



She Was the Best of Us: A Tribute to Mary Smallwood (1947-2018)

By Sidney F. Ansbacher

Mary Smallwood was a great Floridian. I thought long about the first sentence of this tribute to our friend, mentor and former Administrative Law Section Chair, who died on August 27, 2018. Mary deserves the accolade. She touched more lives than any member of the Bar I know. As a pioneer. Mother. Daughter. Friend. Sister. Wife. Ex-wife. Mentor. Professor. Volunteer. Role model. Unpar-

alleled lawyer. She never sought acclaim. She just sought to do good, well. In that, she succeeded.

Mary was born in Ft. Myers when that former frontier fort had a population of about 12,000. Her great grandparents were Ft. Myers pioneers. Her family lived alongside Thomas Edison, Hamilton Disston, Harvey Firestone, and Henry Ford, together with many people trying

to eek out a living at the edge of the Everglades.

She was born a Frey. Regardless, an interesting coincidence was the 1910 killing of the notorious Edgar Watson at the still-standing Ted Smallwood's general store in nearby Chokoloskee. I never got to ask Mary if there was any remote connection.

See "A Tribute," page 17

From the Chair

By Judge Gar Chisenhall

Chair columns are usually a platform for section chairs to recognize great work done by section members, and this chair's column is going to continue that happy tradition. We are very fortunate to have several people who are working hard to raise the Section's profile and enhance the value of joining the Section.

Tabitha Harnage has done an outstanding job organizing a monthly speaker series at the Florida State University College of Law. The speaker series is a partnership between the Section and student orga-

nizations. Tabitha organizes a small group of Section members to speak about administrative law on the third Wednesday of every month. Tabitha also arranges for local restaurants to cater each event. I have been able to attend every edition of the speaker series so far, and I am happy to report that they have been a huge success, with 30 to 50 students attending each time. Congratulations to Tabitha, and thank you to the Section members who have taken time from their busy schedules to speak to the law stu-

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FROM THE CHAIR*from page 1*

dents: Paul Drake, Taylor Anderson, Alexandra Lozada, Joaquin Alvarez, and Mattie Birster. For most of the students in attendance, this is their first exposure to administrative law, and we hope that they will remember the Administrative Law Section after they pass the bar exam and are deciding which sections to join.

Speaking of Tabitha, she, James Ross, and Virginia Ponder organized the Section's inaugural "Fall FSU Law Mixer & Turkey Drive" to benefit students attending Oak Ridge Elementary School and their families. The mixer was held at Madison Social in Tallahassee on November 1, 2018, and those attending donated canned goods and money for the purchase of turkey dinners. Section members then met the Saturday before Thanksgiving to assemble the meals. Thank you to Tabitha, James, Virginia, all those who donated, and everyone who assembled meals. Thank you as well to Flowers Food in Thomasville, Georgia, for donating bread, peanut butter, and jelly. Hopefully, this will

become an annual event and will reach more families every year.

I am very happy to report that the Administrative Law Section's events are no longer confined to Tallahassee. On October 17, 2018, the Section's brand new South Florida Chapter held a joint happy hour with the Florida Bar's Tax Law Section and the Broward County Bar Association's Young Lawyers Section at Good Spirits Fifth & Fed in Fort Lauderdale. We owe a huge "thank you" to Paula Savchenko for organizing that event, and I am so happy that Paula and Sharlee Edwards stepped up to make the South Florida Chapter a reality. If you are a Section member in South Florida, please contact Paula and Sharlee and see how you can help them make the South Florida Chapter a success. Also, please spread the word and let administrative law practitioners in South Florida know that the Section is starting to branch out beyond Tallahassee and that now is a great time to join the Section.

On August 14, 2018, I received an e-mail from Sarah Hodges who was co-chairing a CLE on basic administrative law for the Young Lawyers

Division of The Florida Bar. Sarah asked if I was interested in speaking on one of several topics. When I saw that she needed several more speakers to fill out her roster, I sent an e-mail blast to my fellow Section members, and Sarah was immediately inundated with volunteers. In fact, she had many more volunteers than needed. So, I thank the following people who were "quick on the draw" and spoke during the CLE on November 2, 2018, in Tallahassee: Seann Frazier, Virginia Dailey, Mattie Birster, Tabitha Harnage, Joaquin Alvarez, Fred Dudley, Marc Ito, Louise St. Laurent, Gigi Rollini, Bridget Smitha, Amanda Bush, and Anthony Miller. I would also like to thank those people who volunteered but were unable to secure a slot due to the overwhelming response. I was so happy to see our Section step up in such a big way.

If Hurricane Michael had not made an unexpected and unwanted visit to Tallahassee, I am sure that I would be thanking Judge Cathy Sellers, Jowanna Oates, and the members of their steering committee for organizing another wildly successful Pat

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This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

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FROM THE CHAIR*from page 2*

Dore Conference. While the Pat Dore Conference did not occur as planned, Judge Sellers and Jowanna acted quickly to secure another date, and the Pat Dore Conference is now scheduled for February 8, 2019. Thank you to Judge Sellers, Jowanna, and the steering committee members for all their hard work in formulating topics and lining up speakers. While we will end up waiting a little longer for this edition of the Pat Dore Conference, I am sure that it will prove to be well worth the wait.

Thank you to Paul Drake, Christina Shideler, and Gregg Morton for maintaining and updating the Section's social media platforms on Facebook, Twitter, and LinkedIn. Paul has been absolutely instrumental over the last couple of years in making the Section's new and vastly improved website a reality. If it has been a while since you have visited

the Section's website, please take a few moments to find it and see all of the great changes that have been made.

As some of you may know, Lyyli Van Whittle has taken over for Stephen Emmanuel as the Section's liaison to *The Florida Bar Journal*, and she put out the call for articles at a recent meeting of agency general counsels. Thank you to Lyyli for assuming this very important position. Getting articles published in *The Florida Bar Journal* raises the Section's profile AND keeps Bar members apprised of important developments in administrative law.

I want to thank Chase Early of The Florida Bar for assisting the Section while our permanent Bar administrator, Calbrail Banner, was on maternity leave. Chase had a "trial by fire" because he had to deal with rescheduling the Pat Dore Conference. Nevertheless, he did a terrific job while fielding countless e-mails from me and many others.

Speaking of Calbrail, she is past due for some much deserved recognition because of the outstanding job she has done as the Section's administrator since September 2013, and I would like to close this chair's column by telling the membership a little about her. Calbrail was born in Tallahassee and graduated from Lincoln High School. After earning two degrees (a Bachelor of Science in Business Administration and an MBA) from Florida A&M University, Calbrail worked as a marketing and communications manager at FAMU. She also worked as an adjunct professor teaching business courses at Keiser University. Calbrail has been featured in Tallahassee Woman Magazine as one of the "Women to Watch" nominees. She has an affinity for traveling, freelance photography, and watching "Flip This House!" Calbrail and her husband Johnathan welcomed their first child, Jaxon, on October 3, 2018. If you get the chance, please thank Calbrail for all of her hard work on the Section's behalf.



Tiffany Roddenberry

New Administrative Law Section Newsletter Co-Editor



Tiffany Roddenberry has agreed to assume the position of newsletter co-editor, serving along with Jowanna N. Oates. Tiffany has long served as a member of the DOAH case notes team. Please drop Tiffany a message today thanking her for service as co-editor and let her know your thoughts on possible topics and authors for future articles. Also, the Section owes Judge Elizabeth McArthur a debt of great gratitude for her many years of tireless service to the Section as the newsletter editor and co-editor.

Administrative Law Section Awards

The Administrative Law Section is seeking nominations for its two highest awards: the S. Curtis Kiser Administrative Lawyer of the Year Award and the Administrative Law Section Outstanding Service Award.

The S. Curtis Kiser Administrative Lawyer of the Year Award is named after Senator S. Curtis Kiser, a 1967 graduate of the University of Iowa and a 1970 graduate of the Florida State University College of Law. Senator Kiser has a long and distinguished career in public service to the State of Florida. His public service includes: Representative (1972-1982); Senator (1984-1994); Public Service Commission Nominating Council (1978-1994); General Counsel for the Public Service Commission; and Commissioner, Public Employees Relations Commission. During Senator Kiser's legislative service, he was the prime sponsor of legislation that established the Florida Evidence Code and the Administrative Procedure Act.

The S. Curtis Kiser Award will be presented to a member of The Florida Bar who has made significant contributions to the field of administrative law in Florida.

The Administrative Law Section Outstanding Service Award will be presented to a member of the Administrative Law Section Executive Council (other than the chair) who has provided outstanding leadership for the Section.

Applications for both awards will be available on January 7, 2019, on the Section's website at: <http://www.fladminlaw.org/>. The deadline for applications is February 28, 2019.

For additional information, please contact Jowanna N. Oates at (850) 488-9110 or oates.jowanna@leg.state.fl.us.

DOAH CASE NOTES

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Virginia Ponder, Christina Shideler, Paul Rendleman, and Tiffany Roddenberry

Licensure Actions

NHI SPB Operations, LLC v. Agency for Health Care Admin., Case No. 18-1275CON (Recommended Order July 27, 2018).

FACTS: Section 408.040(2), Florida Statutes, provides that a certificate of need shall expire 18 months after issuance if the applicant has not commenced necessary construction. The statute also provides in pertinent part that the certificate of need's validity can be extended if the applicant demonstrates that good-faith commencement of the project is being delayed by governmental action or inaction. On June 16, 2018, the Agency for Health Care Administration (AHCA) issued certificate of need 10412 to NHI SPB Operations, LLC (NuVista) for the establishment of an 111-bed community nursing home by new construction anywhere in Palm Beach County. Because governmental action and inaction prevented NuVista from beginning construction at its selected location, NuVista submitted a request on November 15, 2017, for AHCA to extend its deadline for commencement of construction by 60 days. AHCA approved that request, and February 14, 2018, became the new date for construction to begin. Because the same circumstances continued to block the start of construction, NuVista filed a second extension request on January 29, 2018. However, AHCA denied the second request.

OUTCOME: The ALJ found that NuVista demonstrated that good-faith commencement of construction continued to be delayed by governmental action and inaction with respect to regulations and permitting. In doing so, the ALJ rejected AHCA's argument that NuVista should be precluded from presenting evidence

of events that had occurred subsequent to the submission of the second extension request. Any such exclusion would be contrary to the Administrative Procedure Act's requirement of a de novo hearing before DOAH. The ALJ addressed another issue regarding hearsay evidence and rejected AHCA's argument that admission of certain evidence with a stipulation as to its authenticity cured any hearsay problems associated with that evidence. The ALJ concluded that the limitations in section 120.57(1)(c), Florida Statutes, and Florida Administrative Code Rule 28-106.213(3) still applied and that she was thus prohibited from basing any findings solely on that hearsay unless that evidence fell within an exception to the hearsay rule.

Unadopted Rule Challenges

Fla. Horsemen's Benevolent & Protective Ass'n v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, Case No. 18-4448RU (Order of Dismissal Sept. 14, 2018)

FACTS: The version of section 120.57(1)(e), Florida Statutes, that took effect in 2016 authorizes a challenger to an agency action to collaterally attack that agency action via a rule challenge pursuant to section 120.56, Florida Statutes. The Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Division) issued a summer jai-alai permit to Calder Race Course (Calder) on February 9, 2018. On August 9, 2018, the Florida Horsemen's Benevolent & Protective Association, Inc. (FHBPA) challenged that permit by filing a petition pursuant to section 120.57(1). The Division ruled that the petition was untimely, and the FHBPA appealed the Division's ruling to the First District

Court of Appeal. Meanwhile, pursuant to section 120.56(4), the FHBPA filed a petition with DOAH on August 21, 2018, alleging that the Division's issuance of Calder's summer jai-alai permit was based on an unadopted rule. On September 5, 2018, the ALJ issued an order to show cause requiring the FHBPA to explain why its rule challenge petition should not be dismissed as a collateral attack on a permit application not before DOAH.

OUTCOME: The ALJ ultimately dismissed the FHBPA's rule challenge petition. In doing so, he noted that the FHBPA's direct challenge to the summer jai-alai permit was pending before the First District Court of Appeal. As a result, DOAH had no colorable authority over any agency action impacting the FHBPA's substantial interests. According to the ALJ, the "FHBPA is not 'substantially affected' by the alleged unadopted rule, since the unadopted rule cannot be used to collaterally attack the issuance of the summer jai-alai permit, so long as jurisdiction over that permit is with the DCA." The ALJ's dismissal was without prejudice to the FHBPA renewing its rule challenge "at such time as the issuance of the permit is subject to challenge under chapter 120."

Fla. Horsemen's Benevolent & Protective Ass'n v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, Case No. 17-5872RU (Final Order Sept. 4, 2018).

FACTS: In a similar challenge, the FHBPA argued that the Division should not have issued a different pari-mutuel wagering license to Calder on the basis that the license had been issued using an unadopted rule. Calder holds a

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thoroughbred horse racing permit and a slot machine license. On May 9, 2017, Calder applied to renew its slot machine license, and the Division granted that application on July 6, 2017. On October 25, 2017, the FHBPA filed a petition alleging that the Division's approval of Calder's renewal application was based on an unadopted rule. Because Calder had closed its grandstand, the FHBPA argued that Calder's slot machine gaming area was no longer "contiguous and connected" to its live gaming facility as required by section 551.114(4), Florida Statutes.

OUTCOME: The ALJ found that "the Division's action in approving the renewal of Calder's slot machine license was based on facts specific to Calder, applied only to Calder, and constituted an order, not an unadopted rule." The ALJ also found that "the Division was entitled to some exercise of discretion in applying the term 'contiguous and connected' to the unique facts on the ground at Calder, without going through the process of adopting a rule that would apply only to Calder."

Covenant Hospice, Inc. v. Agency for Health Care Admin., Case No. 17-6836RU (Final Order Aug. 15, 2018).

FACTS: As the state agency responsible for administering Florida's Medicaid program, the Agency for Health Care Administration (AHCA) recovers overpayments from Medicaid providers. Covenant Hospice, Inc. (Covenant) provides hospice services to Medicaid recipients. During an audit of Medicaid claims for services rendered by Covenant between January 1, 2011, and December 31, 2012, 52 patient files were referred for physician peer review. The physician peer reviewers determined that several of the aforementioned patients were ineligible for Medicaid hospice services. As a result, AHCA notified Covenant that it would seek

to impose a \$135,404.68 fine and recover \$677,023.44 in overpayments. Covenant initiated a rule challenge arguing in part that the opinions of the peer reviewers were unadopted rules.

OUTCOME: The ALJ determined that the expert opinions were not unadopted rules. In order for a statement to be a statement of an agency, it "must be a statement of the agency as a state institution, not merely the position of a single employee or group of employees." In addition, the ALJ noted that "where application of agency policy is subject to the discretion of agency personnel, the policy is not a rule."

Disciplinary/Enforcement Actions

Dep't of Bus. & Prof'l Regulation, Constr. Indus. Licensing Bd. v. Walk, Case No. 18-3505PL (Recommended Order Oct. 18, 2018).

FACTS: Section 489.129(1)(b), Florida Statutes, subjects construction contractors to discipline for being convicted of a crime "which directly relates to the practice of contracting or the ability to practice contracting." In November 2016, Christopher Walk, a Florida-licensed certified residential contractor, was adjudicated guilty of three counts of possessing child pornography, and he served 18 months in prison. Mr. Walk reported his conviction to the Department of Business and Professional Regulation, Construction Industry Licensing Board (Department) in December 2016. The Department filed an administrative complaint on November 26, 2017, alleging that Mr. Walk violated section 489.129(1)(b).

OUTCOME: The ALJ noted that courts construing statutes similar to section 489.129(1)(b) "have not required the crime to directly relate to the technical ability to practice a profession." Because a state-licensed residential contractor is trusted by homeowners, allowed into their homes, and can come into contact with children, the ALJ concluded that

the Department proved its case by clear and convincing evidence.

Dep't of Health v. MacNeil, Case No. 18-2479 (Recommended Order Oct. 19, 2018).

FACTS: Gary MacNeil is a Florida-licensed massage therapist. At all relevant times, his address of record with the Department of Health (Department) was in Jacksonville, Florida. On October 11, 2016, the Department issued an Order of Emergency Restriction of License (ERO) prohibiting Mr. MacNeil from practicing massage therapy on female clients. The ERO advised Mr. MacNeil that the Department would initiate a disciplinary proceeding at an unspecified time in the future. The Department mailed the ERO to Mr. MacNeil's address of record in Jacksonville. However, Mr. MacNeil and his family were living in Germany at the time, and Mr. MacNeil had directed the U.S. Postal Service to forward his mail to a military address available to members of the armed forces and civilian contractors. The ERO was delivered to the military address on October 21, 2016. Meanwhile, Mr. MacNeil had notified a Department investigator via e-mail on October 13, 2016, that he was living in Germany and using the military address. Now that it had the military address and an e-mail address for Mr. MacNeil, the Department mailed and e-mailed the ERO to MacNeil based on this new information. Mr. MacNeil confirmed receipt of the mailed and e-mailed versions of the ERO on October 28, 2016. On October 25, 2016, the Department mailed an administrative complaint to Mr. MacNeil's address of record in Jacksonville. Mr. MacNeil's wife picked up the administrative complaint from the military address on November 28, 2016. Pursuant to rule 28-106.111(2) of the Florida Administrative Code, Mr. MacNeil had until December 19, 2016, to request a formal administrative hearing. After receiving Mr. MacNeil's election of rights form on January 24, 2017, the Department rejected it as untimely, and Mr. MacNeil requested

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an administrative hearing to contest that determination.

OUTCOME: Mr. MacNeil testified that his estranged wife did not give him the administrative complaint until January 12, 2017. However, Mr. MacNeil did not change his address of record with the Department, and section 456.035, Florida Statutes (2016), provided in pertinent part that service by regular mail to a licensee's last known address of record constitutes adequate and sufficient notice to the licensee for any official communication. The Department deemed November 28, 2016, *i.e.*, the date Mrs. MacNeil picked up the administrative complaint, as the date of delivery, and the ALJ concluded that Mr. MacNeil's "self-serving testimony" was not sufficiently persuasive to establish that he did not receive the administrative complaint until January 12, 2017. As a result, the ALJ recommended that the Department issue a final order deeming Mr. MacNeil's election of rights to be untimely filed.

Bid Protests

Pediatric Servs. of Am., Inc. v. Escambia Cnty. Sch. Dist., Case No. 18-2671BID (Recommended Order July 24, 2018).

FACTS: The Escambia County School District (District) determined in early 2018 that changes in federal law required that all healthcare for students be provided pursuant to competitive bidding. Accordingly, the District issued a request for proposal (RFP) on April 12, 2018, and formed an evaluation committee to review the responses. The existing provider of healthcare services to the District, Pediatric Services of America, Inc., a/k/a PSA Healthcare (PSA) and Aloa Care Group (Aloa) responded to the RFP. PSA, a nationwide company with over \$355 million in assets, had provided healthcare services to the District since 2013, and the District has been satisfied with PSA's services.

In contrast, Aloa had two employees, a husband and wife team, when it responded to the RFP. While Aloa provided no financial information that would have enabled the District to evaluate its long-term financial viability, it did submit a letter of recommendation from a member of the District's own evaluation committee. After initially awarding PSA the higher score, a subsequent meeting of the evaluation committee resulted in Aloa receiving the higher score. Ultimately, the District awarded the contract to Aloa and elected to have Aloa begin providing services even though PSA protested the intended award.

OUTCOME: The ALJ recommended that a final order be entered by the District declaring the award of the

contract to Aloa was erroneous, arbitrary, and capricious, finding fault with several aspects of the District's procurement. For example, the ALJ found that "the financial review by committee members strains all credulity. . . . By any conceivable objective and unbiased measure, as compared to PSA's financial condition, as proven by its audited financial statement, Aloa's financial position was woefully inferior." Moreover, once the evaluation team member learned that Aloa had submitted the member's own recommendation letter as part of the RFP response, the member should have recused herself but did not. Overall, the ALJ found that the reviews by the evaluation committee members "showed an unearned and unwarranted bias in favor of Aloa on all accounts."



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APPELLATE CASE NOTES

by Gigi Rollini, Tara Price, and Larry Sellers

Emergency Rules—Petition to Review Emergency Generator Rules for ALFs and Nursing Homes

Fla. Ass'n of Homes & Servs. for the Aging, Inc. v. Agency for Health Care Admin., 252 So. 3d 313 (Fla. 1st DCA 2018).

In consolidated challenges to emergency rules 58AER17-1 and 59AER17-1, the Florida Association of Homes & Services for the Aging (Association) argued that the findings of immediate danger, necessity and procedural fairness on which the rules were based were insufficient under section 120.54(4), Florida Statutes.

To utilize emergency rulemaking procedures in lieu of standard rulemaking, an agency must express reasons at the time of promulgation of the rule for finding a genuine emergency. Because the emergency rulemaking procedures do not afford parties the full panoply of due process protections or the protections of economic impact analyses as required by the regular rulemaking process, agencies must strictly adhere to the requirements set forth in section 120.54 when adopting emergency rules.

In looking to the four corners of the emergency rules, as is required, the court denied the Association's petitions, finding the emergency rules presented a sufficient, particularized factual basis that an immediate danger to the public health, safety or welfare existed, which the rules were designed to address. In so doing, the court cited the limited nature of its review.

In his dissent, Judge Wolf acknowledged the reasonableness of remedial action in light of the tragedy that took eight lives at the Rehabilitation Center at Hollywood Hills in September 2017. However, he found that the emergency rules did not demonstrate that the substantial expenditures

required within a short period were actually necessitated by any immediate danger, or that the adoption process was fair under the circumstances. Judge Wolf opined that the four corners requirement does not protect an agency from judicial scrutiny. The requirement is one placed on the agency to demonstrate within the rule itself the necessity of issuing an emergency rule without the due process protections of the Administrative Procedure Act. It is not a check on an appellate court's ability to review the agency's determination of fairness.

Environmental Resource Permit—Challenge to Notice of Intent to Issue an ERP

City of W. Palm Beach v. Palm Beach Cnty., 253 So. 3d 623 (Fla. 4th DCA 2018).

The Florida Department of Transportation (FDOT) and Palm Beach County (County) applied for an environmental resource permit (ERP) from the South Florida Water Management District (District) for a road extension project and related surface water management system. The District issued FDOT and the County a notice of intent to issue the ERP. The City of West Palm Beach (City) objected to the issuance of the ERP, arguing that the project would adversely impact a nature preserve and water catchment area owned by the City known as the Grassy Waters Preserve.

Approximately one week before the start of the final hearing, FDOT and the County amended their application to address some of the City's concerns about the impact to the Grassy Waters Preserve. The amended application included a new assertion about a net improvement to the quality of water discharged from the project site. The City moved to continue the hearing so that its expert witness

could analyze the amended application and to permit discovery of FDOT's and the County's experts. The ALJ denied the City's motion. After the hearing, the ALJ issued a Recommended Order, which recommended the approval of the amended permit application.

The District issued a Final Order stating it must defer to the Florida Department of Environmental Protection's (FDEP) interpretation of the narrative nutrient standard and that the ALJ's findings of fact and conclusions of law on the narrative nutrient standard were unnecessary and did not affect the outcome of the proceeding.

On appeal, the City argued that the ALJ's denial of its motion to continue the hearing was a violation of due process. The court noted that a permit application can be amended after the District has issued its notice of intent to approve or deny a permit, but due process must be preserved. The City was not at fault for the additional time that it requested, and FDOT and the County did not show they would be prejudiced by a short continuance. As such, it was error to deny the City an opportunity to fully address the amended permit application, particularly since the amended application included a new assertion which became the foundation upon which the permit was approved.

The City also argued that the ALJ incorrectly interpreted the narrative nutrient standard, and the District thus approved materially flawed findings. The court agreed, noting that the District's Final Order failed to contain substituted findings of fact or conclusions of law on the standard and that it could not conclude that the District properly found the application provided reasonable assurances of water quality when the ALJ made factual findings based on an erroneous interpretation

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of the narrative nutrient standard. Thus, the court reversed the Final Order and remanded the case for a new hearing.

Rule Challenge—Certificate of Need

Orlando Health Cent., Inc. v. Agency for Health Care Admin., 252 So. 3d 849 (Fla. 1st DCA 2018).

The Agency for Health Care Administration (AHCA) accepts and considers certificate of need applications in batching cycles, in which all applications seeking approval for the same type of healthcare facility or expansion are subject to comparative review. By statute, applicants in the same batching cycle are entitled to a comparative hearing on their applications and have 21 days to request one after publication of the award. However, AHCA adopted a rule in 1992, giving applicants 10 days from the publication of a notice of litigation in the Florida Administrative Register to file a petition challenging any or all of the other cobatched applications.

Subsequently, in 1997 a statute was enacted that provided the rules of the agency in effect as of June 30, 1997, which included the 10-day rule, shall remain in effect until such rules are repealed or amended by the agency. The Legislature enacted similar legislation again in 2004.

In September 2016, three health centers applied to establish new hospitals in Orange County, which were co-batched and comparatively reviewed. On December 2, 2016, AHCA published notice that it would approve two of the three applications, thereby triggering the 21-day window to request a comparative hearing. Within that window, two challenges were filed, including one by Orlando Health Central, Inc. (Orlando Health). On January 5, 2017, additional challenges were filed outside of the 21-day window, but within 10 days of the notice of the prior challenges.

Thereafter, Orlando Health chal-

lenged the 10-day rule as contrary to statute requiring a contest to be filed within 21 days. The ALJ agreed that the 10-day rule originally exceeded the authority granted by statute, but concluded that the Legislature's enactment of a subsequent statute effectively adopting and approving the 10-day rule ratified it.

The First District Court of Appeal agreed that when the Legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by courts or administrators. Here, not only did the rule exist prior to the 1997 statute's enactment, but also a subsequent DOAH case determined that any argument as to whether the rule exceeded delegated authority was immaterial once the Legislature ratified it through the 1997 enactment, and the Legislature did not alter that decision when it reenacted the statute in 2004.

Accordingly, while a legislative mandate that certain rules are "in effect" would not alone render them immune from section 120.56, Florida Statutes, challenges, where a decision is then rendered upholding them and the Legislature subsequently reenacts the provision without alteration, the statute effectively ratifies, validates and declares saved the rule.

Rules of Evidence—Application of Daubert in Administrative Actions & Statute of Limitations for Continuous Tortious Acts

SDI Quarry v. Gateway Estates Park Condo. Ass'n, 249 So. 3d 1287 (Fla. 1st DCA 2018).

Gateway Estates Park Condominium Association (Association) filed a petition pursuant to the Florida Construction Materials Mining Activities Administrative Recovery Act, which allows individuals to seek damages for injury resulting from blasting activities. The Association argued that SDI Quarry damaged the lake through its use of explosives over a period of several years. SDI Quarry moved to dismiss the petition as time-barred under section 552.40, Florida Statutes, which requires petitions to be filed within 180 days of the alleged damage's occurrence. The ALJ con-

cluded that the damage to the lake was continuing, and that the harm to the lake was "cumulative, indivisible, and inseparable," and thus, the petition was timely.

The Association's expert witness testified that vibrations from SDI Quarry's blasting activities caused the damage to the lakeshore. His testimony, in part, was based on a series of conversations with a colleague. SDI Quarry objected to the expert witness's testimony. The ALJ permitted the expert to testify and found his opinion on causation to be credible. The ALJ issued a Final Order awarding the Association its requested damages, which included costs for preventative devices to protect the lake from future blasting as well as the cost of restoring the lakeshore to its original condition.

SDI Quarry argued on appeal that the Final Order should be reversed for two reasons: (1) the Association's petition was time-barred under section 552.40; and (2) the Association had failed to prove that the blasting activities damaged the lakeshore. First, the court noted that in a continuing tort action, the statute of limitations runs from the date of the last tortious act. The court concluded that the Association properly alleged a continuing tort because each blast gave rise to a new cause of action that could result in successive actions for damages. The court noted, however, that the portion of the damages award attributable to restoring the lake to its former condition might have been time-barred. But because SDI Quarry had failed to show the portion of the award barred by the statute of limitations, the court affirmed the ALJ's Final Order awarding the total amount of damages.

Second, SDI Quarry argued that the Association's expert witness did not meet the standard under section 90.702, Florida Statutes, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court stated that even though the Florida Supreme Court had declined to adopt the *Daubert* standard to the extent it was procedural, *Daubert* still applied in administrative proceedings

continued...

APPELLATE CASE NOTES*from page 9*

because they are not controlled by the Florida Supreme Court's rules of procedure. The court then concluded that "the *Daubert* standard would apply" in this case, but SDI Quarry's *Daubert* argument was not preserved on appeal because it never made a *Daubert* objection or requested that the ALJ conduct a *Daubert* hearing. The court ruled that although SDI Quarry attacked the witness's training and experience, the ALJ did not abuse his discretion to find the witness qualified to testify based on the record evidence. Moreover, the court held that although the expert witness should not have testified on direct examination about the colleague with whom he consulted, those conversations were not a basis to exclude his opinion. Thus, the court affirmed the ALJ's Final Order.

Standing—Challenge of Permit Issuance to Florida Department of Transportation

Bluefield Ranch Mitigation Bank Tr. v. S. Fla. Water Mgmt. Dist., 43 Fla. L. Weekly D2443a (Fla. 4th DCA Oct. 31, 2018).

Bluefield Ranch Mitigation Bank Trust (Bluefield) is a privately-owned mitigation bank, with the statutory

purpose to sell credits in exchange for conducting environmental enhancement and preservation to offset unavoidable adverse impacts to wetlands and other property within its mitigation service area. The South Florida Water Management District (SFWMD) issued a permit to the Florida Department of Transportation (FDOT) for a road-widening project. Per the permit, FDOT was required to purchase mitigation credits as a means of offsetting the environmental impact. FDOT purchased some of the required credits from Bluefield, but most were provided by Dupuis Reserve (Dupuis).

Bluefield challenged the use of credits from Dupuis, arguing that Dupuis did not meet the statutory criteria to provide the mitigation and could not be used in lieu of Bluefield. The petition asserted that Bluefield's standing was based on a substantial interest in enforcing statutory compliance for mitigation within its service area, and preventing environmental harm caused by unlawful mitigation. Bluefield also argued that as a landowner in the affected area, it has a substantial interest in the protection of the environment within its service area. SFWMD concluded that such allegations were merely economic and insufficient to convey standing.

The Fourth District Court of Appeal found that Bluefield's alleged injuries were sufficient to allege the

requisite injury. Economic injury, in combination with other factors, may provide a basis for standing in an administrative proceeding. In this case, like in *Ybor III, Ltd. v. Florida Housing Finance Corporation*, 843 So. 2d 344, 346 (Fla. 1st DCA 2003), that economic injury was coupled with a substantial interest in ensuring that the agency was providing and promoting the public welfare by administering a governmental function fairly, honestly and consistently according to the rules the agency is charged with implementing.

Accordingly, the court held that Bluefield's interests were greater than purely economic—in choosing an unlawful mitigation option, the agency was subverting the statutory scheme that governs mitigation banks, including one within the same regional watershed and service area as the project, by allowing Dupuis to perform mitigation without the statutory compliance required. The court reversed and remanded the case for a formal administrative proceeding.

State Universities—Review of Order Denying Request for Residency Determination

Cobb v. Fla. Atl. Univ., 254 So. 3d 444 (Fla. 4th DCA 2018).

Johnson H. Cobb requested that Florida Atlantic University (FAU)

continued...

CALL FOR AUTHORS: Administrative Law Articles

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to *The Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for *The Florida Bar Journal*, please email Lylli Van Whittle (Lylli.VanWhittle@perc.myflorida.com) and if you are interested in submitting an article for the Section's newsletter, please email Jowanna N. Oates (oates.jowanna@leg.state.fl.us). Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either *The Florida Bar Journal* or the Section's newsletter.

APPELLATE CASE NOTES*from page 10*

determine his residency for tuition purposes and provided a number of documents to prove that he was a legal resident of the state for at least 12 months immediately before the start of the semester in which he sought in-state tuition. He submitted, *inter alia*, his driver's license, apartment lease, an affidavit of residency, vehicle registration, and a letter from his employer stating that he had worked 25 hours a week during the past six months. FAU's registrar denied Mr. Cobb's residency determination, stating that he did not satisfy section 1009.21, Florida Statutes, which requires the applicant to show proof of working at least 30 hours per week for the 12-month period prior to the start of the semester.

Mr. Cobb appealed the denial to FAU's residency appeals committee,

arguing that the registrar had misstated section 1009.21, and that a 12-month period of employment of at least 30 hours a week was not required but merely one of the ways that an applicant could prove he or she was a permanent Florida resident. FAU's residency appeals committee denied his appeal, stating that the registrar had considered his prior employment, and Mr. Cobb had not satisfied the requirements of section 1009.21.

Mr. Cobb argued on appeal that FAU had misstated the requirements of section 1009.21. The court examined section 1009.21 and agreed that the statute does not require students to show that they have been employed at least 30 hours per week for the 12-month period prior to the start of the semester. The court held that the plain language of the statute stated that employment documentation was only one of 14 types of documentation available to prove residency.

Additionally, Mr. Cobb argued that FAU's residency appeals committee erroneously focused only on his employment. Again, the court agreed, stating that the committee's limited consideration of Mr. Cobb's appeal was clearly erroneous. The court noted that the statute expressly states that employment is not the sole circumstance that should be considered when making residency determinations.

Thus, the court reversed FAU's Final Order and remanded the case for FAU to reconsider the student's request for a residency determination in light of the proper interpretation of section 1009.21.

Tara Price and Larry Sellers
practice in the Tallahassee office of
Holland & Knight LLP.

Gigi Rollini *is a shareholder with*
Stearns Weaver Miller in Tallahassee.



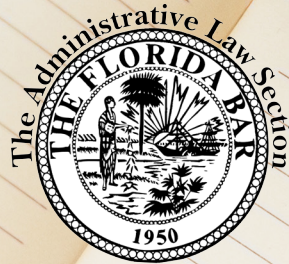
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SAVE THE DATE

Administrative Law Section Calendar of Events

January 7, 2019		Applications for nominations for the S. Curtis Kiser Administrative Lawyer of the Year Award and Administrative Law Section Outstanding Service Award available at www.fladminlaw.org .
January 16, 2019	12:30 - 1:30 p.m.	ALS Luncheon Speaker Series: What is DOAH? Florida State University College of Law – Roberts Hall (Lunch will be provided)
January 18, 2019		Deadline for submission of articles to Newsletter Editors
February 8, 2019	8:00 a.m. - 5:00 p.m.	Pat Dore Administrative Law Conference – Hotel Duval
February 28, 2019		Deadline for nominations for the S. Curtis Kiser Administrative Lawyer of the Year Award and Administrative Law Section Outstanding Service Award
February 20, 2019	12:30 - 1:30 p.m.	ALS Luncheon Speaker Series: Health Law & Administrative Law Florida State University College of Law – Roberts Hall (Lunch will be provided)
February 21, 2019	Webinar	Pat Gleason: Public Records and Social Media Issues
March 7, 2019	Webinar	Ginny Dailey: Declaratory Statements
March 13, 2019	12:30 - 1:30 p.m.	ALS Luncheon Speaker Series: Topic TBD Florida State University College of Law – Roberts Hall (Lunch will be provided)
March 21, 2019	Webinar	Marti Chumbler: Open Meetings
April 4, 2019	Webinar	Tobey Schultz: Licensing
April 12, 2019		Deadline for submission of articles to Newsletter Editors
April 19, 2019	Webinar	Fred Springer: Procurement and Bid Protests
June 28, 2019	1:00 - 3:00 p.m.	Administrative Law Section Executive Council Meeting Florida Bar Annual Convention - Boca Raton, Florida

Law School Liaison

Fall 2018 Update from the Florida State University College of Law

By David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of the Florida State University College of Law students and faculty. It also lists the rich set of programs the College of Law hosted during the Fall 2018 semester.

Recent Student Achievements

- Our Animal Legal Defense Fund (FSU ALDF) student organization has been named chapter of the year by the national Animal Legal Defense Fund. This is the second time since 2014 that FSU's chapter has received this award. The award recognizes an Animal Legal Defense Fund chapter that has shown incredible efforts in advancing the field of animal law and advocating for animals through original projects and initiatives. Laurel Tallent, who serves as FSU ALDF president, Ashley Englund, Jasmine Henry, and Judah Lieblich accepted the award in Chicago on October 12, 2018.
- Alan LaCerra recently received book awards in Sports Law, Corporations, and Twentieth Century American Legal History.
- Joshua Pratt has accepted a one-year federal clerkship with Judges Fitzwater and Reno of the United States District Court for the Northern District of Texas.
- Nicholas Rodriguez-Caballero received a tuition scholarship from the Rocky Mountain Mineral Law Foundation for the 2018-2019 academic year. He was selected as a scholarship recipient from a large pool of applicants at 32 law schools.

Fall 2018 Events

The College of Law hosted a full slate of environmental and administrative law events and activities this upcoming fall semester, with more to be announced.

The Not-So-Secret Science behind Air Pollution Regulation

Dr. Christopher Holmes, Assistant Professor, Florida State University Department of Earth, Ocean, and Atmospheric Science, presented his lecture titled, "The Not-So-Secret Science behind Air Pollution Regulation," on September 13, 2018. A recording of his lecture is available at <http://mediasite.capd.fsu.edu/Mediasite/Play/2aee269252194ae2a7b59a1acc18cc671d>.

Environmental Law Externships Luncheon

Every year the externships office hosts the environmental law externship luncheon for students interested in externship and volunteer opportunities in environmental and land use law. This year's luncheon was held on September 20, 2018. Individuals who participated, and their organizations, include: Janet Bowman, The Nature Conservancy; Peter Cocotos, NextEra Energy/Florida Power & Light; Jason Hand, Florida Department of Environmental Protection Office of General Counsel; Anne Harvey Holbrook, Save the Manatee Club; Bonnie Malloy, Earthjustice; Louis Norvell, City of Tallahassee Attorney Office; Tyler Parks, Florida Fish and Wildlife Conservation Commission; Robert Summers, Florida Department of Agriculture & Consumer Services; Herbert Thiele, Leon County Attorney Office; and Judge Jessica Varn, Division of Administrative Hearings.

Hog Farming: Past, Present, and Future

This panel discussion, organized by Professor Shi-Ling Hsu, explored some of the intertwined economic, environmental and ethical issues surrounding hog farming. Participants included Andy Curliss, CEO, North Carolina Pork Council; Kelsey Eberly, Staff Attorney, Animal Legal Defense Fund; Laurie Ristino, Visiting Scholar, George Washington University Law School; and Kelly Zering,

Professor and Extension Specialist, North Carolina State University College of Agriculture and Life Sciences. A recording of this panel is available at <http://mediasite.capd.fsu.edu/Mediasite/Play/3cbd1e317d17427fb590594e59262a2b1d>

Fall 2018 Environmental Distinguished Lecture

Nina Mendelson, Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School, presented our Fall 2018 Environmental Distinguished Lecture. Professor Mendelson's lecture, "Tribes, Cities, and Children: Emerging Voices in Environmental Litigation," was held on October 24, 2018.

Is Hurricane Michael the New Normal?

Allison Wing, Assistant Professor, Florida State University Department of Earth, Ocean, and Atmospheric Science, and Adjunct Associate Research Scientist, Lamont-Doherty Earth Observatory, Columbia University, presented a guest lecture this fall. Professor Wing's lecture, "Is Hurricane Michael the New Normal?," was held on October 30, 2018.

The National Flood Insurance Program at Fifty: How the Fifth Amendment Takings Doctrine Skews Federal Flood Policy

Christine Klein, Chesterfield Smith Professor and University of Florida Research Foundation Professor, University of Florida Levin College of Law, presented a guest lecture this fall. Professor Klein's lecture titled, "The National Flood Insurance Program at Fifty: How the Fifth Amendment Takings Doctrine Skews Federal Flood Policy," was held on November 7, 2018.

Information on upcoming events is available at <http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events>. We hope Section members will join us for one or more of these events.

Agency Snapshot: Florida Housing Finance Corporation

By James Ross

Florida Housing Finance Corporation (Florida Housing) was created by the Florida Legislature 35 years ago to assist in providing a range of affordable housing opportunities for Florida citizens. Florida Housing is a public corporation of the State of Florida and is the state's housing finance agency. As a financial institution, Florida Housing administers state and federal resources to help provide affordable homeownership and rental housing options for citizens. Its vision is to be recognized as an outstanding provider of innovative, measurable, data-driven and fiscally sustainable solutions that respond to the affordable housing challenges of our state.

Today, Florida Housing continues its mission by increasing affordable housing opportunities and ensuring that its programs are well matched to the needs of those it serves. Florida Housing works with local governments, non-profits, elected officials and others to help spread the importance of affordable housing in Florida's communities.

Agency Head:

Harold L. "Trey" Price joined Florida Housing as Executive Director in April 2017. With over 20 years' experience in real estate and government affairs, Trey brings extensive knowledge and insight into Florida's housing needs and an appreciation of the impact that safe, affordable housing has in the state. Trey is a second-generation Floridian born in Okeechobee, Florida. He and wife, Tara, have two young children and two Australian Shepherds. He enjoys fishing, traveling, and University of Florida football.

Agency Clerk:

Ana McGlamory
CorporationClerk@floridahousing.org

Mailing Address/Location:

227 North Bronough Street
Suite 5000
Tallahassee, Florida 32301
(850) 488-4197

Hours for Filings:

Florida Housing follows the uniform rules on filing. *See* Florida Administrative Code Rule Chapter 28-106.

General Counsel:

Hugh R. Brown joined Florida Housing in February 2002, and currently serves as its General Counsel. Hugh has over 24 years of experience in administrative law and has helped guide Florida Housing through litigation, economic crises, changing legislation, and policy development. Hugh and his wife, Ana, have a daughter and they enjoy hiking, swimming and exploring the beautiful springs of north Florida.

Number of Lawyers on Staff:

There are four full-time lawyers on staff, plus outside counsel as required.

Kinds of Cases:

Florida Housing generally defends bid protests, rule challenges and appeals of administrative decisions.

Practice Tips:

Communication is key. The 30-day bid protest time frame goes so fast that communicating with Florida Housing is essential. Florida Housing is governed by a nine-member Board of Directors (Board). For purposes of the Administrative Procedure Act, Florida Housing is a state agency, but having a Board means Florida Housing is a unique governmental entity. Decisions must be approved through regularly scheduled Board meetings. Florida Housing conducts eight Board

meetings every year. Board meetings are scheduled about every six weeks and action of the Board is necessary to approve or reject preliminary funding awards or settlements.

Florida Housing is also unique in that it awards funding directly to applicants as opposed to a traditional state agency which typically awards contracts to provide goods or services. The funding process can be very complex. Florida Housing conducts publicly noticed workshops on the vast majority of its competitive solicitations, known as requests for applications, prior to issuance. Most litigation matters involving Florida Housing are bid protests based on awards following these requests for applications.



Moving? Need to update your address?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information. The online form can be found on the website under "Member Profile."

Agency Snapshot: Florida Public Service Commission

By Kurt Schrader

Agency Background

The Florida Public Service Commission was created by the Florida Legislature in 1887 as the Florida Railroad Commission. The primary purpose of the Commission, at its inception, was the regulation of rates and operation of railroads for passengers and freight. The Legislature abolished the Commission in 1891, but subsequently re-established it in 1897. Since its re-establishment, with Florida's massive growth through the 20th century, the authority and mission of the Commission has expanded to include the regulation of telephone and telegraph (1911), motor carrier transportation (1929), investor-owned electric utilities (1951), natural gas utilities (1952), water and wastewater utilities (1959), airlines (1972), rate structure of municipal and rural cooperative electric utilities (1972), and safety jurisdiction over all electric utilities (1986).

Beginning with federal deregulation of the airline industry in 1978, deregulatory legislation passed at both the federal and state levels has revised the Commission's jurisdiction over Florida industries. This included a significant deregulation of the telecommunications industry in 2011 through the Regulatory Reform Act, Chapter 2011-36, Laws of Florida. While the Regulatory Reform Act significantly reduced the Commission's jurisdiction over telecommunications, it still retains authority to ensure that incumbent local exchange carriers meet their obligation to provide unbundled access, interconnection, and resale to competitive local exchange companies in a nondiscriminatory manner, administers the system to provide Telecommunications Relay Services, and oversees the federal Lifeline Assistance program for the state.

Today, the Commission's primary areas of regulation are over inves-

tor-owned electric companies, investor-owned natural gas companies, investor-owned water and wastewater utilities, certificated or registered telecommunications companies, and safety authority over all electric and gas systems in the state. The Commission also has limited authority over municipal and cooperative electric utilities (regarding rate structure, territorial boundaries, bulk power supply operations and planning), and gas districts and municipally-owned gas utilities (regarding territorial boundaries and safety).

The Commission is headed by five commissioners appointed by the Governor from a list of nominees provided by the Florida Public Service Commission Nominating Council, and confirmed by the Senate. Commissioner terms are four years and commissioners may apply for additional terms. However, any commissioner appointed after July 1, 2015, may not serve more than three consecutive terms. The chief administrative officer for the Commission is the Chairperson, who is elected to a two-year term by a majority vote of the Commission. The current commissioners are:

Chairman: Art Graham
Commissioner: Julie Imanuel Brown
Commissioner: Donald J. Polmann
Commissioner: Gary F. Clark
Commissioner: Andrew Giles Fay

Venues

Though the Commission may refer certain matters to the Division of Administrative Hearings for adjudication, nearly all of the Commission's business is conducted either through its regularly-scheduled agenda conferences (a schedule of which may be found on the Commission's website at <http://www.floridapsc.com/Conferences/ScheduleCommConf>) and through various hearings scheduled by the Commission. The Commission

typically meets in Tallahassee; however, it has discretion to hold session anywhere in Florida.

Pursuant to article V, section 3(b)(2) of the Florida Constitution, final orders of the Commission relating to the rates or services of utilities providing electric, gas, or telephone service in Florida are appealed directly to the Florida Supreme Court. Other actions of the Commission must be appealed to the First District Court of Appeal.

Commission Clerk

Official filings with the Commission should be submitted to the Office of the Commission Clerk. The Commission strongly encourages electronic filing and may transition to mandatory electronic filing in the future. Regular business hours for the Commission Clerk are 8:00 a.m. to 5:00 p.m. (Eastern Time), Monday through Friday (excluding state holidays). The Clerk may be contacted as follows:

Commission Clerk:

Claudia Stauffer

Mailing Address:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Physical Address:

Gerald L. Gunter Building
2540 Shumard Oak Boulevard,
Suite 152
Tallahassee, Florida 32399-0850

E-mail: Clerk@psc.state.fl.us

Telephone: (850) 413-6770

Website: <http://www.floridapsc.com/ClerkOffice>

The Clerk is also available to assist with public records requests pursuant to chapter 119, Florida Statutes.

Office of General Counsel

The Office of the General Counsel
continued...

AGENCY SNAPSHOT*from page 16*

is responsible for a number of duties, including:

- 1) Making reports and recommendations to the commissioners as requested;
- 2) Preparing formal orders conforming with Commission actions;
- 3) Representing the public interest in matters before the Commission;
- 4) Attending and participating in public hearings and conferences;
- 5) Advising commissioners on legal matters;
- 6) Representing the Commission in legal proceedings at both the state and federal levels; and
- 7) Other duties as directed by the Commission.

The Office of General Counsel is divided into three sections. The Economic Regulation Section (ECR) is responsible for handling utility rate cases, certifications, customer complaints, quality of service, territorial disputes, and other matters involving water, wastewater, electric, and gas industries. ECR handles these matters in both informal and formal proceedings before the Commission, the Division of Administrative Hearings, and in civil courts. The Regulatory Analysis Section (RAS) handles cases relating to development of competitive markets and certain other

formal proceedings before the Commission, the Division of Administrative Hearings, and in civil courts. RAS also reviews and provides counsel on contracts, personnel, and administrative matters. The Appeals, Rules, and Mediation Section (APP) handles all rulemaking, mediation, and the defense of Commission orders on appeal.

The current General Counsel for the Commission is Keith C. Hetrick who joined the Commission as General Counsel in March 2016. His role is divided between managing the Commission's legal staff and providing advice and counsel to the Commission on all legal and regulatory matters within the jurisdiction of the Commission. Prior to joining the Commission, he was an independent solo practitioner with the Ramba Law Group, Broad and Cassel, and Greenberg Traurig, representing clients' corporate needs as well as clients' policy and regulatory issues before the Florida Legislature and in state agency regulatory forums. He has also served as an Assistant General Counsel for the Florida Department of Environmental Protection and in-house General Counsel for the Florida Home Builders Association. He is Board Certified by The Florida Bar in State and Federal Government and Administrative Practice.

Role of Commission Attorneys

In general, Commission staff members, including Commission attorneys, are not advocates in Commission proceedings given that the Commission staff is not a party in such proceedings. Rather, it is the role

of staff to assist the commissioners by developing the case record to ensure the commissioners are fully informed as to all relevant facts and legal considerations when reaching decisions. The exception to this is "show cause" and revocation proceedings. A show cause proceeding involves whether a utility should be assessed penalties for violation of Commission rules or orders, or certain statutes that are the responsibility of the Commission to enforce. A revocation proceeding involves whether a Certificate of Authorization for a water or wastewater utility should be revoked. In show cause and revocation proceedings, Commission attorneys serve in a role that is more prosecutorial in nature.

Practice Tips

Though proceedings before the Commission are generally conducted pursuant to Florida's Administrative Procedure Act and the Uniform Rules of Procedure, the Commission also has a number of unique procedures. These include the frequent use of pre-filed testimony in matters before the Commission and—given the proprietary nature of a substantial amount of the information utilized or relied upon during Commission proceedings—strict rules for the determination and handling of confidential material. For a comprehensive list of the Commission's exceptions to the Uniform Rules of Procedure, see Florida Administrative Code Rule 25-40.001. Persons practicing before the Commission should also make themselves familiar with the Commission's Rules of Procedure found in Florida Administrative Code chapter 25-22.



A TRIBUTE*from page 1*

Regardless, Mary's family immersed her in Florida's history and natural resources. The lesson took. She chose a career and outside interests that allowed her to protect Florida's heritage.

Mary was a proud Florida Gator. She graduated from the University of Florida in 1969, but returned all her life. She remained active in various Gator activities. Mary was a fixture at Gator football games, win or lose.

She got her law degree from the Florida State University College of Law in 1977. Mary initially worked closely with some of the progenitors of our state's modern environmental law field at the august Mahoney, Hadlow & Adams. Mary learned much from that firm's environmental group, who went on to form the preeminent environmental and land use firm now known as Hopping, Green & Sams.

Mary's career was highlighted by her work at the Florida Department of Environmental Regulation (now the Florida Department of Environmental Protection). She served the agency as General Counsel, Division Director, and in various other key roles. Mary was an integral part of the Department's development and implementation of landmark air regulation and wetlands jurisdiction programs, among her numerous cutting-edge achievements.

Mary followed her agency career by working another twenty-five years with two of the largest law firms in our state, Ruden McClosky and Gray Robinson. She worked on many, massive, and essential matters. Not the least of these was her central role in negotiating Everglades restoration. Private and public entities throughout Florida relied on Mary's common sense, brilliance, hard work, sage advice and goodwill. All dosed out with great, undeserved, humility.

Mary loved to teach. She often served as an adjunct professor at the Florida State University College of Law, in addition to headlining various public and private continuing legal education (CLE) courses. She wrote and edited literally hundreds

of CLE materials and articles in her lengthy, trailblazing career. Her greatest impact, however, was not in words generated. Rather, it was in the careers, indeed, the souls, she touched.

A great conversation starter is to ask a distinguished Florida administrative or environmental professional what Mary's impact was on that person's career. Those who thank Mary for profoundly influencing them are themselves among the top professionals of the past several decades. For every Donna Blanton and Cathy Sellers who saw her as a role model when very few women practiced environmental and land use law, there is a Dan Thompson, who credits Mary with teaching him how to lead a state agency office of general counsel. Ralph Demeo and others repeatedly state they would be satisfied to be half the lawyer Mary was.

For all of that, Mary was proudest of her two wonderful daughters, Stephanie and Katy, and her three grandchildren, Stephen, Julia, and Oliver. I can personally attest to hearing for many hours about how much she loved her kids and grandkids, and how proud she was of them. Woe to anyone who crossed any of them. While Mary was humble to a fault,

she fiercely protected her offspring. Mary was, as her daughters proudly recount, a mother who reminded them she was always right. At least, she always put them ahead of all else.

Mary volunteered for many causes, great and small. She worked as hard on St. Mark's Wildlife Refuge and the Leon County Humane Society as she did the Everglades. Have no doubt she would have been down at St. Mark's, with boots on, right after Hurricane Michael blew through. Also, she admitted to a wee bit of cat lady obsessiveness.

Many of us know Mary by her annual, extraordinary CLE seminars and columns on administrative law. Yes, in that, she was a stalwart. I will instead focus on the amazing person who bore all sorts of societal, professional and ultimately, physical impediments and setbacks with an uncommon grace, and achieved so much with little need for acclaim. She absolutely did good, well. I miss my dear friend. I am not alone. Godspeed, Mary.

Sidney F. Ansbacher is a former chair of The Florida Bar Environmental and Land Use Law Section. He is a senior shareholder of Upchurch, Bailey and Upchurch, P.A. in St. Augustine.

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Administrative Law Section



**ADMINISTRATIVE LAW SECTION
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This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this Section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of administrative law. As a Section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

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NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

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Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

For additional information about the Administrative Law Section, please visit our website:
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