
ADMINISTRATIVE LAW SECTION NEWSLETTER



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Chairman's Message

I am pleased to be able to report to you not only that the Administrative Law Section *Newsletter* has been resurrected, but also that the Executive Council and a number of committees have already been at work for several months addressing issues of interest and importance to the Administrative Law Section. Some of those committees include the Administrative Law Conference Steering Committee, headed by Steve Pfeiffer and the Rules Committee headed by Linda Rigot.

I am struck by the breadth and complexity of many issues now being handled as administrative law issues under Florida's Administrative Procedure Act. Chapter 120, Florida Statutes, is no longer a novelty or a curiosity, but is a fact of life in Florida. I am hopeful that the Administrative Law Section will be a source of guidance, information, and insight for all those whose pro-

fessional practice unfolds within the administrative arena. Serving this function, however, requires an effort on everyone's part to transcend much of the minutia of each type of administrative agency practice in order to obtain an overview of legal and policy matters.

We hope you will participate in that effort and share your view concerning areas in which you believe significant advances or improvements may be made, either in the arena of administrative law or within the Administrative Law Section itself. Please direct those comments to me or to the editor of our newsletter at the address included herein. As a final note, I would like to thank our Board of Governors representative, Mr. Tom Ervin, for his continued support in dealing with the section and for his comments in this newsletter. Best wishes for a productive year.

Chris Bentley, Chairman

Commission Recommends Lottery

The Environmental Deficiency Commission, at a recent meeting in Tampa, recommended that all environmental permits for the state be issued on a raffle, or lottery, basis, with drawings to be held monthly. "We've been listening to people's ideas for months," said Chairman Landers, "and came to the conclusion that, since the whole thing was pretty much a crap-shoot, we might as well just call it that."

Dale Twachtmann, DER secretary, lauded the plan as a step forward in applicant services. "This way you'll know that somebody is going to get something every month," he said. "If people don't get what they want, it won't be our fault; it will just be the luck of the draw. Besides, this lottery idea appears to be the only way we can get salaries up and bring in new people. Overall, I think it would be a big step forward for the agency."

"Just how would this system work?" asked a reporter from INTER ALIA assigned to cover the Deficiency debate.

"What we're going to have," said John DeGrove, Chairman of the Planning and Implementation Committee, "is a fixed-need pool, like they do for hospitals. Our planners — as a matter of fact I may be working on a grant myself to follow-through on this project — our planners will be looking around the state to decide just how many docks and seawalls and land-fills and swampy golf courses are really needed. People are applying for stuff every day that they just don't need. We'll call this the Environmental Deficiency Inventory. Once we've decided, for example, how many docks are appropriate," he said, "it won't really matter to us who gets them or where they go. This will take a lot of the scientific mumbo-jumbo out of growth management," he said. "I

continued . . .

never let that stuff influence me.”

Jim Wolf said he liked the idea for the private sector but thought it went way too far in dealing with the cities and counties. “We never ask for anything we don’t need,” he said, “so I don’t see the point in us having to draw straws or however you’re gonna do that. A landfill will require at least a trifecta.”

“The farmers deserve a fair shake, too,” said L. M. Blain. “There’s no reason to treat a farmer any worse than you’d treat a county. I say exempt both of them and let the water management districts work it out,” he concluded.

“I believe that delegating this lottery function to the water management districts,” said Nancy Roen, “is in recognition of the strong and able role that our boards have played thus far.”

New DNR director Tom Gardner has picked up on the idea quickly and has proposed a new game called “Wheels of Progress” to be played

every other Tuesday before the Governor and Cabinet Jim Smith, who has always wanted to be the MC of his own talkshow, has agreed to spin the wheel, and Victoria Tschinkel, formerly of DER, has agreed to turn the big letters on the big board for Big Jim. “Together they should be quite a team,” said Tom. “We’ll have some new twists in it,” he said. “For example, if certain numbers come up on the wheel, you may have to lease land to us. By the same token, we may have to abandon a state office building or two to create additional wildlife habitat. Wouldn’t that be a stitch,” he said.

The lottery recommendation still has to go before the Governor, who is talking about repeal even before the passage of this bill. As you recall, he campaigned strongly on this point.

In any case, everyone feels that the legal profession stands to be the big loser. “Lawyers and hearing officers won’t have anything to quibble

From the Editor ...



As many of you know, it has been some time since the last publication of a newsletter by the Administrative Law Section. I am convinced that there are many topics — scholarly, informational, political or humorous — which are of common,

if not equal, interest to members of the Administrative Law Section. Assembling these matters in print on a periodic basis, however, is not a task that any individual can do. For that reason, your assistance is needed for future issues of this newsletter.

You may elect to contribute in a variety of ways. If you read the Florida Administrative Weekly, you may assist me in noting the peculiar language and format into which ordinary, and usually unremarkable, events have been pressed. You will drop me a note, for example, to advise that the alligator musk turtle may no longer be harassed or disturbed except during hunting season, at which time, one may have no more than two dead ones in the trunk of one’s automobile or other type of vehicle. You will call to my attention that the Department of Natural Resources has prohibited boating within certain waters adjacent to a spot at which the Pope and President Reagan were to meet. (Whether this ban extended to walking on water as well was unclear. In any case, it is doubtful that the Department of Natural Resources has jurisdiction over either the Pope or the President.)

You may also use the newsletter for correspondence with other members of the section or for preliminary scholarly endeavors for which you may seek some collaboration or feedback. You may feel, for example, that the lottery for environmental permits described elsewhere herein should be extended forthwith to healthcare facilities. A short letter of support to the newsletter would be an ideal way to express that desire.

Your contribution to the Section newsletter will be greatly appreciated. Please contact me in advance if you have a substantial contribution which may warrant special handling by our extensive newsletter editorial staff.

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Charles G. (Gary) Stephens, a graduate of the FSU College of Law, has recently opened his own office in Tampa for the practice of Environmental and Administrative Law. Stephens' background includes over five years as a DER attorney. He also serves on the executive council of the Florida Bar Administrative Law section and is a member of the Florida Chamber of Commerce Natural Resources and Growth Management Committee.

over now," said Sharyn Smith, the new D.O.T. general counsel. "Maybe we can get back to building roads for the people."

The Florida Bar, however, has gone on record preliminarily as opposing the lottery concept "We don't like to see justice, especially environmental justice, equated with a roulette table. We strive for a system where the better lawyers representing the better clients get the better results. If you abandon that concept," the Bar spokesman said, "we might as well go back to the jungle."

"The Jungle...the Jungle..." said a commission member, "that's kinda catchy. How do you think that would work?"

Administrative Law Recent Developments

Recent cases of interest interpreting various provisions of the Administrative Procedure Act or other aspects of governmental practice include:

DER v. C. P. Developers, 12 FLW 2053, (1st DCA Aug 25, 1987), a DER permitting case construing the grandfather provisions of 17-4.022(8) F.A.C. and declining to apply the doctrine of equitable estoppel to assist a developer who had relied on previous representations by the department. Compare, *Occidental Chemical Agricultural Products Inc. v. DER*, 501 So.2d 674 (Fla 1st DCA 1987); see also, *Reedy Creek Improvement District v. DER*, 486 So.2d 642 (Fla 1st DCA 1986)

Florida Department of Corrections v. Bradley, 12 FLW 1899 (Fla 1st DCA Aug 5, 1987). A novel case in which the motion of Appellee Bradley to strike the department's brief for failing to introduce the record of the proceeding is granted on the grounds that the department's brief made references to factual matters in the record despite their failure to submit that record during the administrative proceeding below. Not inclined to give up easily, the Dynaspan Corporation held off both a hearing officer and a circuit judge on writs of mandamus and prohibition respectively while seeking the determination of a federal law preemption matter. See, *Dynaspan Corp. v. Hearing Officer Arnold H. Pollock, DOAH, v. Honorable John D. Wessel, Judge of 15th Judicial Circuit, Palm Beach County*, 510 So.2d 307 (Fla 4th DCA 1987).

Inverness Convalescent Center and Beverly Enterprises — Florida v. HRS, 12 FLW 2083 (Fla 1st DCA Aug 26, 1987). This case updates the

First District's evaluation of comparative review rights since *Gulf Court*.

Thompson v. DER, Supreme Court of Florida, September 3, 1987. In this most recent recitation of the rights and duties of parties in environmental permitting proceedings, the Supreme Court has indicated that doctrine of *res judicata* is to be applied very sparingly in administrative proceedings and that virtually any reasonable change in the subject of the application, the passage of time, the nature of the impact or the scope of the proposal will preclude the use of *res judicata* to prevent examination of the permit application on the merits.

Finally, in *Grove-Watkins Constructors v. Florida Department of Transportation*, Case No. BR-163, First District Court of Appeal opinion on motion for rehearing, August 4, 1987. The court affirmed its earlier ruling in the same case to the effect that DOT had erred in declining to grant a road construction contract to Grove-Watkins Constructors after a recommended order by a hearing officer was favorable to their position. With the work approximately half-completed, there are now two parties who, by contract or court order, are entitled to the benefits of that award. Stay tuned.

In what I have been told is a *completely* unrelated proceeding, the DOT has challenged certain rules proposed by the Division of Administrative Hearing for the conduct of bid protest proceedings before that division. Reminiscent of who's taking care of the caretaker's daughter when the caretaker's out taking care, DOAH has had to look around for a hearing officer to hear this rule challenge. At latest word, the general counsel for PERC had been selected to entertain this challenge to the 22I-6 rule requiring notice of A bid protest to all bidders.

Are the Model Rules Still Alive and Well?

The Rules Committee of the Administrative Law Section solicits your comments on the continued viability of the Model Rules of Procedure. Should any of the Model Rules be amended? Repealed? If so, which ones and why? Should any new rules be added? What area? Why?

Your comments and suggestions should be mailed no later than *January 28, 1988* and should be directed to the attention of Fay Yenyo, The Florida Bar, 600 Apalachee Parkway, Tallahassee, FL 32301.

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Board of Governors Liaison Report

by Thomas M. Ervin, Jr.

Congratulations to the Administrative Law Section on this fine new bulletin, and thanks for the opportunity to submit a brief liaison report. It has been my privilege to serve as liaison from the Board of Governors to the Administrative Law Section for the past three years.

No report of Board of Governors events can be complete without some mention of current budgetary factors. With recent amendments to The Florida Bar budget to finance the start up of mandatory CLE, the projected Bar operating deficit for 1987-1988 is approximately \$600,000. While we hope the eventual operating deficit won't be this high, this would represent approximately a 20% depletion of the Bar's operating reserve. This state of economic affairs is the reason for a number of "belt-tightening" measures enacted by the Board recently, some of which may directly or indirectly impact sections. All I can say, or ask, is bear with us folks. We are trying to stave off a general dues increase unless and until absolutely necessary.

CLE is another current, recurring issue. As all should know, by now, the mandatory CLE program goes into effect January 1, 1988, with a general Bar-wide requirement of 30 credit hours over three years. This program, with significantly increased demand and need for CLE, represents both a burden and an opportunity for sections. The "burden" arises from the necessity that much of the expanded CLE offerings *must* emanate from sections, if the program is to succeed, and both scope of offerings and quality need to be expanded. The "opportunity" is for sections to increase revenues, section interest, and membership through their CLE programs. All other factors aside, sections will do their members a service by encouraging them to get an early CLE start

and not leave it to the last minute.

Increased section autonomy is also a recurring Board of Governors subject. Recent policy changes have somewhat increased section autonomy in budgetary and legislative areas. The Board of Governors is quite willing to consider, or reconsider, *any* restriction on section activity that unnecessarily or unproductively burdens the sections. This is not to say that every restriction or Bar oversight function can be removed. The sections *are* arms or units of the Bar and the system *must* recognize this reality. It is, however, to say that the Board of Governors has not only an open mind, but also an active desire to cut away section rules, restrictions and procedures that irritate or impede to no good end.

Again, thanks for the opportunity to submit these comments. Section officers and members are invited to "educate" me at any time regarding section concerns, or matter of general Bar interest.



Thomas M. Ervin, Jr. is a graduate of the University of Florida and Florida State University where he received his B.S. in 1963 and his J.D. in 1967. He is a partner in the Tallahassee law firm of Ervin Varn Jacobs Odom & Kitchen.
