initiative Petitions – Trial Court Did Not Abuse Its Discretion in Determining that Laches Barred the Mandamus Action Filed by Citizen Initiative Committee.

In 2002, the City of West Palm Beach began a project to relocate city hall and the city's public library. The city passed a series of resolutions in connection with the project over the course of several years and committed several million dollars in funds for the purchase of real property and other services essential to the development. In May 2006, a citizen committee organized to adopt a citizen initiative ordinance that would have effectively required a referendum before city hall could be relocated. An identical initiative ordinance was filed in relation to the relocation of the city library. The citizens obtained sufficient signatures to place the issue on a ballot for submission to the public. In response, the city began the process of filing suit to obtain declaratory relief regarding the sufficiency of the proposed ballot language used by the citizen committee in its initiative ordinances. Next, the citizen committee sued for an alternative writ of mandamus to require the city to set an election on their two initiatives or submit the ordinances to the electors within the time allowed by the charter. The trial court initially entered an order granting the alternative writ of mandamus. The city filed a motion to quash and the trial court subsequently entered an order quashing the writ of mandamus. When the citizen committee appealed the order, the city raised the defense of laches and the district court affirmed the trial court, essentially basing its holding upon the laches defense and the citizen committee's failure to act during the three-year time frame that arose between the city's initial actions to relocate city hall and the time when the citizen committee formally initiated the initiative ordinance process. *Carolyn J. Wright, Michael Bornstein, Anita Mitchell, Gladys D. Van Otteren and Patricia M. High v. Louis Frankel*, 32 Fla. L. Weekly D97 (4th DCA December 27, 2006).

Comprehensive Plan Amendment – Hearing – Final Order Dismissing Petition for Hearing to Challenge a Land Use Change Was Proper Where Petitioner Lacked Standing.

The petitioner was a land use planner who did not live, own property, or have a business address or business license in the Village of Wellington. However, he sought to challenge a land use decision approved by the village. The order dismissing the petition for a hearing was properly dismissed because he only conducted business activity in Wellington, which is not the same as owning or operating a business in Wellington. *Denis Potris and Bart Novack v. Dept. of Community Affairs and The Village of Wellington*, 32 Fla. L. Weekly D172 (Fla. 4th DCA January 3, 2007).

Involuntary Annexation – Certiorari – County Failed to Demonstrate Miscarriage of Justice Sufficient to Warrant Exercise of District Court's Certiorari Jurisdiction.

The City of Cocoa annexed 757 acres of property. Nearly all of the affected parcels consented to the annexation. The surrounding county sought a writ of certiorari to review the annexation. The city had been the recognized utility provider for the annexation area for nearly 50 years. Additionally, the entire annexation area was slated for urban development under the county's land use plan and was surrounded by property already developed for urban purposes. Although §171.043, Florida Statutes, provides that for involuntary annexations, the area to be annexed must include an area already developed for urban purposes. Cocoa's annexation apparently did not include such area. Nevertheless, the district court denied the petition for writ of certiorari, citing the second-tier review standard which requires there be a violation of a clearly established

principle of law resulting in a miscarriage of justice. The district court's decision included a finding that the county failed to demonstrate a miscarriage of justice sufficient to warrant the exercise of the court's discretionary certiorari jurisdiction. *Board of County Commissioners v. City of Cocoa, Florida*, 32 Fla. L. Weekly D294 (Fla. 5th DCA January 5, 2007).

Counties – Attorney's Fee Reimbursement – Summary Judgment in Favor of County Affirmed Not on Basis of Sovereign Immunity as Argued, but Because Alleged Sexual Misconduct Did Not Arise Out of and in the Course of Commissioner's Employment with Board.

Several ethics complaints were filed against a county commissioner. The charges culminated in an administrative hearing from which the commissioner emerged victorious. The commissioner sought reimbursement from the county under theories including reimbursement under the county attorney's fee policy; reimbursement under the common law; and a declaratory judgment as to his right to fee reimbursement by the public. The trial court denied the second and third theory on the basis of sovereign immunity. The trial court denied summary judgment on the first theory because the alleged sexual misconduct did not serve a public purpose. On appeal, the district court rejected the trial court conclusion that sovereign immunity applies to bar an official's recovery of attorney's fees, explaining that supreme court precedent recognizing the common law right to fee recovery must be presumed to have considered and rejected the application of sovereign immunity limitations on recovery. However, the court upheld the lower court's denial of fee recovery on the basis of whether the conduct at issue satisfied the public purpose test. The court explained that the specifically alleged conduct does not dictate the outcome; rather, the analysis must look to the context of the ethics charges and whether the context out of which the alleged conduct arose serves a public purpose. Here, although the commissioner was cleared of the alleged sexual misconduct underlying the reimbursement request, the context surrounding such conduct could not be deemed to serve the public interest. *Rudy Maloy v. Board of County Commissioners of Leon County*, 32 Fla. L. Weekly D308 (Fla. 1st DCA January 26, 2007).

Civil Rights – Property Interest in Deceased Remains – Trial Court Erred in Not Granting City's Motion for Directed Verdict Where No Constitutionally Protected Property Interest Existed to Support Plaintiff's §1983 Claim.

The plaintiff sued the City of Key West for a burial mix up which involved her husband's remains. The urn containing her husband's cremated remains was interred in an above-ground vault at the Key West Cemetery. Six months later, the casket containing the plaintiff's cousin-in-law was placed in the same vault with the urn. This mix up lasted for approximately two months, after which time the plaintiff filed suit alleging she was deprived of a property interest in her husband's buried remains without due process in violation of 42 U.S.C. §1983. At trial, upon the close of the plaintiff's evidence, the city moved for a directed verdict. The trial court denied the motion. A jury awarded the plaintiff $15,000 in §1983 damages. On appeal, the district court reversed the judgment. The court explained that under Florida law, relatives of a decedent have limited rights to the decedent's remains. Those rights are for burial or other lawful disposition but no other statutory purposes. Accordingly, any claims for events occurring after burial must be pursued under traditional common law causes of action. In this case, the plaintiff's only claim was a post-burial deprivation of property interest in the remains. Given that Florida law does not grant any substantive property interest in those interred remains, the court could find no constitutionally protected property interest that would support the §1983 claim. *City of Key West v. Lorrain Knowles*, 32 Fla. L. Weekly D204 (Fla. 3d DCA January 10, 2007).

Liens – Foreclosures – Counties – Trial Court Abused Its Discretion in Ordering County to Enter an Agreement Effectively Subordinating Its Properly Filed Lien to a Subsequent Mortgage and in Declaring County Liens Satisfied.

Broward County brought suit to foreclose $423,750 in liens it had recorded against a property for code enforcement violations. The property owners sought to refinance the property during the pendency of the litigation but asked the court to discharge the county's liens to facilitate the refinancing. Believing there would be sufficient equity to refinance the property and still extinguish the county's liens, the court entered an order directing the county to enter a subordination agreement by a given deadline, subordinating its lien position to that of the refinance mortgagor. The county did not execute the agreement as a necessary building official was away for an emergency and did not return until after the deadline expired. After the county finally assented to the agreement, the trial court entered an order stating the county liens were satisfied and are of no further force or effect. On appeal, the district court of appeal reversed the order and held the trial court abused its discretion in ordering the county to enter the subordination agreement and unilaterally declaring duly recorded liens satisfied. The trial court had no discretion to enter an order that circumvented the statutory order of lien recording and its order could not be substantiated as a form of sanction for the county's failure to execute the agreement as no findings of willfulness or deliberate disregard were contained in the record. *Broward County v. Andrew Recupero*, 32 Fla. L. Weekly D397 (Fla. 4th DCA February 7, 2007).

Ad Valorem Taxation Exemption – Telecommunications – Trial Court Erred in Holding City's Fiber Optic Equipment and Internet Network Equipment Exempt from Ad

Valorem Taxation and Properly Held Leasing of Communications Tower Space to Private Cellular Providers Was Not Exempt.

The City of Gainesville appealed a portion of a final declaratory judgment wherein the trial court in part held in favor of the city with regard to its fiber optic network and Internet equipment being exempt from ad valorem taxation, but otherwise held that nine of the city's communication towers were not exempt from ad valorem taxation. The city also appealed the court's holding that vacant property held by the city as a buffer between its power generating facilities and residential development was not exempt from ad valorem taxation. The district court of appeal reversed the trial court's holding that exempted the fiber optic network and Internet equipment from ad valorem taxation as a matter of law. The district court cited Florida Supreme Court precedent that distinguished between a city's provision of telecom services as something traditionally provided by the private sector and accordingly subject to ad valorem taxation, versus the city's provision of other utilities like electricity and water as traditionally provided by the city and solidly representing a municipal or public purpose. The issue was remanded for a determination of whether, under the supreme court precedent, it could be said the provision of telecom services satisfied the municipal or public purpose test. The district court affirmed the trial court's holding that the telecommunications could not satisfy the municipal or public purpose test. The court reasoned that to the extent the city did not use the towers to provide services directly to the public, but rather leased space on the towers to private providers who in turn sold telecom services to customers, such leasing of space on the towers to private providers does not satisfy the municipal or public purpose test for tax exemption which allows government-to-government leasing activity but not government-to-private or proprietary leasing activity. The district court also affirmed the trial court ruling on the vacant property owned by the city. The court explained that while the property was held in fee simple by the city for future expansion of electrical facilities and for a residential development buffer, tax exemption could not be recognized where a timber company both retained rights to harvest timber on the property and further leased hunting rights to another party. *City of Gainesville v. Ed Crapo, Von Fraser, Jim Zingale*, 32 Fla. L. Weekly D442 (Fla. 1st DCA Feb. 12, 2007).

Torts – Sovereign Immunity – Issues of Fact Precluded Issuance of Final Summary Judgment in Favor of City Where Police Officer Struck Pedestrian While Driving to Work in a "Take Home" Vehicle Issued by City.

A police officer employed by the City of Hollywood, Fla., was off duty but driving a city-issued vehicle to work early one morning and struck and injured a child. The child sued the officer and the city, arguing the city was liable on a theory of respondeat superior. The trial court issued final summary judgment in favor of the city and the accident victim appealed. The city argued it was not liable for the officer's off-duty actions to the extent prior case law established the conduct at issue must be the type the officer was hired to perform; the conduct must occur within the time and space limits authorized or required by the work to be performed; and the conduct must at least be activated by a purpose to serve the employer. In reversing the summary judgment, the district court of appeal considered that the officer was on his way to the police station, driving in a marked police vehicle one hour before his shift began and he was going to work early to study for the police lieutenant's exam. Such activity could reasonably satisfy the three elements required by existing case law to bring the officer's conduct within the scope of his employment, notwithstanding his off-duty status. Accordingly, the court reversed the trial court order and remanded the matter for further proceedings consistent with its conclusions. *Garcia v. City of Hollywood, Florida*, 32 Fla. L. Weekly D507 (Fla. 4thd DCA February 21, 2007).

Contracts – Trial Court Erred in Excluding Evidence that a Developer Failed to Timely Provide a Required Financing Commitment Letter Requirement for a Project with the City.

The City of Hollywood appealed a one-million dollar judgment entered against it in a lawsuit by a developer for breach of an August 29, 1997, lease contract with a developer involving a lease of beach property for the construction of a hotel and other commercial enterprises. The suit alleged the city breached the contract by failing to provide the developer with notice of a default event and a chance to cure. The city contended it wasn't required to submit the notice of default, as the incident driving the city's decision to pull out of the deal was not specifically provided for in the "Event of Default" provisions of the agreement. The facts at trial revealed the developer waited until the last day of the one-year window allowed to provide evidence of a financial commitment to complete the project. However, the commitment letter contained language that clearly showed the lender still had sole discretion as to whether it would terminate the processing of the commitment. The city construed this as something less than an actual financial commitment. On appeal, the city argued the trial court erred in excluding evidence that the purported commitment letter was untimely, if not fraudulent. That evidence showed that the developer represented payment of a $100,000 commitment fee to the lender on August 28, 1998. However, the check had not been delivered to the lender until September 14, 1998. Additionally, the developer did not disclose that that lender withdrew the commitment on October 22, 1998, and returned the $100,000 check uncashed. Only during discovery for the lawsuit did the city become aware of that evidence and the court felt it was relevant to the issue of whether the developer met the one-year deadline for the commitment. Accordingly, the court reversed the judgment. *City of Hollywood v. Diamond Parking, Inc.*, 32 Fla. L. Weekly D511 (Fla. 4th DCA February 21, 2007).

Voluntary Annexation – Circuit Court Properly Quashed an Ordinance Annexing a Parcel which Created a 100-Acre "Pocket" of Unincorporated Territory.

The City of Center Hill annexed 1,235 acres of land in unincorporated Sumter County. The owners of a nearby parcel petitioned the circuit court for certiorari review of the ordinance, arguing the annexed property was not reasonably compact as required by statute, as it created a 100-acre "pocket" of unincorporated territory surrounded by hundreds of acres of municipal property. The circuit court granted certiorari and quashed the annexation ordinance, finding that the annexation resulted in the creation of an impermissible pocket of unincorporated property. On petition for second tier certiorari, the district court, citing section 171.013, set forth the standard for proper annexation, one element of which is that the annexed area be compact. Section 171.013(12) defines compactness as the "concentration of a piece of property in a single area and precludes any action which would create enclaves, pockets or finger areas in serpentine patters." The court acknowledged "pockets" is not defined in the statute but relied upon an earlier court's conclusion that a pocket is "a small isolated area or group." The city argued that since the area annexed in this case totaled 100 acres, it was not "small" as referenced in the court's definition of pocket. The court admitted that the100-acre area was not insignificant relative to the 1,235-acre annexation. Nonetheless, the annexation resulted in the creation of an area of unincorporated property "left in a sea of incorporated property," an area described at one point as "looking like a balloon on a string." Because a pocket-like area resulted, the court denied certiorari. *City of Center Hill, Florida v. Clyde McBryde, William Sander, et al.*, 32 Fla. L. Weekly D787 (Fla. 5th DCA March 23, 2007).

Section 3. Recent Decisions of the United States Supreme Court

None reported.

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

Civil Rights – Excessive Force – District Court Erred in Granting Summary Judgment to City where District Court Took Erroneous View of the Law and Ruled Plaintiff Could Not Prove a Critical Element of His Excessive Force Claim.

Juan Velazquez sued the City of Hialeah, alleging the use of excessive force by its police officers. The law of the Eleventh Circuit is that an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable for his nonfeasance. Velazquez's suit alleged that two officers were present while Velazquez was subjected to a beating, while handcuffed. The two officers admitted to being present during the incident, but Velazquez could not identify which officer beat him. Based on this inability to identify who beat him, the district court granted summary judgment, concluding Velazquez could not prove which officer beat him. On appeal, the circuit court of appeals retorted that the failure of the victim to identify the aggressor is not the law and if it were, "all that police officers would have to do to use excessive force on an arrestee without fear of consequences would be to put a bag over the arrestee's head and administer the beating in silence." The court concluded that given the allegation that the two officers were present and the officers' admission to being present, such information taken in a light most favorable to the non-moving party in a summary judgment proceeding demonstrates that triable issues of fact exist as to whether one or both of the officers used excessive force on him, and whether one or the other failed to intervene to stop the use of such force. Accordingly, the court reversed the order granting the city's motion for summary judgment. *Juan Velazquez v. City of Hialeah*, 20 Fla. L. Weekly Fed. (11th Cir. March 14, 2007).

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

Civil Rights – Speech – City's Motion for Summary Judgment Failed Against City Firefighter Who Published an Opinion Column that Criticized the Quality of Services Provided by Fire and Paramedic Service because Firefighter's Speech Was Protected Speech.

City of Marathon firefighter, paramedic and local union official, Robert Abad, published an opinion column that criticized the city fire service's quality based on an insufficient number of emergency workers and below-average annual wages. The day the article was published, Abad was suspended without pay pending an investigation of the matter and whether the actions violated the city's standard operating procedures relevant to media relations. Abad was disciplined with three shifts without pay. Thereafter, Abad filed suit alleging various claims under 42 USC §1983. The city moved for summary judgment on the claims, asserting the speech at issue was not public employee protected speech. The district court denied summary judgment and concluded while Abad stood to gain personally from the pay raise he advocated in the column, the issues raised by the column regarding the quality of service provided by the local firefighter/paramedics were of concern to the general public, as demonstrated by the content of the column and the newspaper's decision to print the article. Additionally, Abad's speech interest was found to outweigh the city's interest in maintaining public

confidence in the Fire Department's ability to protect the public, given its design to raise public consciousness about a potential danger to the community. Finally, the court concluded that the city manager who disciplined Abad was entitled to qualified immunity. Qualified immunity protects a government official for actions taken in an official capacity which do not violate a clearly established statutory or constitutional right of which a reasonable person would have known. The district court concluded that since the column advocated for a raise and other workplace enhancements from which Abad would have personally benefited, it was not clearly established that a court would inevitably hold the column at issue to be protected speech. *Robert Abad v. City of Marathon, Florida*, 20 Fla. L. Weekly Fed D436 (S.D. Fla. February 8, 2007).

Civil Rights – Commerce Clause – Ordinance that Imposed Size Limits on Properties Operated by Formula Retail Drugstore Establishment and Effectively Precluded Store Owners from Selling Real Estate to National Drug Store Chain Was Unconstitutional Under Dormant Commerce Clause.

The plaintiffs owned a retail store in the Village of Islamorada. They sought injunctive relief contending the village's interpretation of its Formula Retail Regulations denied them a constitutionally protected right to sell their property. The ordinance, limiting formula retail establishments to 50 feet of frontage and 2,000 total square feet, was held to violate the Dormant Commerce Clause. The ordinance had the practical effect of discriminating against national retail chains in favor of local non-formula stores, which could be of any size, and consequently, the ordinance was subject to elevated scrutiny. The regulations were found to be unconstitutional under the elevated scrutiny test applicable to regulations involving interstate commerce that are discriminatory. The ordinance failed the elevated scrutiny test because the alleged purpose of preserving small-town community was not a legitimate purpose in this instance, since the village could not demonstrate that it was uniquely relaxed or natural, nor was there a predominance of natural conditions and characteristics over human intrusions. Accordingly, the ordinance could not be found to serve the alleged interests of preserving small-town character. The ordinance also failed the more permissive *Pike v. Bruce Church*, burdens versus benefits balancing test, applicable to regulations that are not discriminatory. In this case, the evidence showed commerce had been greatly curtailed in that plaintiffs were unable to sell their property except at reduced prices, willing purchasers were unable to expand their businesses into the area and residents of the village lost the advantages of having unhampered national competition for their business. By comparison, the purported benefit was an attempt to establish a small-town character but that was not encouraged by the ordinance to the extent it allowed new, non-conforming chain stores to be established. *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, 20 Fla. L. Weekly Fed D577 (S.D. Fla. February 28, 2007).

Section 6. Announcements

FMAA Web Site

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