FLORIDA MUNICIPAL ATTORNEYS ASSOCIATION

FLORIDA MUNICIPAL LAW REPORTER

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

Section 1. Recent Decisions of the Florida Supreme Court

BOND VALIDATION – TRIAL COURT CORRECTLY CONCLUDED COMPETENT SUBSTANTIAL EVIDENCE SUPPORTED THE FINDING THAT IMPROVEMENTS TO EXPAND CAPACITY AND TREATMENT FACILITIES AND TO PROVIDE FOR WASTEWATER COLLECTION FROM NEW USERS WOULD CONFER SPECIAL BENEFIT ON NEW USERS.

A citizens group challenged a City of Marco Island bond validation on the issue of whether special assessments, which will be used to pay the debt service on two bond issuances, are equitably apportioned when imposed only on new users rather than on all users of the system. The supreme court concluded in agreement with the trial court that the expansion of the wastewater treatment and collection system conferred a special benefit on the new users and the special assessment was not arbitrary or inequitable. In particular, the city offered testimony that the new users of the system would receive a special benefit in that there would have been no reason to expand the capacity of the wastewater system had the city not undertaken to provide service to the new users. The city's use of the bond funds and the assessment was sufficiently limited to the wastewater treatment expansion and collection project based on the declarations contained within the bond resolution passed by the city. Finally, the court reiterated that so long as expansion is reasonably required and assessments or fees were imposed on new users only to the extent representing a pro rata share of the expansion costs, the cost of funding new facilities could be born exclusively by new users even if a collateral benefit would be conferred upon existing users. *Citizens Advocating Responsible Environmental Solutions v. City of Marco Island*, 32 Fla. L. Weekly (Fla. May 31, 2007).

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

EMINENT DOMAIN – TRIAL COURT ERRED IN AWARDING SEVERANCE DAMAGES TO PROPERTY OWNER BASED ON CHANGES IN TRAFFIC FLOW WHERE CHANGES RESULTED FROM CITY'S CONSTRUCTION OF NEW MEDIAN ON PROPERTY ALREADY OWNED BY CITY AND NOT ON PROPERTY TAKEN THROUGH EMINENT DOMAIN.

The plaintiff, Twin Restaurants, sued the City of Jacksonville for a taking of commercial property owned by Twin. The city acquired the parcel, along with several others, in connection with a road widening project. The trial resulted in an award of compensation for Twin's interest in the parcels actually taken through eminent domain. Twin also sought and was awarded severance damages on the theory that a new median constructed by the city prevented westbound traffic on the adjacent roadway from directly entering Twin's property, thereby affecting the business operated thereon. The City of Jacksonville appealed the award of severance damages and the First District Court of Appeal reversed that portion of the award. To receive severance damages the rule requires any alleged impairment must result directly from a taking. The city's motion to prevent any evidence on severance damages was erroneously denied since the theory advanced by Twin was that the damages resulted indirectly from a median built on city-owned property that altered the flow of traffic, and not directly from the taking of Twin's actual property. Accordingly, the award of severance damages was reversed. *City of Jacksonville v. Twin Restaurants, Inc.*, 32 Fla. L. Weekly D913 (Fla. 1st DCA April 9, 2007).

REAL PROPERTY – DEDICATION TO PUBLIC – TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO CITY BASED ON ALLEGED STATUTORY DEDICATION UNDER SECTION 95.361(1), FLORIDA STATUTES, WHERE CITY DID NOT ASSERT AND PROPERTY OWNER DID NOT ADMIT THE CITY CONTINUOUSLY AND UNINTERRUPTEDLY MAINTAINED OR REPAIRED THE SUBJECT ROAD FOR FOUR YEARS.

When the plaintiffs, James and Betty Pasco, bought their property, there was a dirt pathway that traversed the southern boundary of their property. Several years later, the city decided to pave the road, but the path of the road was altered to cut diagonally across the front of the plaintiffs' property, at one point intruding almost 30 feet onto their property. The plaintiffs objected to the paving but the city did not relent, claiming it had a 30-foot easement allowing the road. Some 20 years later, the plaintiffs sought a permit to build a front porch on their home. Because the road was so close to the plaintiffs' home, they were told they would need to obtain a variance before proceeding. Shortly thereafter, the plaintiffs sued the City of Oldsmar alleging the city built a road across their property. They sought a declaratory judgment confirming their title to the portion of their property beneath and near the road and alternatively claimed damages for inverse condemnation. The city defended its action, chiefly arguing there had been a statutory dedication of the property under §95.361(1), Florida Statutes. A key element under that statute required the city to show that it continuously and uninterruptedly maintained the road for four years. During the litigation, discovery revealed the city could not produce any documents or legal instruments evidencing its title to the property beneath the road. On the other hand, the plaintiffs responded to a request for admissions by admitting that the city "maintained the road since it was constructed." However, the plaintiffs also offered affidavits that averred the city had never repaired, patched, striped or edged the road since it was constructed. Rather, the city cleaned out the drainage gully in 2003 and swept the street once in 1999. Nonetheless, on the basis of this evidence, the trial court awarded summary judgment to the city. On appeal, the district court explained that the statutory dedication statute should be strictly construed. And the plaintiffs' evidence about the sporadic nature of the city's maintenance of the roadway raised genuine issues of disputed fact regarding whether the city maintained the road continuously and uninterruptedly for the requisite time period pursuant to §95.361(1). Therefore, the court reversed summary judgment and remanded the case to the trial court. *James I. Pasco and Betty Pasco v. City of Oldsmar, Florida*, 32 Fla. L. Weekly D1038 (Fla. 2nd DCA April 20, 2007).

Counties – Impact Fees – Trial Court Erred in Granting County's Motion for Summary Judgment Where County Failed to Prove Absence of Fact Issues as to the Calculation of the Impact Fee and the Intended Use of Revenues from the Fee.

A community action group organized to combat an impact fee and surcharge imposed by Sarasota County in connection with the county's demand that residents hook up to the county's central sewage system. Count I of the suit challenged the county's authority to compel residents to connect to the sewer system. The action group lost on this count and did not appeal it. In Count II, the group challenged the $1,642-per-dwelling-unit impact fee based on the fact that the fee would generate some $23 million but the county intended to divert at least $10 million of that revenue to repay existing indebtedness. In this count, the group argued the county intended to use the impact fee proceeds to improperly benefit existing customers, rather than to absorb the impact of new hookups. In Count III, the action group challenged the anticipated $17.50-per-month surcharge fee, asking the court to declare that the county could not legally impose the surcharge fee exclusively against the new users because the county intended to fund a sewer system capital improvement plan for the whole county. The trial court granted the county's motion for summary judgment on Counts II and III. On appeal, the district court considered the action group's argument that the $10 million in fee revenue was above and beyond the residents' fair share of any sewer system expansion cost. The county argued its intended use of the impact fee revenues was legitimate given the difficulty of distinguishing between the costs for existing facilities and those needed for new facilities. On one hand, the county asserted that payment of existing debt was an integral part of proceeding with expansion of the sewer system, given the trend of modern financing that requires reductions in existing debt to permit financing of further expansion. The county also argued that the mandated comprehensive planning concurrency requirements for sanitary sewer systems under §166.3180, Florida Statutes, dictated local governments must ensure that facilities be in place for future development. Accordingly, this factor made it difficult or impossible to clearly distinguish between existing costs and expansion costs. For these reasons, the district court disagreed with the groups' argument that revenues from an impact fee can never be used to pay existing indebtedness or that the amount of the impact fee cannot be based in part upon a recognized need for future capacity. However, absent any analysis within the trial court's summary disposition of Count II, the district court felt there remained genuine issues of fact as to whether the county met its burden of showing the fee had a reasonable connection or rational nexus between the need for additional capital facilities for the anticipated new users and benefits expected to accrue to the those new users. Therefore, summary judgment was reversed. As to Count III, the county moved for dismissal because at the time of the lawsuit, there was not yet any ordinance establishing the surcharge calculation and suit was pre-mature before such was passed. The trial court granted dismissal; however, it failed to acknowledge that even at the time of the summary judgment hearing the county mentioned it had since passed a resolution establishing the surcharge fee. The trial court erred in failing to issue an order allowing the action group to file an amended complaint challenging the resolution. *Save Our Septic Systems Committee, Inc. et al. v. Sarasota County*, 32 Fla. L. Weekly D1119 (Fla. 2nd DCA April 27, 2007).

Zoning – Historic Districts – Trial Court Did Not Depart from Essential Requirements of Law in Reversing City Council's Decision to Deny Certificate of Appropriateness for a Proposed Building that Exceeded Certain Height Based on Historic District Design Guidelines.

The City of Tampa petitioned for certiorari relief from an order of the circuit court that reversed the city's denial of a certificate of appropriateness (COA) for an applicant to build a multistory residential condominium. The COA is issued by an architectural review commission (ARC), and the ARC's standards are effectively guidelines developed to govern the historical district within which the proposed high rise was to be built. The ARC denied the applicant's COA on the basis the structure was too tall for its historic district location and that the historic district design guidelines trump the zoning administrator's review of the applicant's plans for compliance with the zoning code. The circuit court reversed the ARC decision and that of the City Council based on its findings. On appeal for second-tier certiorari review, the district court affirmed the circuit court. Essentially, the district court considered an aspect of the historic district guidelines that empowered the ARC to consider the "scale: height and width" of the proposed building. However, the district court found evidence that when the historic district guidelines were enacted, there was an expressed legislative intent to defer to any conflicting zoning ordinance. Further, another aspect of the historic district regulations provided that the zoning administrator, and hence the zoning code, would be the sole authority for administration of the zoning code. Finally, the district court explained that the city could have utilized a historic overlay district that contained specific height restrictions notwithstanding the underlying zoning. The failure to enact such legislation, coupled with the existing indications of legislative intent to defer to the underlying zoning requirements led the district court to affirm the denial of certiorari. *City of Tampa v. City National Bank of Florida, and Citivest Construction Corp.*, 32 Fla. L. Weekly (2nd DCA May 23, 2007).

Sovereign Immunity – Trial Court Properly Granted Summary Judgment to City for Its Police Officer that Struck Pedestrian and Was Protected by Sovereign Immunity Based on Facts Indicating Officer Was Not Engaged in His Primary Responsibility as Law Enforcement Officer at the Time of the Accident.

A City of Hollywood police officer won summary judgment on the question of whether the officer was acting within the course and scope of his duties and, as a result, protected from liability by sovereign immunity. The injured party argued the facts indicating a jury issue existed included: (1) at the time of the accident, the officer was operating a vehicle provided by the city; (2) the "take-home" vehicle was part of the city's employment package; and (3) the officer was require to be in uniform when operating a police vehicle. However, the district court disagreed and explained that prior cases held an employee merely driving to or from work in one's own car doesn't necessarily demonstrate action within the course and scope of employment. And in this case, the district court noted the officer was not engaged in his primary responsibility of his job as a police officer. The officer was not actually on duty at the time of the accident and he was not furthering any interest of his employer or performing any duties of his employment at the time. Instead, he was simply in transit to the police station an hour before his shift. Therefore, he was acting outside the scope of his employment and granting summary judgment to the city on its defense of sovereign immunity was appropriate. *Garcia v. City of Hollywood*, 32 Fla. L. Weekly D1442 (4th DCA June 6, 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

Outdoor Advertising – District Court Erred in Dismissing Advertiser's Sign Building Permit Complaint as Moot; However, Dismissal Was Affirmed Based on Other Defects in Sign Permit Applications at Issue.

KH Outdoor, LLC filed a complaint against Clay County, Fla., following the county's denial of some seven outdoor sign building permit applications under the county's existing sign ordinance. In the complaint, KH sought injunctive relief in addition to damages based on alleged violations of the First and Fourteenth Amendments to the United States Constitution. At trial, the district court dismissed the complaint as moot based on the county's repeal of the challenged sign ordinance and adoption of a new, constitutionally sound ordinance. KH appealed to the Eleventh Circuit Court of Appeals and argued that its claims survived the mootness defense because of the alleged damages. The eleventh circuit agreed, explaining that monetary damages lost as a result of a defective code do not vanish based on a change in the subject ordinance, and concluded the district court erred in dismissing the complaint on this ground. However, for other reasons, the eleventh circuit affirmed the dismissal. In particular, the court held KH lacked standing to pursue its claims. In such actions, litigants such as KH must be able to demonstrate that injury is causally related to the alleged constitutional infirmity of a sign ordinance and that injury is therefore likely to be redressed through legal action against the sign ordinance. Here the injury was KH's inability to erect its proposed billboards. However, the record indicated that the building permit applications submitted by KH were non-compliant with the Florida Building Code as well as Chapter 489, Florida Statutes, regarding contracting. A favorable decision for KH with respect to the challenged sign code provisions would not have allowed it to overcome the alleged injury and build its signs because of the other, unrelated problems with the building permit applications. Accordingly, KH lacked the requisite standing to pursue its claims and the district court decision was affirmed. *KH Outdoor, LLC v. Clay County, Florida*, 20 Fla. L. Weekly Fed C449 (11th Cir. March 29, 2007).

Civil Rights – Speech – Noise Ordinances – District Court Did Not Err in Granting City's Motion for Summary Judgment as to the Validation of Its Noise Ordinance.

A club owner sued the City of Miami Beach for First Amendment violations under the city's noise ordinance. The club owner alleged the city violated state law in that it purported to establish a code enforcement scheme that empowered special masters to enforce violations under the Miami-Dade County noise ordinance, where the city never adopted the county noise ordinance as its own. The city responded to this claim by repealing its own noise ordinance and adopting that of the county. This portion of the club owner's claim was thereby rendered moot and the eleventh circuit agreed with the city that the claim was indeed moot absent any asserted damages based on the code enforcement law violation. The club owner raised several arguments challenging the constitutionality of the Miami-Dade noise ordinance; however, after a careful and detailed analysis of the various portions of the ordinance, the court found it passed constitutional muster and affirmed the district court order that found the county ordinance valid on its face and the city's enforcement provisions proper. *DA Mortgage, Inc. v. City of Miami Beach and Miami-Dade County*, 20 Fla. L. Weekly Fed (11th Cir. May 18, 2007)

Adult Entertainment – District Court Properly Upheld City's Zoning Ordinance Limiting Location of Adult Entertainment Establishments but Improperly Struck Down City's Nudity Ordinance on the Basis It Did Not Further a Substantial Government Interest.

The City of Daytona Beach enacted several ordinances aimed at the location of adult entertainment establishments in the city and regulation of public nudity. Several adult entertainment establishments challenged the constitutionality of the ordinances, arguing the zoning ordinance did not permit reasonable alternate venues for adult theaters to communicate their erotic message, and arguing that the nudity ordinance was not narrowly tailored to accomplish the government's asserted interest and that the ordinance was not supported by a substantial government interest. The district court granted summary judgment to the city on the zoning ordinances finding that it did afford reasonable alternative venues for adult establishments. The district court did not grant summary judgment on the nudity ordinances and then at trial, ultimately declared the city's nudity ordinances unconstitutional. On appeal, the eleventh circuit court affirmed the ruling on the zoning ordinances. However, the court reversed the district court on the nudity ordinances. The eleventh circuit primarily concluded that contrary to the adult establishments' arguments, the anecdotal data, other court cases and analysis of the city's police dispatch records that displayed ill secondary effects of adult establishments that the city sought to curb through its regulations was sufficient to satisfy the standard U.S. Supreme Court's test that a city may rely on data believed to be reasonably relevant to the problem that the city seeks to address. The court specifically explained that neither the *Alameda Books* nor *Peek-A-Boo Lounge* case raised the evidential bar or required a city to justify its nudity ordinances with empirical evidence or scientific studies. *Daytona Grand et al. v. City of Daytona Beach*, Florida, 20 Fla. L. Weekly Fed. (11th Cir. June 28, 2007)

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

None reported.

Section 6. Announcements

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 *2006 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 2006 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.

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Notebooks from the 2006 and 2007 FMAA Seminars are available for $40 each. Please contact Tammy Revell at (850) 222-9684 or *trevell@flcities.com* for information.