FLORIDA MUNICIPAL ATTORNEYS ASSOCIATION

FLORIDA MUNICIPAL LAW REPORTER

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January - March 2008

Editor's Note: The following case law summaries were reported from January 1, 2008, through March 31, 2008.

Section 1. Recent Decisions of the Florida Supreme Court

None reported.

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

Mandamus – Initiative Petitions – District Court Certified Question to Supreme Court Regarding a City's Decision to Decline to Place a Citizen-Initiated Ordinance on the Ballot in Accordance with the Charter.

Appellant citizens of the City of West Palm Beach filed a motion for rehearing en banc with the Fourth District Court of Appeal. The district court denied the motion, but certified the following question to the Florida Supreme Court as a question of great public importance: Where a city charter provides for a citizen-initiated referendum process to enact an ordinance, and a city declines to place a citizen-initiated ordinance on the ballot in accordance with the charter provisions, is laches a defense to a mandamus petition brought by the citizens to require the city commission to place the proposed ordinance on the ballot? *Carolyn J. Wright, Michael Bornstein, Anita Mitchell, Gladys D. Van Otteren and Patricia M. High v. Lois Frankel, as mayor of City of West Palm Beach, et al*. 33 Fla. L. Weekly D171 (Fla. 4th DCA December 31, 2007).

Civil Rights – Florida Civil Rights Act – Retaliation – Employment – Trial Court Erred in Dismissing Complaint for Discrimination Under Title VII Where County Policy of Ending Internal Employment Investigations Whenever a Claimant Filed EEOC Complaint Was Tantamount to Discrimination.

The claimant was a Caucasian bus driver for Broward County. He filed an internal complaint with the county Office of Equal Opportunity (OEO) because he was passed over for a promotion in favor of an African-American employee. Subsequently, the driver filed a complaint with the Equal Employment Opportunity Commission (EEOC). County OEO policy provided, "Once a complaint is filed with the EEOC and/or Florida Commission on Human Relations or other relevant federal or state agency, the OEO investigation process will be administratively closed except in allegations involving harassment or retaliation…" As a result of this policy, the driver's internal investigation was closed. The driver sued the county alleging retaliatory discrimination. The Florida Civil Rights Act, which is virtually identical to Title VII, provides, "it is unlawful to discriminate against any person because that person has opposed any practice which is an unlawful employment practice or because that person has made a charge, testified, assisted or participated in any manner in an investigation under this section." To assert a prima facie claim for retaliation under Title VII, a plaintiff must demonstrate (1) he engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) there is a causal relation between the two events. The trial court dismissed the driver's complaint because it concluded the policy of terminating the internal investigation was not discriminatory; it reasoned the plaintiff didn't allege any entitlement to an internal investigation nor did he allege the policy impacted his job, working conditions or compensation. However, the district court reversed, citing the Supreme Court's opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, which concluded "the anti-retaliation provision [of Title VII] does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." Rather, any action, whether or not directly related to work, can form the basis of a retaliation claim, so long as a "reasonable employee" would consider the action to be "materially adverse." In this case, the district court found that being denied the internal investigation process might deny the employee the chance at informally resolving the alleged discrimination. And waiting to use the internal investigation process and other available remedies sequentially might ultimately deny a claimant the opportunity to bring a formal complaint and action, given the 365-day limitations period for filing a claim under §760.11(2), Florida Civil Rights Act. Therefore, the trial court's order dismissing the complaint for failure to state of cause of action was reversed. *Richard Donovan v. Broward County Board of Commissioners*, 33 Fla. L. Weekly D291 (Fla. 4th DCA January 23, 2008).

filed until March 2002. Following discovery, the City of Tampa moved for summary judgment, asserting that each of the plaintiffs' claims was barred by the applicable statute of limitations. On review, the second district court affirmed the trial court, ruling that the inverse condemnation claim ripened no later than 1988, when the plaintiffs wrote the city requesting that it participate in resolving the contamination problem. The court denied the argument that so-called stabilization of the effects of government actions must occur because the offensive government action was not of a continuing nature but had ceased in 1966. The fact that harmful effects of the dumping may increase over time does not mean the consequences of dumping had not so manifested themselves that it was impossible to reasonably foresee the extent of damage. In addition, the court ruled that the continuing trespass claim was barred because it accrued no later than 1988. At that point, the court explained, the plaintiffs expressed their unwillingness to accept the status quo of the city's invasion of the property. A continuing tort requires continual tortious acts, not continual harmful effects from an original, completed act; hence a claim should have been brought within four years of the plaintiffs' 1988 expression of disapproval of the dumping and the deleterious effect it caused. Finally, the court dismissed the plaintiffs' attempt to reverse the trial court based on the statutory pollution clean-up claim afforded by §376.313(3), Florida Statutes, because the trial court's order wasn't based on this section and the plaintiffs failed to raise this issue in their initial brief. *Josephine C. Suarez and the Suarez Family Trust v. City of Tampa*, 33 Fla. L. Weekly D408 (Fla. 2nd DCA February 1, 2008).

Labor Relations – Public Employees – Unfair Labor Practices – PERC Commission Improperly Affirmed Hearing Officer Decision that City Manager's Threatening Comments Supported a Claim Under §447.501, Florida Statutes.

The City of Coral Gables and the local Fraternal Order of Police Union (Union) were engaged in collective bargaining agreement negotiations. A 2003-2005 agreement contained terms under which the Union members would contribute toward their retirement plan. That agreement also contained a "re-opener" clause under which negotiation of a change in the cost-of-living provision of the retirement plan could later occur. During the re-opener, the city refused to offer any change in the cost-of-living adjustment, citing budgetary constraints and ever-increasing pension costs. In response, the Union filed a grievance. On the eve of arbitration of the grievance, the city settled and agreed to return to the Union the retirement contributions made thus far under the 2003-2005 agreement. Simultaneously, the city and Union were negotiating the successor agreement to the 2003-2005 agreement and the city delayed repayment of the pension contributions as part of the new agreement negotiations. The Union again initiated an unfair labor practices charge against the city, to which the city responded by again agreeing to repay the contributions and cease further pay deductions. When the city's representative met with Union officials, the city official was found to have said if the Union official agreed to take the contribution refunds, officers would be "looking at a long future of no raises for at least the next three years, a zero-percentage wage increase…" In response to these remarks, the Union initiated an unfair labor practice charge, alleging the city violated §447.501(1)(a), (c), and (d), Florida Statutes, by threatening the Union with wage freezes. The administrative hearing concluded with a finding that the city violated the statute because the threat had the foreseeable effect of instilling in the employees a reasonable belief that further participation in protected activity might also result in adverse employment consequences. The city filed exceptions to the hearing officer's recommended order and the Public Employee Relations Commission (PERC) rejected each. PERC, like the hearing officer, focused on the "foreseeable effect" of the city's remarks on wage freezes, rather than its motivation for making the statements. On review, the district court reversed, finding both the hearing officer and PERC misapplied relevant law. Specifically, the evidential standard for the unfair labor charge launched by the Union required proof that the exercise of statutorily protected conduct motivated the employer to make a threatening or coercive decision against the employee's interest. However, in this case, the lower tribunals focused on the possibility that future activity might be curtailed as a result of the city's wage-freeze threats. Because the lower tribunals failed to recognize this distinction and determine if protected conduct motivated the city's threats, the court reversed the commission's order. *City of Coral Gables v. Coral Gables Walter F. Stathers Memorial Lodge 7, Fraternal Order of Police*, 33 Fla. L Weekly (3rd DCA February 6, 2008).

Development Orders – Certiorari Review – Trial Court Properly Reviewed and Affirmed Town Council's Denial of Application for Site Plan Approval.

The Town Council of the Town of Davie denied Wal-Mart's application for site plan approval of a planned development. Wal-Mart appealed to the circuit court for writ of certiorari. The circuit court denied the petition. Wal-Mart appealed denial of its first-tier petition for writ of certiorari. On appeal, the district court was limited in its review to consider only whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. Given the limited standard of review afforded on a second-tier certiorari petition, many of Wal-Mart's points were outside the scope of review. Wal-Mart's sole contention worthy of discussion was the argument that the circuit court lacked jurisdiction because the town council decision reviewed was not issued in the form of a written, signed and rendered decision. Section 166.033, Florida Statutes, presently requires that a municipality issue a written notice to the appellant that includes a citation to the applicable portions of an ordinance, rule, statute or other legal authority for the denial of the permit. This section became effective October 1, 2006. The town council's denial of Wal-Mart's application was decided June 19, 2006. Accordingly, the district court concluded the decision was not subject to §166.033, Florida Statutes, and affirmed the circuit court's review of the matter. *Wal-Mart*

Stores East, L.P. v. Town of Davie and Rolling Hills Plantation Homeowners Ass'n, 33 Fla. L. Weekly D482 (Fla. 4th DCA February 13, 2008).

Eminent Domain – Quick Taking – Necessity – Trial Court Did Not Err in Finding that County Demonstrated Necessity for the Taking, Notwithstanding County's Failure to Consider Alternative Alignment Designs for the Road Extension Project at Issue.

The appellant, Helen Rawls, appealed an order of taking issued in favor of Leon County. The order granted the county a nearly two-acre parcel owned by Rawls in order for the county to complete a road-extension project provided for in the long-range transportation plans of the Capital Region Transportation Planning Agency. During the course of the order of taking hearing, the county introduced the authorizing resolution and called the engineer of record and project manager. The engineer testified that he looked at no other potential alignments in the design of the road. He also testified that the needs of the long-range transportation plan would be met by the proposed alignment, environmental concerns would be satisfied, safety issues were considered and cost issues were considered in the chosen alignment location. On appeal, Rawls argued the county failed to demonstrate a necessity to acquire her particular parcel, given that the county's engineer testified he did not consider alternative road-alignment designs. The district court acknowledged that eminent domain jurisprudence requires the condemning authority to show a necessity for the taking as a condition precedent to the valid exercise of the power of eminent domain. However, necessity in this context need only be reasonable and not an absolute necessity. The court explained that the determination of necessity is initially a legislative function. And once a reasonable necessity is demonstrated, the exercise of that discretion by the condemning authority may not be disturbed in the absence of bad faith or gross abuse of discretion. The court further cited precedent for the proposition that a landowner cannot object merely because some other location might have been made or some other property obtained which would have been suitable for the purpose behind the taking. The trial court order granting the taking was supported by competent substantial evidence and to the extent Rawls did not show bad faith or an abuse of discretion on the part of the county, the order was affirmed in all respects. *Helen B. Rawls v. Leon County, FL*, 33 Fla. L. Weekly D494 (Fla. 1st DCA February 13, 2008).

Contracts – Counties – Procurement – County's Agreements with Vendor Represented a Significant Expansion beyond Vendor's Prior Agreements with Another Public Vendor and County Therefore Acted Arbitrarily and Capriciously in Violating Terms of the "Piggybacking" Exception to Competitive Bidding.

Sarasota County has a procurement code that requires competitive bidding for all goods and services costing more than $25,000. The county's procurement code permitted the practice known as "piggybacking," that is, entering into agreements based on existing contractual agreements between a given vendor and another governmental entity. However, the county's procurement code contained one element requiring that the vendor-party to the existing contract extend the terms and conditions of that contract to the county. The county sought to procure new software to track land-use activity. It decided upon a company with an existing contract with the Wisconsin Department of Agriculture, Trade and Consumer Protection. However, the final agreement struck between the county and the software company contained existing provisions with the Wisconsin agency, as well as additional terms that expanded the scope of services to be received. A competitor challenged the application of the piggybacking exception in this instance, arguing the agreement violated the procurement code. The county argued that as long as the new agreement included at base the existing terms of the Wisconsin agency agreement, it wouldn't matter if the scope of the agreement was further expanded. The trial court denied relief to the challenger. On review, the district court disagreed, explaining that if additional terms could be added to expand the terms of the existing agreement, the piggybacking process would become a vehicle for abuse of the competitive bidding process required by the county's procurement code. Accordingly, the court reversed the trial court and ruled the final agreement struck in this case represented a significant expansion beyond the terms of the existing agreement with the Wisconsin agency. Though recognizing the county's argument that a public body is entitled to great deference in dealing with public bids and competitive proposals, the court could not sustain the trial court decision where the county's position amounted to a violation of its own procurement code. *Accela, Inc. and CRW Systems, Inc. v. Sarasota County and CSDC Systems, Inc.*, 33 Fla. L. Weekly D601 (Fla. 2nd DCA February 27, 2008).

Prohibition – Jurisdiction – Trial Court Erred When It Entered Stay Order Applicable to Code Enforcement Violation Matter Before It, as Well as Separate Quasi-Judicial Occupational License Revocation Order Entered in a Separate Venue and Unchallenged in Present Case.

The City of Boynton Beach entered a final order finding a local restaurant to be in violation of the Boynton Beach Code. The Code Board certified a fine for failure to comply with an earlier board order, which provided for a fine accruing at $500 per day until the restaurant came into compliance. The restaurant filed an appeal from that order and an emergency motion for stay pending appeal with the Palm Beach circuit court. In addition, the restaurant argued that the city sought to revoke its occupational license. In fact, in a separate proceeding, the Boynton zoning and business tax manager had announced the intent to revoke the restaurant's local business tax receipt/

occupational license, based on the code compliance board order. However, the city argued that the matter before the circuit court in this case related only to the order certifying a fine for non-compliance and not the occupational license case. The circuit court entered an order that restrained the city from taking any actions which adversely affect the operation and carrying on of the restaurant's business or use of its property during the pendency of the appeal. Believing the order was overly broad, the city moved for clarification of that order to which the circuit court responded with an order that enjoined the city from taking any action relating to issues involved in the case which adversely affect the business or use of its property during the appeal. On appeal to the district court, the court found even with the purported clarification, the circuit court order enjoined the city from enforcing the separate quasi-judicial occupational license revocation order in the separately proceeding appeal. And, the circuit court lacked authority to consider and stay the quasi-judicial order entered in a separate venue and not challenged in the present case. Therefore, the district court found the trial court exceeded its jurisdictional authority and prohibited it from taking further action as to the matters contained in the stay order. *City of Boynton Beach v. Ralph and Rosie, Inc.*, 33 Fla. L. Weekly D732 (Fla. 4th DCA March 12, 2008).

Civil Rights – Qualified Immunity – Trial Court Erred in Denying Town's Motion to Dismiss Section 1983 Civil Rights Claim against Town Officials Based on Town Officials' Qualified Immunity Defense.

The plaintiff filed suit against the Town of Southwest Ranches, its deputy attorney and town building official because the defendants refused to allow him to build a home on his property. The suit alleged the defendants' actions were calculated to ensure the property's availability at a depressed value whenever the town decided to embark upon construction of a permanent fire station. The local land-use plan required where contiguous lots unified under common ownership were subsequently redivided, the resulting lots must each net two acres in size. The plaintiff acquired one of these redivided lots. It was part of a pair of unified lots that netted less than two acres each. The plaintiff eventually applied for a building permit for construction on his lot and was denied. Upon receipt, the town's building official promptly returned the plaintiff's application along with a letter from the town attorney which stated the plaintiff's lot could not be developed due to the lot-size land-use plan violation. The plaintiff sued and the town moved to dismiss the complaint, arguing that the attorney and building official were acting within their discretionary authority and as such, were entitled to qualified immunity under clearly established Florida law. Even where the plaintiff alleged the building official failed to properly process his application, this didn't remove her actions from the scope of her duties and authority. Further, the plaintiff's allegations could not establish violation of a clearly established right. The plaintiff's assertion of a land-use dispute did not automatically invoke a constitutional deprivation. The town attorney and building official's refusal to process and grant the requested building permit did not violate such a clearly established right that all reasonable town officials would know that the refusal to process the permit application and consequent denial might violate federal law, notwithstanding the allegation that their motivation was to benefit the town. Therefore, the plaintiff's alleged right to have his building application further processed could not be deemed such a clearly established right that any reasonable town official would know that rejecting it would violate the federal constitution. Therefore, it was error to deny the town officials qualified immunity defense and deny the motion to dismiss as to those officials. *Town of Southwest Ranches v. Shahab Kalam*, 33 Fla. L. Weekly D733 (Fla. 4th DCA 2008).

Vehicle Impoundment Ordinance – Separation of Powers – City's Vehicle Impoundment Ordinance Was Unconstitutional as Violating Separation of Powers and Due Process.

A suit concerning the City of Hollywood's vehicle impoundment ordinance was subject to remand to the Fourth District Court of Appeal based on what the Florida Supreme Court considered serious constitutional concerns. Those concerns related to the amount of notice afforded absent owners of vehicles impounded in connection with the commission of illegal activity by vehicle drivers. Constitutional concerns also surrounded the claim that city-created quasi-judicial hearing mechanisms designed to accommodate vehicle owners violated the separation of powers required by the state constitution. On review, the district court considered arguments that the form of notice provided under the impoundment ordinance was deficient because it failed to include written notice to absent co-owners, lessors and lienors. The district court concluded such written notice was not required and notice to the owner or person in control of the vehicle is sufficient. However, the district court disagreed with the process by which an owner might challenge the impoundment. Under the ordinance, the person whose vehicle was seized must request a hearing before a city-appointed official who determined if police had probable cause to impound the vehicle. If the impoundment were upheld, the official would determine the administrative fee to be charged for return of the vehicle. The ordinance provided no criteria for fixing the amount of the fee. Considering these elements of the ordinance, and the basically constitutional connotation behind the term "probable cause," the district court concluded the process for determining if an officer had probable cause for finding an owner's vehicle was being used in solicitation for prostitution was essentially a judicial function. Accordingly, the district court held that those portions of the ordinance as provided for administrative hearings before city officials on whether there was probable cause to impound a vehicle and the amount of any fee to obtain a return of it were a violation of the separation of powers and due process requirements of the state constitution. *Colon B. Mulligan v. City of Hollywood*, 33 Fla. L Weekly D783 (Fla. March 19, 2008).

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

None reported.

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

None reported.

Attorney General Opinions of Note

2008-01. January 9, 2008.
The City of Belleair Beach asked whether the Belleair Beach City Council may temporarily locate its chambers for public meetings in an adjacent municipality while a new city hall is being built, provided adequate notice is given to city residents.

The Attorney General's Office opined that based on constitutional and statutory considerations, as well as previous opinions of the Attorney General's Office, its opinion is that the Belleair Beach City Council may not temporarily relocate the site of public meetings to an adjacent municipality in the absence of state legislative authorization to do so.

2008-09. February 26, 2008.
The City of Live Oak asked whether it could allow its elected officials and its employees to opt out of the city's group health insurance plan and, in lieu thereof, receive compensation in the amount of the unused premium. And if so, may the City of Live Oak allow only its elected officials to participate in the optional program?

The Attorney General's Office opined that the City of Live Oak may allow its elected officials and its employees to opt out of the city's group health insurance plan and, in lieu thereof, receive compensation in the amount of the unused premium. Absent a limitation in the city's charter or personnel rules, the city may allow only its elected officials to participate in the optional program.

2008-11. February 29, 2008.
The City of Naples asked whether it may adopt an ordinance banning riders in the beds of pick-up and flat-bed trucks without proper restraints.

The Attorney General's Office opined that given the Legislature's handling of the use of seat belts and safety restraints, as well as circumstances under which persons must be restrained when riding in the open body of a pickup and flatbed truck, the Uniform Traffic Control Law preempts local legislation on this subject. Therefore, the City of Naples may not adopt an ordinance banning riders in the beds of pickup and flatbed trucks without proper restraints.

Section 6. Announcements

Mark Your Calendar

The 2008 Florida Municipal Attorneys Association Seminar will be held July 17-19, 2008, at Ocean Reef Club in Key Largo. For seminar information and registration form, please go to *www.fmaa.us*, click on "Seminar Info" or contact Tammy Revell at (850) 222-9684 or *trevell@flcities.com*.

FMAA Seminar Notebooks Available

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.

Florida Cities of Excellence Awards Program

The Florida League of Cities is pleased to announce the fifth annual Florida Cities of Excellence Awards Program. Award brochures will be mailed to League members by mid-May. Information also will be available online at *www.flcities.com*, under "News & Hot Links." The nomination deadline is August 11. We hope that your city will participate in this unique opportunity to spotlight your city, its leaders and its citizens!

Once again there will be a category for "**City Attorney of the Year**." Other categories for the Florida Cities of Excellence Awards are: City of Excellence, City Spirit Award, Mayor of the Year, Council Member of the Year, City Manager of the Year, City Finance Official of the Year, City Clerk of the Year, City Employee of the Year and City Citizen of the Year.

Not only are the Florida Cities of Excellence Awards a great way to recognize and honor programs and people who make cities successful, they also are a wonderful way to promote your city!

This year's awards luncheon will be held on November 21, 2008, at the Hyatt Regency Orlando International Airport Hotel. It will be held following the Florida League of Cities Legislative Conference.

A list of the 2007 finalists and winners is available at *www.flcities.com/awards.asp*. For more information, call or e-mail Mandy Stark (*mstark@flcities.com*) or Beth Mulrennan (*bmulrennan@flcities.com*) at the League office, 1-(800) 342-8112.