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

April - June 2009

Editor's Note: The following case law summaries were reported from April 1, 2009, through June 30, 2009.

Section 1. Recent Decisions of the Florida Supreme Court

None reported.

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

Public Employees – Collective Bargaining – Unfair Labor Practices – Local Public Employees Relations Commission Erred in Affirming Dismissal of Recently Unionized Workers' Unfair Labor Practice Charge Based on Disruption of "Status Quo Period."

The Lakeland Public Employee Relations Commission (PERC) affirmed the dismissal of a charge by certain recently unionized city electricians. The electricians were long-time Lakeland employees who, following unionization, were excluded from the customary annual employee wage increase. The electricians argued the city violated the so-called "status quo" period that follows a recently entered collective bargaining agreement but precedes finalization of the subsequent collective bargaining agreement, during which time the prevailing employment conditions are to remain substantially unchanged. The complaint was filed with PERC general counsel, who initially dismissed the claim. The general counsel relied upon the terms of the ground rules agreement which specifically provided that "the issue of wages including any wage increase will be addressed later…" Lakeland PERC affirmed the dismissal. On appeal, the district court reversed, noting that there was at least some evidence before PERC suggesting Lakeland employees had customarily received annual wage increases for about two decades. The court explained that the city's reliance on the ground rules agreement raises the question of whether the city unilaterally changed employment terms solely for the recently unionized electricians. Accordingly, the matter was reversed and remanded for application of the status quo analysis. *Utility Workers Union of America and UWUA Local 6904, v. City of Lakeland*, 34 Fla. L. Weekly D698 (Fla 2nd DCA April 3, 2009).

Eminent Domain – Inverse Condemnation – Trial Court Erred in Concluding that No Taking Occurred When County's Prior Diversion of Water Flow Across Plaintiff's Property for Emergency Purposes Was Permitted to Continue.

The appellant sued Walton County alleging takings via inverse condemnation. The county diverted the flow of outflow drainage of a nearby lake following a 1995 hurricane. The diversion was made to alleviate flooding of other property caused by rising lake waters. In 2004, the county successfully re-directed the water flow away from the appellant's property. But on at least one emergency occasion beginning in 2005, the county diverted the water flow across the upper portion of the appellant's property, again to protect a neighbor's home and property, and such diversion was permitted to remain. The county argued it acted pursuant to §252.43(6), Florida Statutes, which purports to deny compensation for actions taken to divert waters in order to reduce the dangers associated with flooding. The appellant argued that Article X, §6, Florida Constitution, effectively trumps that statute and requires compensation for the county's exercise of eminent domain powers. The trial court held there had been neither a continuing physical invasion of the subject property nor a substantial deprivation of all beneficial use. On review, the district court concluded that an inverse condemnation claim requires a showing that the county's act in creating a drainage ditch during an emergency and allowing such diverted flow to remain as a drainage easement on the appellant's property conferred a public benefit on other property owners rather than prevented a public harm. The district court felt that water diversion in the instant case was a permanent or continuous physical invasion of the appellant's property, rendering it useless and permanently depriving the appellant of the beneficial enjoyment of her property. Accordingly, the court reversed the trial court and held takings occurred following the 1995 diversion and the 2005 diversion and judgment for the appellant should be entered for the two takings and appropriate compensation determined. *Drake v. Walton County*, 34 Fla. L. Weekly D745 (Fla. 1st DCA April 14, 2009).

Torts – Interference with Business Relationship – Doctrine of Absolute Immunity Barred Claims of Former City Employees Against Their Supervisor.

The plaintiffs, former city recreation department employees, brought suit against a department supervisor and the City of Stuart for, among other things, tortious interference with an advantageous business relationship. The plaintiffs alleged facts supporting such claim and relied upon such allegations in overcoming the defendant's motion to dismiss. On the defendant's petition for certiorari review of that holding, the appellate court concluded that the doctrine of absolute immunity precluded the individual claims against the defendant supervisor because the alleged acts and statements at issue all occurred within the context of the plaintiffs' employment. *City of Stuart, Albie Scoggins and James Chrulski, v. Wonderful T. Monds and Lois Smith-Monds*, 34 Fla. L. Weekly D961 (Fla. 4th DCA May 13, 2009).

Code Enforcement – Trial Court Erred in Dismissing Notice of Code Violation on Grounds Notice Did Not Include the Inception Date of the Code Violation.

A county inspector issued a six-count notice of violation against the property owner. Thereafter, the property owner sought a variance and requested a hearing before a special magistrate. The special magistrate determined the property owner violated all six counts contained in the notice and ordered her to correct the violations within a reasonable time. The biggest violation was a prohibited downstairs enclosure. The notice of violation failed to indicate the date the enclosure was built. Ultimately, the circuit court dismissed the notice of violation, holding the county failed to comply with §162.21(c)(3), Florida Statutes, which requires that a code enforcement citation indicate the date and time the civil infraction was committed. On review, the district court disagreed and quashed the circuit court order. The district court explained that the circuit court applied Part II, §162.21(c)(3), which requires that a citation list the "date and time the civil infraction was committed," to a Part I administrative enforcement proceeding. By enforcing the former requirement, the circuit court created an additional unrequired pleading and proof requirement for the county. *Monroe County Code Enforcement v. Sandra L. Carter*, 34 Fla. L. Weekly D993 (Fla. 3d DCA May 20, 2009).

Religion – Free Exercise – Zoning – Counties – Action by Not-for-Profit Organization, Which Operates Church and Opened Church Property as Shelter for Homeless as Part of Its Christian Mission, Alleging that Imposition of County's Land Development Code to Plaintiff's Activities as Homeless Shelter Violated Florida Religious Freedom Restoration Act and Federal Land Use and Institutionalized Persons Act.

Westgate Tabernacle, Inc. (appellant) operated a church and homeless shelter in West Palm Beach. Westgate's church and homeless shelter were located in a multi-family residential high-density zoning district (RH) under the Palm Beach County (appellee) unified land development code (ULDC). In order to operate a shelter for more than six people in an RH zone under the Palm Beach County ULDC, a conditional-use permit (CUP) must be approved by the county commission. On May 4, 1998, the county issued a notice of violation entitled, "operating a homeless shelter is prohibited in this zoning district." The notice provided Westgate with two months to comply or appear before the code enforcement board. At a code enforcement board hearing, Westgate conceded that the facility then housed 20 people, admitting that the use was illegal in that location without a CUP. Westgate was granted 180 days to either obtain the appropriate CUP or discontinue the operation of the shelter. After the 180-day period, Westgate would be subject to a $100-per-day fine for non-compliance. During that 180-day period, Westgate submitted, but then withdrew, an application for the appropriate CUP. In April 1999, a code enforcement officer inspected Westgate's facility, finding that they continued to operate a shelter and had not complied with the board's order. The board then imposed a fine, which Westgate did not appeal. In October 1999, Westgate closed the facility, but the county still imposed a fine of $22,000 for the period of non-compliance. Westgate did not pay the fine and the county imposed a lien on the property. Westgate then filed suit against the county claiming that the county violated Florida's Religious Freedom Restoration Act (FRFRA) and the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Westgate presented evidence that providing shelter to the homeless was mandated by their religion and the county ULDC imposed an outright prohibition of shelters in RH zoning districts. The jury found the application of the ULDC did not substantially burden Westgate's religious activities in violation of FRFRA or RLUIPA and the ULDC was the least restrictive means of furthering a compelling interest. The 4th DCA affirmed the decision of the lower court holding that Westgate did not show that the county's imposition of its permitting requirements constituted a substantial burden on its exercise of free religion. *Westgate Tabernacle, Inc., et al. v. Palm Beach County*, Fla. L Weekly D997 (Fla. 4th DCA May 20, 2009).

Municipal Corporations – Ordinances – Challenge to Upholding Constitutionality of Municipal Ordinance Which Pertained to Certain Building Projects – Motion to Dismiss for Lack of Standing Granted.

The Florida Home Builders Association (FHBA), Tallahassee Builders Association (TBA), Hermitage Ventures and Sue Boyton appealed a trial court order that upheld the constitutionality of a City of Tallahassee building ordinance. The City of Tallahassee moved to dismiss the appeal due to lack of standing. Sue Boyton was ruled to not have standing and that ruling was not challenged. Hermitage Ventures withdrew their original building application from the city and announced their intention to build a project that was not subject to the ordinance at issue, therefore they no longer had standing in the appeal. FHBA and TBA declare they have associational standing because their membership is composed of builders and developers who are reasonably likely to be subject to the ordinance at issue. In order for an association to establish standing to bring a legal challenge on behalf of its mem-

bers, the association must show that a substantial number of members are substantially affected by the ordinance. The court held that the speculative possibilities provided by FHBA and TBA do not establish necessary standing for declaratory or injunctive relief. *Florida Home Builders Association, et al. v. City of Tallahassee*, Fla. L. Weekly D1096 (Fla. 1st DCA, May 29, 2009).

Counties – Development Orders – Inconsistency with Comprehensive Plan – Circuit Court Erred in Determining that Development Order Authorizing Construction of Large Beachfront Resort Was Inconsistent with County Comprehensive Plan's Housing Density Restriction.

Bay County and Laguna Beach Properties, LLC (appellants) challenged a circuit court finding that a development order (DO) permitting the construction of a large beachfront resort condominium was inconsistent with Bay County's comprehensive plan. Brenda Harrison and the West Beaches Neighborhood Defense Fund (appellees) initially appealed the DO to the Bay County Commission. After that challenge failed, appellees filed a challenge in circuit court alleging that the DO was inconsistent with the comprehensive plan. The circuit court found the DO inconsistent with the comprehensive plan because the condominium would exceed the plan's density restriction. The appellate court overturned the ruling holding that the density restrictions did not apply to the condominium because it was the functional equivalent of a hotel. *Bay County and Laguna Beach v. Brenda Harrison and West Beaches Neighborhood Defense Fund*, 34 Fla. L. Weekly D1099 (1st DCA, May 29, 2009).

Section 3. Recent Decisions of the United States Supreme Court

Elections – Voting Rights Act – Preclearance – Federal District Court Erred in Concluding that Bailout Was Only Available to Subunits of Government that Register Voters.

Northwest Austin Municipal Utility District Number One (utility) appealed a decision of the U.S. District Court for the District of Columbia that ruled the utility was ineligible for the bailout provision of the Voting Rights Act of 1965. The Voting Rights Act of 1965 (act) requires preclearance by the federal government of any changes to elections in specified areas of the country, including Texas. There is a "bailout" provision in the act that releases a political subdivision from the preclearance requirements if certain conditions are met. The District Court ruled that the utility was not eligible for the bailout provision because it did not meet the definition of "political subdivision" under §4 of the act. On appeal, the U.S. Supreme Court held that the definition of political subdivision in question did not apply to the bailout provision and reversed the District Court and remanded the case for further proceedings. *Northwest Austin Municipal Utility District Number One v. Eric Holder*, Fla. L. Weekly Fed. S965 (USSC, April 29, 2009).

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

Civil Rights – Racial Discrimination – For Purposes of Establishing Purposeful Discrimination Under Sections 1981 and 1982, Plaintiffs Failed to Show that, Under Similar Circumstance, the County Treated a White Developer Different Than It Treated Plaintiffs.

Sony and Raymonde Roy filed suit against Walton County, and others, alleging that they had been prevented from developing their property by discriminatory actions. During the process of development, the plaintiffs experienced delays and stop-work orders in large part because of third-party complaints and mistakes made by the county's staff. The plaintiffs claimed violations of their right to make and enforce contracts (42 U.S.C. § 1981), right to hold and enjoy property (42 U.S.C. § 1982), conspiracy to violate civil rights (42 U.S.C. § 1985 (3)) and violations of the Fair Housing Act (42 U.S.C. § 3604). In order to prevail on claim under §1981, §1982 or §1985, a plaintiff must prove intentional discrimination on the basis of race. To establish intentional discrimination, a plaintiff must show that, under similar circumstances, the defendant treated a white individual differently than it treated him. The court found that the plaintiffs provided no evidence of intentional discrimination. Furthermore, without the illegal underlying act, there can be no conspiracy claim. In order to prevail on a § 3604 claim, the plaintiff must identify a facially neutral policy that actually or predictably results in discrimination against an identifiable group. The court found that the Roys failed to identify any facially neutral policy to challenge. *Sony and Raymonde Roy v. Walton County, et al.*, Fla. L. Weekly Fed. D 663 (U.S. District Court, Northern District of Florida, March 31, 2009).

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

None reported.

Section 6. Announcements

Mark Your Calendar

Future dates for the Florida Municipal Attorneys Association Seminar:

- July 15-17, 2010 – Amelia Island Plantation
- July 21-23, 2011 – The Breakers, Palm Beach

FMAA Seminar Notebooks Available

Notebooks from the most recent FMAA Seminars are available for purchase. 2007 Annual Seminar notebooks are $25 each; 2008 Annual Seminar notebooks are $50 each; and 2009 Annual Seminar notebooks are $75 each. Please contact Tammy Revell at (850) 222-9684 or *trevell@flcities.com* to place your order.