CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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Negotiation and Implementation of School Interlocal Agreements: The South Florida Experience

by Susan L. Trevarthen

The 2002 Legislature enacted a requirement that school boards, counties and non-exempt municipalities enter into school interlocal agreements with each other addressing various issues, including local government consideration of the effect of development on nearby school facilities, school board consideration of the effect of planned school facilities on local governments, coordination of data and analysis regarding population projections, and other matters. The minimum criteria to be satisfied by these agreements and other statutory requirements are set forth in two places in the Florida Statutes: Chapter 163, Part 2, and Chapter 1013, the newly rewritten Education Code. See Sections 163.31777 and 1013.33(2). Local government attorneys are most familiar with Chapter 163, but Section 1013.33, F.S., should also be reviewed because it contains additional statements of legislative policy regarding school facilities.

The Department of Community Affairs has established a schedule for the adoption of these agreements from March 1, 2003 through December 1, 2004 as required by statute. The schedule prioritizes those counties with larger amounts of growth. Miami-Dade County was due on March 1, 2003; Broward County was due on May 1, 2003; and Monroe County is due by September 1, 2003. (Both Broward and Miami-Dade Counties have been found in compliance with

See "Negotiation" page 3

Is There Light at the End of the Quasi-judicial Tunnel?

by Edward G. Guedes

Ever since the Florida Supreme Court's landmark decision in *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993), which resolved that property specific rezonings were quasi-judicial in nature and subject to review by petition for writ of certiorari, the question has lingered whether the reasoning of the Court in *Snyder* foretold an end to administrative consideration and approval of any and all development orders.

Snyder is often cited as standing for the proposition that any land development decision of local government that involves the application, rather than the implementation, of policy must be a quasi-judicial decision subject to all the safeguards of procedural due process. If an existing land development regulation is being applied to a single or limited number of parcels of land, so the argument goes, the local government is required to do so in quasi-judicial proceedings. The foundation for this particular argument is found in the following language from *Snyder*:

See "Quasi-judicial" page 7

INSIDE:

Chair's Report

A•G•E•N•D•A

by Kenneth W. Buchman

I look forward to working with all of you during the coming year. Our Immediate Past Chair, Tom Pelham, did an outstanding job. I want to congratulate him for a job well done and express my appreciation to him for all the assistance that he has given me in order to prepare for this year. Through Tom's leadership, the Section has grown and among his many contributions, Tom chaired a successful Long-Range Planning Retreat and responded to recent changes in Florida law by establishing the Quasi-Judicial Hearings Model Ordinance Committee.

We are fortunate to have as our Bar liaison, Carol Kirkland, who tirelessly works behind the scenes to make the City, County and Local Government Law Section the best Section of the Florida Bar. I look forward to working with her.

This year, we have a new committee whose mission will be to update the Local Government Lawyers' Desk Book. In 1998, Judge James R. Wolf of the First District Court of Appeal, with the support of this Section, the Florida League of Cities, the Florida Municipal Attorneys' Association and the Florida Association of County Attorneys, compiled a notebook which included excellent summaries of various topics important to the local government lawyer. The book was supplemented in 2000, but hasn't been updated since. Marion Radson and Liz Hernandez have agreed to co-chair a new committee, whose purpose will be to update this important legal resource on an annual basis. Marion and Liz will be assigning chapters to different members of the Section. Any member that is interested in serving on this committee and assisting us in updating a chapter, please contact Liz or Marion.

We will also begin implementing a new college grant program. At the May 8 meeting in Tampa, at the recommendation of an ad hoc committee consisting of Marion Radson, Mary Helen Campbell and Craig Coller, the Executive Council unanimously approved the funding of $10,000 for a new grant program for local government law education. The funds will be available to both students and schools. Marion, Mary Helen and Craig are to be commended.

Congratulations to Emmy Acton for being this year's recipient of the Ralph Marsicano Award. I also want to thank her for doing an outstanding job with the *Agenda* for the past couple years. This year, Liz Hernandez has agreed to serve as the Editor of our newsletter. Judging from the current edition of the *Agenda*, Liz will do an excellent job.

We welcome to the Executive Council three new members: Vivian Monaco, who will be representing District 5 and Grant Alley and Howard Lenard who are new at-large members. Vivian is an Assistant County Attorney with Orange County. Grant Alley and Howard Lenard are City Attorneys for Ft. Myers and North Miami Beach respectively.

Sadly, during this past year, we lost two of our most esteemed leaders, Richard Nelson and Lawrence Levy. Our thoughts and prayers are with their families.

Richard Nelson was one of our founding members and a Past Chair of this Section. He had served as County Attorney for Sarasota County for over thirty years. He served as a member of the first Executive Council in 1973 and as Chair of the Section between 1976-1977. In 1999, Richard donated $1,000,000 to the University of Florida College of Law for an eminent scholar's chair. Through this generous gift, he has enabled the law school to recruit and retain a leading scholar in the field of local government law. All of us are indebted to him for his dedication to promoting local government law. He will be missed.

In December, we also lost Lawrence Levy. Larry served for many years as Assistant City Attorney for the City of Miami Beach. He had the unique experience for a local government lawyer of also serving as acting City Manager for a brief period before his death. He was active in this Section and was serving on the Public Finance Committee at the time of his death. He was also active in the Florida Municipal Attorneys' Association and served on their Executive Board. Larry was well respected and was a close friend to many of us. We will miss him.

This year marks our 30th anniversary. As local government law has evolved over the last 30 years, this Section too has grown to respond to the increasing demands of our members. Over the past 30 years, we have evolved from a small group of local government attorneys into a vibrant organization of approximately 1,500 members.

A few years ago, this Section defined its renewed purpose in a mission statement and each year we commit ourselves to programs, both new and old, that promote our important mission. Our success has been due not only to the members who have served on the Executive Council, but also to the many volunteers that serve as active members of committees of this Section.

I am honored to serve as your Chair. All our Executive Council meetings are open to any member and I encourage anyone interested in serving on any committee to please contact me.

the statute by the DCA.) According to the DCA, they are ahead of schedule in achieving statewide compliance.

Rather than rehashing the statutory requirements in detail, this article presents the lessons I have learned in representing nine local governments in these three counties in the negotiation of these school interlocal agreements since fall 2002. My views are undoubtedly colored by the fact that South Florida has some of the worst public school overcrowding in the state, and that its counties contain dozens of local governments. A smaller county with only a few cities, less explosive growth, and good relations with its school board may have a quite different experience.

1. <u>These agreements are not about school concurrency</u>.

The statute does not require these agreements to adopt school concurrency. Many people seem to think that they do (or perhaps that they should). However, the agreement cannot and should not require school concurrency because there is a separate statutory section that governs school concurrency. It requires a lot more than a simple agreement, though an agreement is part of the implementation of it. See Section 163.3180(13), F.S. Unless your county is well on its way to satisfying all of these major requirements and you already have consensus among all governmental units, you should not attempt to combine the adoption of school concurrency with this agreement. Why? Because you will never meet the deadline. It took Palm Beach County two and a half years to get all its local governments on board with school concurrency. Because there are potential financial penalties for the failure to enter into this agreement by the deadline, local governments should not go down that path.

2. <u>These agreements should not require or even suggest that local governments should be denying rezonings based on school impacts</u>.

In my experience, the school boards have advocated language that suggests that municipalities should be (or even could be) denying development projects that increase student impacts on overcrowded schools. Local governments should not agree to such language, because it can be used as a tool by development opponents appearing before local governing bodies, to convince them to deny development for school impacts. To my knowledge, every local government that has denied development based on school impacts has drawn significant litigation. The statewide organizations of builders and developers are afraid of this issue and will fight it aggressively.

Moreover, in the absence of school concurrency, there is no way to know that every government signing the agreement in a particular county has a sufficient comprehensive planning basis to deny development on the basis of school impacts. Orange County was able to do it, and their decision was upheld by the Fifth District Court of Appeal in *Orange County v. Mann*. But that was based on the specific language of their comprehensive plan and code, and the evidence that they presented at the hearing denying the rezoning. Those cities that have a sufficient planning basis can choose to say no whether or not this issue is addressed in the school interlocal agreement. Even if the opponents do not convince the governing body to deny the development, the elected officials still get a lot of heat for not taking advantage of their "authority" under the agreement to do it. Either way, it's a bad outcome.

In short, these agreements are about sitting down together and talking; there are no specified outcomes required. There is no massive increase in funding for schools, or fundamental change in the current processes. They don't resolve current overcrowding, let alone address the implications of the class size constitutional amendment. They are all about coordination.

3. <u>Timing is key: Get started early, and keep moving forward</u>.

The negotiating process takes longer than you think, because of the number of independent governing bodies that have to vote on the agreement, and the fact that most of them meet only once or twice a month. Also, some may have lengthy packet deadlines to contend with. Hints for getting it done:

a. First, structure the agreement so that it is effective as to any one city or the county at the time that the school board and that city or county have executed the same agreement. That way, in a county with many local governments, you don't create the ability for one city to be a holdout and keep everyone out of compliance.

b. Next, the lead agency should initiate negotiations no later than seven months prior to the deadline. The first draft needs to be circulated about five months prior to the deadline. As the common party to all agreements, the school board should be one of the first to vote on the draft agreement, ideally no later than two months prior to the deadline. The agreement can then be taken to all the local governing bodies, and proposed changes can be identified with sufficient time for review and another vote by all parties.

c. In retrospect, I think a useful step might be to use the first negotiation session as a forum for describing the school planning process. The school board should have key personnel present to explain the capital facilities plan; the educational plant survey; the meaning of FISH capacity; the boundaries process; and the role of magnets and other countywide boundary schools. They should also explain the school planning year, because most of their timeframes are fixed by statute. Even now, with the agreement already in place for months in Miami-Dade and Broward Counties, many staffpersons do not have a good idea of what these various documents mean or how they can affect their cities. Their ability to effectively negotiate and advise their cities is compromised by this lack of knowledge.

d. Identify your city's strategy in the negotiating process. To avoid last minute problems, be sure to involve the attorney, management, and even elected officials, early in the process. Make sure they receive and actually review the early draft agreements. Don't mistakenly assume that they can wait until the hearing on the agreement only a few weeks before the deadline. See additional discussion in 4.a. below.

e. If it is already too late to comply with this schedule, a fallback strategy is to have everyone adopt a minimal

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agreement with a short term (90 days or longer, depending on how many issues remain to work out) to allow for further negotiating time. One county has already done that, and DCA accepted the approach. However, please note that this merely delays the issue. The statute provides that, if at any time a party fails to have an agreement that satisfies the statute, the penalty issue reemerges. Also, all amendments are reviewed for compliance with the statute's minimum criteria.

4. Figure out what your local government's issues are, and what your negotiating strategy will be.

Local governments seem to fall into a few recognizable patterns with this agreement.

a. The first category knows little about education issues. They may care in a general sense, but lack the knowledge to effectively participate. Maybe they are not exempt from the agreement, but there are no real issues affecting them and so they send the lowest level available staffer to the negotiations. They may involve management and the attorney only when the agreement is ready to go into the packet for a vote.

The danger of this approach is that sometimes these governments find that they do have issues, once management is exposed to the negotiations and the draft agreement. In my experience, the vast majority of staff persons do not understand much about the school planning process. That's not surprising, because they have not had much reason to know about this process in the past. Lower level staff also may not be sufficiently sensitive to the political importance of these issues. It may be true that there is not much that the agreement can do on its own to actually solve school facilities problems, but it is still important to many elected officials that the local government has the appearance of being part of the solution to these problems.

b. A second category of local governments has an axe to grind with the school board, based on some past dispute. They see the agreement as a way to get even or to obtain relief on this possibly unrelated matter. Sometimes, all that is required in these situations is some relationship building efforts, and pledges not to repeat the mistakes of the past. It is important that such unrelated, historical issues not eclipse the real issues these governments may have with the current agreement. If the issue does relate to the agreement, then it is imperative to make sure that the school board representative is aware of the issue and the background early in the process; he or she may well know nothing about it.

c. A third category of local governments has experience with school issues, and has staffpersons who understand the issues. They might have developed this expertise as part of developing a city-sponsored charter school, or simply in response to intense political interest among their voters. These governments often produce the most comments on the draft agreement, and may perceive issues of which other governments are totally unaware. Their goal needs to be educating fellow local governments as much as convincing the school board, as discussed in the next section.

5. Decide whether you want to try to alter the school board's responsibilities to comply with the local comprehensive plan and land development regulations, or just leave them as defined by statute.

Most local governments have found their school boards to be very resistant to complying with any local regulations, citing statutory preemptions such as the school building code. Most local governments would like to see more school board compliance with their land development regulations, including perimeter buffer and setback requirements, design regulations, etc.

Section 1013.33, F.S., governs this issue (the replacement for Section 235.193, F.S.). Unfortunately, you will find that it is rather unclear. In some places, it seems to say that the school board must fully comply with the local comprehensive plan and land development regulations. But other parts of the section contradict that broader language, and limit the power of a local government to reject a site plan to items that affect off-site conditions. Additional language explicitly provides for the enforceability of "reasonable development standards and conditions" by local government that serve police power purposes. At a minimum, it appears clear that schools must be consistent with the comprehensive plan land use map designation on a property. Beyond that, there will probably have to be a fight over interpretation in the event of a future disagreement.

Subsection (14) says that the statutory process for reviewing school developments can be varied by the interlocal agreement. But most school boards do not want to agree to anything more than they are required to do by statute. In the approved Broward and Miami-Dade agreements, the agreement follows the statute. However, in the post-approval negotiations, the Broward municipalities have continued to ask the school board to comply with perimeter buffer and landscaping requirements. The school board has not yet responded, but it appears staff will oppose the request.

In Monroe County, which is an Area of Critical State Concern with major environmental issues, the local governments have asked the school board to agree to comply with the environmental regulations of the local comprehensive plans in addition to whatever it is required to comply with by statute. The school board has opposed this requirement and negotiations are pending.

6. Find common ground with fellow local governments and other interested parties.

Some of the most important negotiating in this process is with fellow local governments. If only one city has an issue and twenty other parties are ready to sign on the dotted line, that city is going to have a hard time getting everyone else to budge, particularly with a deadline and financial penalties looming. On the other hand, when faced with a unanimous request from a group of nineteen local governments, it is harder for the school board to say no.

An investment of time early on, making sure that other local governments understand your issue(s) and how it might benefit them, pays off in the group negotiating sessions. Options include developing an email list

of the local government representatives participating in the negotiations and circulating ideas for discussion via email (and/or developing such an email list and forum for the local government attorneys involved with the agreement). Hold a teleconferences with other interested cities, or even having separate meetings without the school board present.

A major hurdle seems to be getting the local governments in category 4.a. above to focus on the issues early enough. In a few cases, I had tried to brief and involve a key person at another city with shared interests two or three times. Only after their hearing, two weeks before the deadline did that person acknowledge that they simply had not considered it a priority and now regretted not having been more proactive in the negotiations. If your local government is motivated and organized, attending the school board meetings and advocating for the local government issues, it may be frustrated with all the other "free rider" local governments benefiting from its efforts. However, if no one steps up to the plate, then all will likely end up with an agreement that is slanted towards school board interests.

A good rule of thumb might be that, if a local government wants something out of the agreement and it does not harm any other local government (even if it does not benefit the other local governments), the other local governments will agree to support that request. The school board will likely expect the local governments to be more unilateral and organized than they usually are.

Also, on certain issues, local governments may be able to find common ground with the local association of builders and developers. Some local associations are sensitized to the issue of school overcrowding, where it has resulted in denials of development or major controversy over new residential development. Their members might have strong political relationships with individual board members and staff members. The representatives and members of these associations can be very effective in influencing the school board members directly if staff is being resistant to local government issues.

7. <u>Focus carefully on the various committee processes under the agreement, and the level of municipal representation in each.</u>

There are at least three major committees that should be considered in detail.

a. Oversight Committee

First is the oversight committee or, more accurately, the oversight process as it is worded in the statute. The statute requires public participation, but provides few details. Miami-Dade and Broward Counties both responded to this language with the creation of a new committee; so did the DCA model agreement. In Miami-Dade County, the draft provided for five representatives of the school board, five representatives of the county, and five representatives of the municipalities, selected by the County's League of Cities. At the adoption hearing, the school board unilaterally changed this to provide for nine school board representatives, while leaving the others each with five representatives. Several cities objected to this, but were unsuccessful in getting it changed in the short time available.

Broward County cities were deadlocked on the issue of how to choose the municipal representation. Several ideas were floated, but all favored some cities over other cities. As a result, the appointment of the five municipal members was left an open issue when the agreement was signed. The only method all cities could agree on in post-deadline negotiations was to have one representative for every city. The school board has not yet voted on whether to accept that approach.

In contrast, Monroe County's draft agreement defines the oversight process as the process of each party reviewing and monitoring the agreement at a regular public meeting on a defined timeframe. Each party will receive and review the products of the staff working group, take public input, and adopt a resolution identifying any needed revisions to the process. The resolution is returned to the staff working group for discussion and potential recommendations for action. No new committee was created.

Timing issues include when the members will be appointed (if a new committee is created), and when the first meeting will be. Dade County decided that the first meeting should be a year after adoption, so that there will have been a year of activity under the agreement for the committee to review. They want to see the appointments made earlier, although that timeframe has not yet been defined.

b. Staff working group

The second committee is the staff working group. This is where staff will coordinate and share data. They may also look at the longer term plans, such as the five year capital facilities plan and the school plant survey. There is usually no issue with representation on this body; all cities have their own representatives and so do the school board and the county. The issue may be with how frequently it meets. You should plan for it to meet at least monthly for the first four to six months, until the kinks get worked out. A lot of mutual education needs to take place. You may also want to specify whether the staff working group, as a body, is authorized to make recommendations to the parties for amendments to the agreement.

c. Facilities review committee

Third, you must determine what committee process will review specific facilities decisions. The statute provides that the school board must provide for local participation in its decisions about new school sitings, expansions, and school closings. In Miami-Dade and Broward Counties, the school boards both tried to give these review responsibilities to an existing school board committee which reviewed these decisions and made recommendations to the school board. However, once the more involved cities inquired about the nature of these committees, they found that neither committee had <u>any</u> municipal representation on it at all.

Such a structure would not satisfy the statute, and definitely did not satisfy the cities. A large amount of the negotiating time in both counties was devoted to formalizing these committees, by the adoption of a school board rule governing their membership and charge, and reforming their membership to reflect their responsibilities under the agreement. This is one of the most important aspects of the agreement for cities. Usually, major issues and conflicts start with a siting, expansion or closing decision for a school facility, and local governments need to ensure that they will have the right to participate when these decisions affect them.

In a small county like Monroe, with only seven parties to the agreement, it was easy to provide that all cities would have a representative on this

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committee. Everyone recognized that there would be self-selection and most would attend only those meetings with projects that affected them. In larger counties, that structure may not be feasible, and most likely will not be accepted by the school board.

The Miami-Dade negotiating group came up with the concept of a floating member of the committee, who would be a representative of the local government in which the school closing, expansion or siting was proposed to take place. The Broward negotiating group rejected that as too narrow, because often these decisions affect more than the host city. For example, a new high school might be sited only a few hundred feet from the border with a neighboring city. Or there might be two potential sites in two different cities, and the decision is which site to pick. Even an expansion or closing decision might affect multiple cities, in the sense that school boundaries often encompass more than one city and thus students from multiple cities will be affected by the decision. These decisions clearly affect more than one city, and all affected parties should have the opportunity to participate in the process. Or perhaps the site is in unincorporated county and presents these issues with its neighboring cities. The Broward alternative was to define the floating members as the host local government and all its adjacent municipalities. That geographic area is likely to capture most impacts from the school facility, and it is also likely to contain the bulk of the boundary for student assignment.

8. Consider whether to incorporate special clauses, such as third-party beneficiary and most favored nation clauses.

In Miami-Dade County, one city proposed and everyone else accepted a "most favored nation" clause. The clause provided that, if the Miami-Dade County School Board agreed to something with one city in a side agreement, the other cities would all be offered the opportunity to incorporate that provision in their agreement with the School Board. The upside of such a clause is obvious; the downside perhaps less so. In practice, it gave the School Board a reason to resist the various changes that flowed from the cities. They were more reluctant to give up something, knowing they would have to face it everywhere, than they might have been for only one city.

The Broward County School Board's proposed draft agreement included a boilerplate "no third party beneficiaries" clause that did not draw any comment or discussion. The Miami-Dade County school agreement did not have such a clause and, when one city asked for it to be included, they strongly resisted it. The city's reason for seeking the clause was the interference it had experienced from a neighboring city in its planning affairs. The neighboring city was exempt from having to enter into the agreement, and the city did not want to have to deal with interference in planning for its public school. Of course, most of the coordinating processes under the agreement involve public meetings from which no one could be excluded, and there were few specific advantages to being a party to the agreement. But the clause made this city more comfortable with the process to have this clause included. Unexpectedly, the Miami-Dade school board staff interpreted this clause as inconsistent with their constitutional mission to educate and serve the entire county, and refused even to consider it.

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Mission Statement

To generally serve as an organization and resource within The Florida Bar for lawyers representing local government interests and also practicing in this field on behalf of private interests.

To be informed regarding the development of local government law, in Florida and nationally, and to actively participate in its formulation, both legislatively and through participation in the development of case law affecting and relating to local government.

To serve as a liaison among the public, the general membership of The Florida Bar, and the Board of Governors by providing a forum for the development and exchange of ideas in matters affecting local government law.

To function as a resource of information to members of The Florida Bar relating to local government law, including the publication of a newsletter, sponsorship of seminars and other continuing legal education events, and the production of publications in various forms.

QUASI-JUDICIAL
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> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. [citations omitted] Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy. [citations omitted]
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> . . .
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> Rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from the distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of…quasi-judicial action….

Snyder, 627 So.2d at 474, quoting *Snyder v. Board of County Comm'rs*, 595 So.2d 65, 78 (Fla. 5th DCA 1991).

This particular argument was further strengthened by the Florida Supreme Court when one year after *Snyder* it decided *Park of Commerce Assocs. v. City of Delray Beach*, 636 So.2d 12 (Fla. 1994). In *Park of Commerce*, the Court made the following statement:

> [T]he law concerning appellate review of decisions of local governments on building permits, site plans, and other development orders [is that] [t]hese local government decisions are quasi-judicial in nature and thus subject to certiorari review by the courts.

Id. at 15; *see also Broward County v. G.B.V. Int'l, Ltd.*, 787 So.2d 838, 842 (Fla. 2001) (quoting language from *Park of Commerce* regarding quasi-judicial nature of local governmental approvals of development orders).

Snyder, *Park of Commerce* and *GBV* are frequently being cited by neighbors who oppose the granting of certain development orders but who were not given notice and an opportunity to be heard regarding the approval before it was granted. The question is, though, do these cases actually require that *every* development order that involves the application of policy be considered in a quasi-judicial proceeding? Or do these cases instead stand for the proposition that *if* the local government has created a mechanism for review and approval of these orders that provides neighbors notice and an opportunity to be heard, *then* the mechanism should be considered quasi-judicial and subject to review by writ of certiorari? A careful reading of *Snyder*, *Park of Commerce* and *GBV* suggests that the latter interpretation is the correct one.

While the Supreme Court undeniably concluded in *GBV* and *Park of Commerce* that the approval of a site plan, plat or building permit was a quasi-judicial determination, it did so in the context of the specific procedures created by the local governmental entities. In each case, those procedures chosen by the local government *required* that the determination take place at a public hearing held before the county commission or city council.

For example, in *GBV*, the property owner sought approval of a perimeter plat, which required the consideration and approval of the Broward County Commission pursuant to the Broward County Code. *GBV*, 787 So.2d at 840-41. Pursuant to the code's requirements, the commission considered the application in a quasi-judicial public hearing and denied the application. *Id.* at 841.

Similarly, in *Park of Commerce*, the property owner sought approval of its site plan by the Delray Beach City Council at a public hearing. 636 So.2d at 13. When the site plan was rejected, the property owner sought review by certiorari petition and the city opposed the petition claiming that the city council's denial of the site plan was a legislative function. *Id.* The parties conceded on appeal, however, that *under the city's approval scheme*, *Snyder* was controlling and that the denial of the site plan was not legislative, as urged by the city, but rather quasi-judicial. *Id.* at 15 ("[A] *city council's denial* of a site plan was quasi-judicial action that was properly reviewed by petition for certiorari.") (emphasis supplied).

This reading of *GBV* and *Park of Commerce* is consistent with earlier holdings of the Florida Supreme Court. For example, in *Anoll v. Pomerance*, 363 So.2d 329 (Fla. 1978), the Supreme Court considered the question of how and at what point an administrative proceeding (in that case, a personnel board hearing) becomes judicial or quasi-judicial in nature. In determining that the personnel board's decision was subject to certiorari review, the Court held as follows:

> As we explained in *De Groot v. Sheffield*, 95 So.2d 912 (Fla. 1957), a judgment [of an administrative agency] *becomes* judicial or quasi-judicial, as distinguished from executive, *when notice and hearing are required* and the judgment of the board *is contingent on the showing made at the hearing*. In such cases, certiorari, not mandamus, should be employed as the proper method of review.

Id. at 331 (emphasis supplied). The Court did *not* rule that *any* fact-finding determination by a City is automatically a quasi-judicial proceeding.

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This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

Annual Section Budget

for Fiscal Year 2003-2004

The proposed budget was approved by the Executive Council, January 2003. *The Board of Governors of The Florida Bar approved this budget at their May 2003 meeting in Key West.*

Revenues	**Budget**
Dues	34,000
Dues Affiliate	90
Dues Retained by TFB	17,060
Net Dues	**17,030**
Audio Tape	2,500
CLE Courses	10,172
Course Books	200
Registrations	1,500
Section Service Program	18,000
Past Chair Circle	200
Sponsorship	2,500
Allowance	200
Miscellaneous	250
Interest	2,440
Total Revenues	**$54,792**

Expenses	
Postage	1,500
Printing	350
Officer Office Expense	25
Newsletter	2,600
Membership	500
Supplies	50
Photocopying	150
Officers Travel Expense	800
Meeting Travel Expense	1,000
CLE Speaker Expense	2,000
Committee Expense	100
General Meeting	250
Board or Council	1,000
Bar Annual Meeting	2,000
Section Annual Meeting	8,500
Midyear Meeting	250
Section Service Program	18,000
Retreat	3,000

Membership Directory	3,000
Awards	850
Law School Liaison	3,000
Scholarships	3,000
Civility Week Plaque	5,500
Stetson Reception	500
Local Bar Assn. Awards	5,000
Web Site	3,000
Council of Sections	300
Symposium	9,000
Employee Travel	2,356
Operating Reserves	**7,798**
Miscellaneous	250
CLER Credit Fee	150
Total Expenses	**$85,779**
Beg. Fund Balance	**69,728**
Ending Fund Balance	**$38,741**

Section Reimbursement Policies:

General: All travel and office expense payments are in accordance with Standing Board Policy 5.61 or more restrictive Section policies identified elsewhere in this budget notice. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(h), 5.61(e)(6) which is available from Bar headquarters upon request.

Convention — Chair's Travel: Costs of Chair's suite at convention is paid by the section. Included in this are costs associated with its use as a hospitality suite.

All reimbursement of expenses will be in accordance with Standing Board Policy 5.61(e) 1 through 6.

Final Budget for Fiscal Year 2002-2003

Revenues	**Budgeted**	**Actual**
Dues	33,500	34,825
Dues Affiliate	60	120
Dues Retained by TFB	16,790	<17,483>
Net Dues	**16,770**	**17,462**
CLE Courses	7,091	8,607
Audio Tape	2,500	7,778
Course Books	200	163
Section Service Program	18,000	0
Registrations	1,500	0
Sponsorship	1,000	0
Past Chair Circle	200	0
Allowance	0	<1>
Interest	5,145	<779>
Miscellaneous	200	88
Total Revenues	**$52,606**	**33,318**
Expenses		
Postage	2,000	1,888
Printing	350	191
Officer Office Expense	25	0
Newsletter	2,600	712
Membership	500	0
Supplies	50	14
Photocopying	150	183
Officers Travel Expense	1,200	0
Meeting Travel Expense	1,000	0

	Budgeted	**Actual**
CLE Speaker Expense	2,000	0
Committee Expense	100	0
General Meeting	250	0
Board or Council	1,000	572
Bar Annual Meeting	2,000	717
Section Annual Meeting	8,500	2,301
Midyear Meeting	250	0
Section Service Program	14,550	506
Retreat	3,000	848
Membership Directory	3,300	3,298
Awards	850	843
Scholarships	3,000	1,000
Stetson Reception	1,000	0
Civility Week Plaque	3,500	48
Law School Liaison	3,000	0
Local Bar Assn. Awards	1,500	0
Web Site	4,000	858
Council of Sections	300	0
Symposium	7,500	9,319
Employee Travel	2,962	921
Operating Reserves	**7,329**	**0**
Miscellaneous	2,700	2,424
CLER Credit Fee	150	150
Total Expenses	**$80,616**	**26,793**
Beg. Fund Balance	**74,913**	**89,854**
Ending Fund Balance	**$46,903**	**96,379**

QUASI-JUDICIAL
from page 7

The implication derived from this holding is that where the local legislation does *not* require notice and a hearing and the decision is *not* contingent on a showing made at a hearing, then the decision does not "become" quasi-judicial and certiorari will not lie.

Neither *GBV* nor *Park of Commerce* mandates that a local governmental entity *must* approve development orders through a quasi-judicial public hearing process that is later subject to review via certiorari petition. In fact, the Supreme Court held in *GBV* that the approval of a site plan is "governed by local regulations, which must be uniformly administered." *GBV*, 787 So.2d at 842. Even *Snyder* lends credence to this interpretation:

> Rezoning actions…*where the decision is contingent on a fact or facts arrived at from the distinct alternatives presented at a hearing*, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of…quasi-judicial action….

Snyder, 627 So.2d at 474, quoting *Snyder v. Board of County Comm'rs*, 595 So.2d 65, 78 (Fla. 5th DCA 1991) (emphasis supplied); *see also West Flagler Amusement Co. v. State Racing Comm'n*, 165 So. 64, 65 (Fla. 1935) ("[O]rders…may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.")

Therefore, to the extent "local regulations" do not provide for approval of particular development orders via a quasi-judicial public hearing, the proceeding cannot be deemed quasi-judicial simply because it involves the application of policy. The mere fact that a particular governmental decision requires the application of specified criteria to a particular factual situation does not automatically make the decision a quasi-judicial one subject to review by certiorari petition. Almost every governmental decision – from the granting of a building permit to the issuance of a driver's license to the determination of entitlement to a homestead exemption – requires someone to make a decision whether the criteria for approval have been met. If every such decision were subject to certiorari review by any individual claiming he or she was adversely affected, local government would grind to a halt, and the courts would be deluged with petitions for writ of certiorari.

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CALENDAR OF EVENTS

Executive Council Schedule 2003-2004

September 5, 2003
11:00 a.m. - 1:00 p.m.
Tampa Airport Marriott
Tampa

October 23, 2003
5:00 p.m.
Hyatt Airport Hotel
Orlando

January 9, 2004
9:00 a.m. - 12:00 noon
Teleconference Meeting

May 6, 2004
Gaylord Palms
Kissimmee

May 8, 2004
Section Annual Meeting
Gaylord Palms
Kissimmee

June 25, 2004
Boca Raton Resort and Spa
Boca Raton

Seminar Schedule 2003-2004

Public Employment Labor Relations Forum
October 23-24, 2003
Hyatt Airport Hotel
Orlando

Certification Review Course
May 6, 2004
Gaylord Palms
Kissimmee

27th Annual Local Government Law in Florida
May 7-8, 2004
Gaylord Palms
Kissimmee

Florida Case Summaries

by Rebecca O'Hara, Assistant General Counsel and Eric Hartwell, Assistant General Counsel, Florida League of Cities

Section 1. Recent Decisions of the Florida District Courts of Appeal

EQUITABLE ESTOPPEL - CITY ESTOPPED FROM ENFORCING ZONING CODE TO PROHIBIT OPERATION OF "CRUISE-TO-NOWHERE" GAMING SHIPS.

The operator of "cruise-to-nowhere" gaming ships and the City of Hollywood appealed a circuit court ruling that found the City was estopped from enforcing its zoning code as to two of the operator's ships, but was not estopped as to a third ship. The gaming ships were operated from the dock of a restaurant in Hollywood. The restaurant was a permitted use within the City's zoning code. The City had approved the operation of two gaming ships as an accessory use to the restaurant, and granted occupational licenses for the two ships. A third ship began operating from the restaurant, but the City did not issue a license for it. Subsequently, the City attempted to remove the gaming ships, contending they did not meet definition of an "accessory use." The gaming ships' operator challenged the decision in circuit court. The court concluded that although the ships did not meet the definition of "accessory use" under the City's code, the City was estopped from enforcing the code against the first two ships because of its previous representations that the ships were an accessory use, as well as its actions in issuing occupational licenses. The court found no estoppel as to the third ship, and enjoined the operation of the third ship. On appeal, the district court affirmed the circuit court decision. *Sun Cruz Casinos, L.L.C. v. City of Hollywood*, 28 Fla. L. Weekly D1011 (Fla. 4th DCA, April 23, 2003).

SOVEREIGN IMMUNITY - LEGISLATIVE CLAIMS BILL AWARD MAY NOT BE APPLIED TO SATISFY THE PER CLAIM/PER JUDGMENT CAPS UNDER THE SOVEREIGN IMMUNITY STATUTE.

Plaintiff and a passenger in his car were injured in an automobile accident involving a City of Miami police car. After the passenger sued the City, the City entered a settlement agreement with the passenger whereby the City agreed to pay $100,000 in accordance with the recovery limits in section 768.28(5), F.S., and to assist in obtaining a legislative claims bill for $4.9 million. The legislature passed the claims bill. Plaintiff then filed suit against the City. The City agreed to settle Plaintiffs claim for $100,000 subject to the City's right to contest Plaintiffs entitlement to collect the money without first obtaining a claims bill. The City argued that the $200,000 per incident aggregate cap in 768.28(5) had been exhausted by its payment of $100,000 to the passenger and its compliance with the claims bill in favor of the passenger. The circuit court and the district court disagreed. The courts reasoned that a legislative claims bill is not an "action at law" as contemplated by the language in 768.28(5). Therefore, a legislative claims bill may not be applied to satisfy the per claim/per judgment aggregate cap in the statute. *City of Miami v. Valdez*, 28 Fla. L. Weekly Dl039 (Fla. 3d DCA, April 23, 2003).

LAND DEVELOPMENT REGULATIONS - PETITION FOR WRIT OF MANDAMUS FOR ISSUANCE OF BUILDING PERMITS RENDERED MOOT BY SPECIAL MASTER RECOMMENDATION THAT PERMITS ISSUE IN SPITE OF TRAFFIC CONCURRENCY PROBLEM.

Petitioners obtained County approval for residential building permits, but were subsequently notified by County that the permits would not issue until an area roadway reached a specified level of service because traffic concurrency requirements. Petitioners sought a writ of mandamus requiring the County to issue the permits, in addition to damages for takings of their properties. While the case was on appeal, the County initiated a special master proceeding for a beneficial use determination. The special master recommended that the building permits be issued. The Third District Court of Appeal held that the special master's recommendation rendered moot the mandamus portion of petitioners' claims. The Court upheld a condition on the permits that required petitioners to obtain environmental coordination letter from U.S. Fish and Wildlife Service, stating that it had no jurisdiction to override the jurisdiction of a federal agency. The Court rejected the takings claims as not ripe because the petitioners had failed to exhaust administrative remedies that would have allowed for an exception from traffic concurrency requirements. *Clay v. Monroe County*, 28 Fla. L. Weekly Dl164 (Fla. 3d DCA, May 14,2003).

CODE ENFORCEMENT - CIRCUIT COURT FAILED TO APPLY CORRECT LAW BY NOT GIVING PLAIN MEANING TO WORDS IN COUNTY CODE.

The Miami-Dade County Code prescribes conditions on the storage of boats in residential areas. Petitioners were found in violation of the Code when they "parked" a boat in front of their house on two different days. The Third District Court of Appeal reversed a circuit court's order upholding the code violation. It found that the terms "store" and "storage" as used in the Code were undefined and should therefore be ascribed their plain meaning. It stated the circuit court failed to apply the correct law — in this case, the "plain meaning rule." The Court detennined that "parking" a boat on two separate days did not amount to storage. *Castro v. Miami-Dade County*, 28 Fla. L. Weekly Dl168 (Fla. May 14, 2003).

DEDICATION - EVIDENCE DID NOT SUPPORT FINDING THAT BEACH HAD BEEN VALIDLY DEDICATED TO PUBLIC USE.

Plaintiff, the owner of property located across the street from a strip of land bordering Sarasota Bay (the "beach"), and the Town of Longboat Key filed cross claims for declaratory and injunctive relief concerning ownership of the strip of land. The Second District Court of Appeal reversed the circuit court's judgment in favor

of Town based on a finding that the beach property had been dedicated to public use. The Court determined the Town had failed to prove a valid dedication of the property had occurred, as there was no evidence of official acceptance of any dedication, and insufficient evidence to show that acceptance was accomplished by public use of the beach for the relevant time period. The Court did not rule on the Town's claims of adverse possession, prescriptive rights, or the right of customary use. *Krieger v. Town of Longboat Key*, 28 Fla. L. Weekly D 75 (Fla. 2d DCA, May 14, 2003).

INVERSE CONDEMNATION - TAKINGS CLAIM DEEMED RIPE WHERE CITY POLICY BANNING CONVERSION OF GOLF COURSE TO ANY OTHER USE WAS ABSOLUTE AND FURTHER APPLICATIONS BY PROPERTY OWNER WOULD BE FUTILE.

The City of Plantation comprehensive plan contained a policy stating that golf courses within the City are open spaces arid shall not be converted to other uses. A similar policy in the Broward County comprehensive plan allowed conversion of golf courses to residential uses by the use of flex units. Plaintiff purchased 214 acres in the City—half of which was used for a golf course and the other half was undeveloped. The City denied Plaintiff property owner's application to allow the development of single-family residential homes on a portion of the property pursuant to its comprehensive plan policy. In addition, the City denied Plaintiff's applications for building and electrical permits to install netting and lights for a driving range on the property, on the grounds that such construction would interfere with the view and light of surrounding residences. The Plaintiff sued the City for inverse condemnation and denial of due process. On appeal from a summary judgment in favor of the City, the Fourth District reversed. The Court concluded that Plaintiffs claims were ripe for review and that Broward County was not an indispensable party to the suit. Unlike the County's comprehensive plan policy, which allowed conversion to other uses, the Court found that the City's policy against conversion was absolute. Accordingly, no other use of Plaintiffs property was possible under the City's policy regardless of the County's flex unit policy. The City argued that Plaintiff's claims were not ripe because it failed to apply for other recreational uses of the property such as a tennis club, dog track or marina. Because of the absolute nature of the City's policy against conversion of golf courses, however, the Court determined that it would have been futile for the Plaintiff to make such application. *Golf Club of Plantation, Inc. v. City of Plantation*, 28 Fla. L. Weekly Dl190 (Fla. 4th DCA, May 14, 2003).

TAXATION--SECTION 166235 ADMINISTRATIVE REMEDY FOR IMPROPER COLLECTION OF MUNICIPAL PUBLIC SERVICE TAXES APPLIES TO CHARTER COUNTIES AS WELL AS MUNICIPALITIES.

Plaintiffs brought a class action suit against Bellsouth Corporation and Palm Beach County, claiming the defendants collected excessive public service taxes on their telephone service. The Fourth District Court of Appeal affirmed the tower court's dismissal of the complaint for failure to exhaust administrative remedies. The Court determined that plaintiffs had failed to comply with procedures specified in section 166.235(2) for challenging the collection of municipal services taxes that were not due. Although the statute references only municipalities, the Court found that it applied to charter counties such as Palm Beach County. *Stork v. Bellsouth Corp.*, 28 Fla. L. Weekly Dl44l (Fla. 4th DCA, June 18, 2003).

AD VALOREM TAXATION - AIRPORT HANGERS OWNED BY GOVERNMENTAL ENTITY BUT LEASED THROUGH CONDOMINIUM ASSOCIATION TO PRIVATE USERS EXEMPT FROM TAXATION.

The Fourth District Court of Appeal considered whether airport hangers owned by a governmental entity but leased to a condominium association (and then subleased to condominium members) were exempt from ad valorem taxation as governmental property. The Court ultimately rejected a county property appraiser's argument that the airport hangers should not be exempt from taxation because the hangers constituted real property under the condominium statute, section 718.106, F.S. *Nikolits v. Runway 5-23 Hangar Condominium Ass'n, Inc.,* 28 Fla. L. Weekly Dl327 (Fla. 4th DCA, June 4, 2003).

EMINENT DOMAIN - PRELIMINARY SITE PLAN DID NOT ESTABLISH AS MATTER OF LAW CONDEMNOR'S INTENDED USE OF PART OF PROPERTY.

Property owner appealed an order of taking authorizing county school board to take an entire 24.88-acre tract for use as an elementary school. The property owner argued that trial court erred in approving the taking of the entire tract when a preliminary site plan indicated that 2.5 acres of the property would be used for a police substation. The district court found that sufficient evidence existed for the trial court to conclude that the entire parcel would be taken for school uses, particularly in the face of conflicting evidence about the use of the 2.5-acre parcel. The court rejected property owner's argument that the school district was estopped from claiming that the property would be used in a manner other than as expressed on preliminary site plan. That principle applies only in situations where there is a partial taking resulting in a claim for severance damages, and not to situations involving a total taking. *Rorabeck's Plants and Produce, Inc. v. School District of Palm Beach County*, 28 Fla. L. Weekly D1532 (Fla. 4th DCA, July 2,2003).

SOVEREIGN IMMUNITY - SOVEREIGN IMMUNITY DOES NOT BAR ACTION AGAINST CITY UNDER BERT HARRIS PRIVATE PROPERTY PROTECTION ACT.

Property owner brought action against the City of Miami Beach under the Bert J. Harris Private Property Rights Protection Act, section 70.001, F.S. The City argued that Section 13 of the statute, which provides "This section does not affect the sovereign immunity of government," barred the property owner's claim against the City. The trial court agreed and entered summary judgment in favor of the City. On appeal, the Third District reversed. It applied rules of statutory construction and concluded that a fair reading of the statute evinces sufficiently clear legislative intent to waive sovereign

continued, next page

immunity as to a private property owner whose property rights are inordinately burdened as set forth in the statute. It found that a literal reading of the statute would lead to an absurd result by negating everything the statute was designed to achieve. The Court reasoned that section 13 of the statute merely preserves the sovereign immunity benefits otherwise enjoyed by governmental entities. *Royal World Metropolitan, Inc. v. City of Miami Beach*, 28 Fla. L. Weekly D1620 (Fla. 3d DCA, July 16, 2003).

ORDINANCES - CITY ORDINANCE REQUIRING PERMIT FOR ACTIVITY SEAWARD OF COASTAL CONSTRUCTION CONTROL LINE WAS NOT PREEMPTED BY STATE STATUTE.

A developer challenged a City of Boca Raton ordinance that requires a city permit for activities conducted seaward of the established coastal construction control line. The developer contended the ordinance was preempted and/or inconsistent with the state Beach and Shore Preservation Act, Chapter 161, F.S. The Fourth District Court of Appeal affirmed the trial court's ruling in favor of the City. It concluded that the developer was collaterally estopped from raising the preemption challenge because its predecessor in title had previously litigated and lost the same issue. In addition, it concluded the state statute did not impliedly preempt the City's ordinance, especially where the statute expressly required deference to local setback requirements. *GLA and Associates, Inc. v. City of Boca Raton*, 28 Fla. L. Weekly Dl636 (Fla. 4 DCA, July 16, 2003).

Section 2. Recent Decisions of the United States Supreme Court

FIRST AMENDMENT - PUBLIC LIBRARIES' USE OF INTERNET FILTERING SOFTWARE DOES NOT VIOLATE PATRONS' FIRST AMENDMENT RIGHTS.

The Children's Internet Protection Act (CIPA) prohibits a public library from receiving federal assistance to provide Internet access unless the library installs Internet filtering software designed to block pornographic images. A group of plaintiffs challenged the constitutionality of CIPA. The United States Supreme Court reversed a federal district court decision that held CIPA violates the Spending Clause of the U.S. Constitution because it would require any library that complies with CIPA by installing Internet filtering software to violate the First Amendment. The Supreme Court concluded that use of filtering software would not violate library patrons' First Amendment rights. Internet access in public libraries was not a "traditional" or "designated" public forum subject to heightened judicial scrutiny. *United States v. American Library Ass'n*, 16 Fla. L. Weekly Fed. S415 (June 23, 2003).

FIRST AMENDMENT - HOUSING AUTHORITY'S TRESPASS POLICY IS NOT FACIALLY INVALID UNDER FIRST AMENDMENT'S OVERBREADTH DOCTRINE.

A public housing authority adopted a "trespass" policy that authorized police officers to serve notice on any person "lacking a legitimate business or social purpose" for being on the housing development premises and to arrest for trespass any person who remains or returns after having been so notified. The United States Supreme Court reversed a Virginia Supreme Court decision that found the trespass policy unconstitutionally overbroad in violation of the First Amendment. The U.S. Supreme Court determined that challenging party had not shown that the trespass policy prohibits a substantial amount of protected speech in relation to its many legitimate applications. *Virginia v. Hicks*, 16 Fla. L. Weekly Fed. S347 (June 16, 2003).

Section 3. Recent Decisions of the United States Court of Appeals, Eleventh Circuit

SPEECH - COUNTY MANAGER WHO WAS NOT A PARTY TO ADMINISTRATIVE AND STATE COURT PROCEEDINGS CANNOT ASSERT COLLATERAL ESTOPPEL AGAINST PLAINTIFF IN FEDERAL RETALIATORY DISCHARGE ACTION.

Plaintiff filed a 1983 action against Monroe County and its county manager in federal court, alleging she was terminated from her position in retaliation for exercising her First Amendment rights. The Eleventh Circuit reviewed district court orders granting summary judgment in favor of the County and the County Manager. First, the Court affirmed summary judgment in favor of the County because the County Manager was not the "final policymaker" for purposes of municipal liability under section 1983. Second, the Court reversed the order granting summary judgment for the County Manager because it concluded he was in fact the "decisionmaker" with the authority to both recommend termination and to immediately effectuate termination. Third, the Court considered the County Manager's claim that Plaintiff was collaterally estopped from bringing the federal court action against him based on prior state administrative and court proceedings. The Court concluded that because Florida law requires mutuality of parties for the application of collateral estoppel, the County Manager could not assert collateral estoppel because he (individually) was not a party to the prior state proceedings against Monroe County. *Quinn v. Monroe County*, 16 Fla. L. Weekly Fed. C604 (11th Cir. May 19, 2003).

RELIGION—USE OF COURT CLERK SEAL THAT CONTAINS OUT OF TEN COMMANDMENTS INTERTWINED WITH A SWORD DOES NOT VIOLATE ESTABLISHMENT CLAUSE.

The Eleventh Circuit considered whether the use of a county court clerk's seal violated the Establishment Clause of the First Amendment. The seal contained an outline of the Ten Commandments intertwined with a sword, although it did not contain the actual text of the Commandments. The seal was used for the sole purpose of authenticating documents. The seal had been in use for 130 years but there was no evidence of the purpose for the seal's design. The Eleventh Circuit concluded that the seal did not violate the "purpose and effect" prongs of the Establishment Clause analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court found that the County had articulated a plausible secular purpose under the *Lemon* analysis for the design of the seal — that in the context

of authenticating legal documents, the seal's design helped viewers recognize the validity of legal documents. The Court further determined that the County's use of the seal did not violate the effect prong under the *Lemon* analysis by giving the appearance of governmental endorsement of religion. The Court was persuaded by the presence of four factors: the seal was limited to the narrow context of authenticating legal documents; the outline of the Ten Commandments was not the only symbol appearing on the seal; the size of the seal was relatively small and it was always placed at the bottom of the last page of documents; and the seal did not contain the text of the Ten Commandments. *King v. Richmond County*, 16 Fla. L. Weekly C676 (11th Cir. May 30, 2003).

RELIGION - MONUMENT TO TEN COMMANDMENTS INSTALLED IN ROTUNDA OF STATE JUDICIAL BUILDING VIOLATES ESTABLISHMENT CLAUSE.

The Chief Justice of the Alabama Supreme Court installed a large monument to the Ten Commandments in the rotunda of the state judicial building. A federal district court concluded that the display of the monument violated the Establishment Clause of the U.S. Constitution. The Eleventh Circuit affirmed. It found that display of the monument failed two of the requirements of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that display of the monument did not have a valid secular purpose and it had the effect of advancing or inhibiting religion. The Court rejected arguments that display of the monument fell within the parameters of *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding prayer preceding Legislative session on grounds that the practice was "deeply embedded in the history and tradition of this country"). Unlike the Supreme Court in Marsh, however, the Eleventh Circuit in this case found no evidence of an "unambiguous and unbroken history" of displaying religious symbols in judicial buildings. *Glassroth v. Moore*, 16 Fla. L. Weekly Fed. C803 (11th Cir. July 1, 2003).

ORDINANCES - COUNTY NOT ENTITLED TO SUMMARY JUDGMENT IN CONSTITUTIONAL CHALLENGES TO ADULT ENTERTAINMENT ORDINANCE AND PUBLIC NUDITY ORDINANCE.

Two adult dancing establishments appealed a district court's grant of summary judgment upholding the constitutionality of two county ordinances that regulate adult entertainment establishments and public nudity. The Eleventh Circuit reversed. The adult entertainment ordinance imposed requirements on the physical layout of the adult establishments (prohibiting private rooms, setting minimum levels for lighting, etc.) and allowed the County Sheriff to search the premises without a warrant. The public nudity ordinance was a general public nudity ordinance that was not directed specifically at adult entertainment establishments. The Eleventh Circuit determined that while both ordinances may target perceived "secondary effects" of adult entertainment, the ordinances must be evaluated under separate standards. The adult entertainment ordinance must be evaluated under the standards for time, place and manner regulations. A content-neutral public nudity ordinance must be evaluated under the four-part test for expressive conduct set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). As to the adult entertainment ordinance, the Court found there was no "pre-enactment" evidence to support a conclusion that the ordinance was narrowly tailored to serve the County's interest in combating negative secondary effects. The Court stated that while the County was not required to conduct new studies or produce new evidence independent of what had been established by other cities, the County in this case failed to rely on any evidentiary foundation at all in adopting the ordinance. Turning to the public nudity ordinance, the Court found that summary judgment for the County was inappropriate because the plaintiffs put forth evidence casting direct doubt on the County's secondary effects rationale for enacting the ordinance and County failed to rebut such evidence. In addition, the evidence in the record was insufficient at that point for the Court to determine whether the ordinance would survive intermediate scrutiny prohibition. The Court was concerned that the ordinance's prohibition on the use of pasties and G-strings could proscribe too much protected expression and fail to preserve "ample capacity to convey the dancer's erotic message." *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 16 Fla. L. Weekly Fed. C837 (11th Cir. July 15, 2003).

SPEECH - CITY'S POLICY OF NOT ALLOWING PAWN SHOPS TO ADVERTISE ON CITY'S BUS BENCHES DOES NOT VIOLATE CONSTITUTION.

A pawnshop challenged on First Amendment grounds the City of Hollywood's policy of not allowing pawnshops and certain other types of businesses to advertise on bus benches on the City's rights-of-way. On appeal, the Eleventh Circuit affirmed the district court's determination that the City's bus benches constituted a non-public forum and that the City's policy was reasonable. The Court found that the City's preclusion of certain types of businesses from advertising on bus benches evidenced the City's intent to act in a proprietary capacity to manage a commercial venture. Accordingly, the bus benches were a non-public forum and any limitations placed by the City on the use of the benches for advertisements need only be reasonable in light of the purpose served by the forum and viewpoint neutral. The Court concluded that the City's policy was reasonable, where the undisputed purpose of the non-public forum was to earn money, and the City feared that allowing advertisements by certain types of businesses might negatively impact revenue. *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 16 Fla. L. Weekly Fed. C846 (11th Cir. July 16, 2003).

SPEECH - ZONING AND LICENSING PROVISIONS OF ADULT ENTERTAINMENT ORDINANCE HELD UNCONSTITUTIONAL.

The Eleventh Circuit reviewed an order of summary judgment that rejected a First Amendment challenge to various provisions of a city adult entertainment ordinance. The ordinance at issue regulates adult entertainment establishments in three ways: it regulates conduct by proscribing total nudity on the part of employees at such establishments; it is a zoning ordinance because it limits the location of such establish-

continued, next page

ments; and it is a licensing ordinance because it establishes criteria for a business license and imposes a licensing fee. The Eleventh Circuit upheld the order of summary judgment as to the portion of the ordinance that regulated expressive conduct. It found that the prohibition on total nudity was properly characterized as a time, place and manner restriction where it regulated the manner of presentation of the message but did not ban the message itself Further, the ban on total nudity was permissible because it was aimed at reducing negative secondary effects associated with adult entertainment establishments. The Court reversed the summary judgment as to the zoning portion of the ordinance. It found the ordinance, which permitted only three specified locations for four existing businesses and set aside less than 1% of the city's total acreage for such businesses, was unconstitutional because it did not leave open ample avenues of communication. Finally, the Court reversed the summary judgment as to the licensing provisions. It concluded that the licensing provisions amounted to an unconstitutional prior restraint because the city provided no restriction on the length of time within which it must make an application decision, and because the license fee was not reasonably related to the costs of administering the license program. *Fly Fish, Inc. v. City of Cocoa Beach*, 16 Fla. L. Weekly Fed. C856 (11th Cir. July 18, 2003).

Section 4. Recent Decisions of the United States District Courts for Florida.

ZONING - INDIVIDUAL MEMBERS OF TOWN PLANNING BOARD ARE ENTITLED TO ABSOLUTE IMMUNITY FROM CLAIM OF EQUAL PROTECTION VIOLATION ARISING FROM BOARD'S REVERSAL OF DECISION TO GRANT PERMIT.

The Village of Wellington Planning, Zoning, and Adjustment Board held a quasi-judicial hearing to review decision of planning director to grant a permit for the construction of a private stable on residential property. The Board issued a written order reversing the planning director's decision, finding there was no competent substantial evidence to support the permit. Plaintiffs, the aggrieved property owners, sued the Village and members of the Board individually, contending the action violated their equal protection rights because similarly situated property owners had been granted permits. The district court granted the motion to dismiss filed by the individual board members. The court concluded that individual members of this quasi-judicial body were entitled to absolute immunity from Plaintiffs' claims after applying the functional analysis set forth in *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (extending absolute immunity to administrative or executive officials "who perform functions closely associated with the judicial process"). *Berkos v. Village of Wellington*, 16 Fla. L. Weekly Fed. D380 (S.D. Fla. May 2003).

SOLID WASTE CONTRACTS - COUNTY CONTRACTS THAT REQUIRED SOLID WASTE HAULER TO DELIVER SOLID WASTE ONLY TO DESIGNATED FACILITIES DOES NOT VIOLATE COMMERCE CLAUSE.

Broward County entered contracts with BFI, a solid waste hauler, to collect residential and commercial solid waste generated within unincorporated areas of the County. The contracts contained a provision that required BFI to deliver such solid waste to a solid waste disposal facility designated by the County (the "designation clause"). The County's actions in entering the contracts stemmed from its participation in the Broward Solid Waste Disposal District (along with numerous municipalities within the County), whereby the County and participating municipalities operated under an Interlocal Agreement to comprehensively dispose and process solid waste generated within their respective jurisdictions. After several years of operation pursuant to its contracts with the County, BFI filed a complaint in federal district court alleging, *inter alia*, that the designation clause of its contracts violated the dormant Commerce Clause of the U.S. Constitution. The federal district court disagreed. It concluded that the Commerce Clause was inapplicable to the County's actions under the "market participant" exception. That is, because the County had entered both the solid waste collection and disposal market as a participant (rather than as a regulator), it was not subject to the restraints of the dormant Commerce Clause. *BFI Waste Systems of North America, Inc. v. Broward County*, 16 Fla. L. Weekly Fed. D431 (S.D. Fla. June 6, 2003).

FIRST AMENDMENT - CITY POLICY OF EXCLUDING POLITICAL ORGANIZATIONS FROM PARTICIPATING IN PARADE DOES NOT VIOLATE FIRST AMENDMENT.

The City of Parkland adopted a policy that allows marching bands, civic and youth organizations to participate in City parade but which excludes political organizations from participating if they identify themselves as political organizations. The purpose of the parade is to provide fellowship in a non-political, family atmosphere. The parade is part of a two-day City festival. Political organizations are allowed to speak and participate in the overall festival. A local Republican club challenged the City's denial of a parade permit on First Amendment grounds. The district court concluded that the City's policy did not violate the First Amendment. First, the court noted that speech identifying the organization as a political club during the parade would constitute protected political speech. Second, the court determined that the parade itself was a limited public forum created by the City, and that the club was not prohibited from ample alternative channels of communication, such as attending the festival and disseminating its literature. The court concluded the City's exclusion of all political organizations from the parade is both viewpoint neutral and reasonable in light of the parade's purpose. *Parkland Republican Club v. City of Parkland*, 16 Fla. L. Weekly Fed. D471 (S.D. Fla. June 4, 2003).

CITY, COUNTY AND LOCAL GOVERNMENT LAW CERTIFICATION

The City, County and Local Government Law Certification Committee would like to congratulate the following attorneys who became board certified in City, County and Local Government Law effective August 1, 2003:

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APPLICATION REQUEST
FOR
CITY, COUNTY AND LOCAL GOVERNMENT LAW CERTIFICATION

Full Name		
License No.		
Address		**Room/Suite**
City	**State**	**Zip Code**

Return to: *The Florida Bar*
Legal Specialization & Education
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Tallahassee, Florida 32399-2300

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