ADMINISTRATIVE LAW SECTION
Newsletter
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Chapter 120 Burden Shifting in Third Party Challenges To Environmental Regulatory Authorizations

by Sidney C. Bigham, III

This article discusses the effects of section 120.569(2)(p), Florida Statutes (burden-shifting law), beginning with an analysis of the types of challenges to which the burden-shifting law applies, followed by a discussion of Division of Administrative Hearings (DOAH) Recommended Orders and agency Final Orders that explain its practical implications. This article further explores whether, and to what extent, the burden-shifting law applies to exemption and variance challenges.

Effective June 24, 2011, the Florida Legislature enacted section 120.569(2)(p), Florida Statutes, which provides:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit,

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From the Chair

by Richard J. Shoop

Having a column in the Section's newsletter gives me the opportunity to update our members on what has been accomplished so far this term by the members of the executive council, Section committees and Section liaisons. The individuals that I am about to name are among the most hard-working and dedicated professionals in our practice area. It never ceases to amaze me how willing they all are to sacrifice their time and energy to serve the members of our Section. Any accomplishments that occur during my term as chair will be the result of their hard work, and I hope they know how appreciative I am of their efforts to date.

The chair of the ad hoc young lawyers committee and newest member of the executive council, Christina A. Shideler, brings some major energy to the Section. She has been faithfully recruiting young lawyer participants as well as hosting the Tables for 8 that are being held on a bi-monthly basis. Christina's goal is that the Table for 8 will expand to other cities in the state, but she and the other

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members of the young lawyers committee need involvement from our members to make that a reality. In addition, Christina also organized a social at Liberty Bar and Restaurant in Tallahassee in September, bringing young lawyers and seasoned practitioners together in an informal setting for excellent conversation and networking opportunities, and is working on at least one other event for the young lawyers in our Section sometime this spring. I am excited to see such enthusiasm and participation by a young attorney and encourage you to thank her and help support her efforts in any way that you can.

The chair of the law school liaison committee, Judge Lynne A. Quimby-Pennock, has been going full throttle since the start of the term. In August, she sent out letters to all the law schools in the state, telling them a little about the Section, and asking if it would be possible for three or four administrative law practitioners to talk to their students about the practice area and their experiences as administrative lawyers. As a result of these letters, she was able to organize "networking noshes" at the law schools for Florida State University, the University of Florida, and St. Thomas University during the upcoming spring semester, and may have even more set up by the time you are reading this column. I have personally participated in one of these events in the past, and can say that the students who attended the event were very interested in hearing from the panelists, asked very insightful questions, and were very grateful that the panelists took time from their busy schedules to come speak to the students. If you are interested in participating in one of these events or have contacts at one of the other law schools in the state and would like to help organize such an event, please feel free to reach out to Judge Quimby-Pennock. I'm sure both she and the rest of the law school liaison committee would welcome the help.

I also want to mention Bruce D. Lamb, the chair of the Section's CLE committee. For as long as I have been a member of the executive council, Bruce has worked hard to bring one quality CLE after another to Section members. This fall, the Practice before DOAH CLE took place on October 2, 2015. The CLE co-chairs, Brian A. Newman and Francine M. Ffolkes, put together an excellent group of speakers. Having co-chaired a CLE steering committee myself recently, I understand how difficult it is to organize and carry out such an event, and applaud Francine and Brian for their time and efforts. For those who were unable to attend the live presentation, the CD should be available soon. Bruce and the other CLE committee members will have more great CLE opportunities this spring, so stay tuned for future announcements in that regard. In addition, Bruce is always looking for CLE ideas and speakers, so please feel free to contact him if you have an idea for a CLE or would like to present at one in the future.

Additionally, the Section's ad hoc pro bono committee has been hard at work. The committee was formed after Chief Judge Robert Cohen approached the Section and asked if there was a way the Section could provide assistance to pro se litigants who were involved in cases before the Division of Administrative Hearings. While the issue is an important one, especially to any lawyer who has ever been involved in a case with a pro se litigant on the other side, finding the solution has been elusive. However, three of the committee's current members, Judge Suzanne Van Wyk, Amy Schrader and Patricia A. Nelson, have come up with a new idea to recruit and train law students at Florida State University College of Law to assist pro se litigants with employment discrimination cases, as a pilot project to test the feasibility of the idea. The first two trainings have already taken place, and mentors for the law students are being recruited. By the time you read this column, the program should be up and running. I applaud Judge Van Wyk, Amy and Patricia for their passion and persistence in seeking out new ways of helping pro se litigants after my own efforts on behalf of the committee the past couple of years have failed to produce any positive results.

Lastly, let me mention other valuable members of the Section. First, the Section's liaisons: Larry Sellers (liaison to the Board of Governors), Bruce D. Lamb (liaison to the Bar's CLE Committee), Clark Jennings (liaison to the Council of Sections), Francine Ffolkes (liaison to the Environmental and Land Use Law Section), Judge Lynne Quimby-Pennock (liaison to the Government Lawyers Section), Allen Grossman (liaison to the Health Law Section), Frederick Dudley (liaison to the Real Property, Probate and Trust Law Section), and Dustin Metz (liaison to the Young Lawyer's Division). These fine professionals do an excellent job of representing the Section and fostering relationships with the Bar and other sections. Second, the members of our publications committee: Jowanna N. Oates, Judge Elizabeth W. McArthur, Jamie Jackson and Stephen Emmanuel. Jowanna and Judge McArthur are the co-editors of the Section's newsletter, which I believe is one of Section's most valuable benefits to its members. I have no idea how they manage to bring one outstanding issue after another to print, but I am definitely in awe of their work. Stephen is the Section editor for *The Florida Bar Journal*, and has done a terrific job in recruiting writers and bringing several outstanding articles to print this past year. Lastly, let me thank those who are regular contributors to the newsletter, such as Larry Sellers and Gigi Rollini, who provide the appellate case notes, or have written articles for both the newsletter and *The Florida Bar Journal* this past year. Their work has had a very positive impact on the Section, and I am very appreciative of the time these writers sacrificed to write them.

I hope that, after reading these highlights, you will have a greater appreciation for the hard work that these members are doing, and will want to contribute in some way to the Section's efforts yourself. There is always more work to be done, and plenty of room for others to help do it. If you have an interest in helping with any of the projects mentioned above, please feel free to contact either myself or any other member of the executive council.

APPELLATE CASE NOTES

by Larry Sellers and Gigi Rollini

Administrative Finality – Concurrent Jurisdiction
Department of Revenue v. Vanamburg, 174 So. 3d 640 (Fla. 1st DCA 2015).

The Department of Revenue (DOR) appealed two orders entered in response to a motion for rehearing of a final administrative order on paternity and support that DOR filed prior to taking appeal. One order denied DOR's motion for rehearing, and the other treated a portion of the motion that sought to correct clear errors in the order as a motion to amend, and granted it in part. DOR argued that the ALJ lacked jurisdiction to enter the orders on the basis that DOR filed a notice of appeal after the motion for rehearing was filed, and before the ALJ ruled on it.

The appellate court agreed. While the ALJ correctly determined that a motion for rehearing is not authorized in the context of the administrative establishment of child support obligations, the ALJ erred by entering any order after appeal was taken.

First, while on January 1, 2015, Florida Rule of Appellate Procedure 9.020(i)(3) was amended, DOR filed a notice of appeal when the 2014 version was in effect. Under the prior version of the rule, DOR's pending motion was abandoned when its notice of appeal was filed.

Second, the ALJ erred by treating the motion for rehearing as a motion to amend and entering an order granting it. Florida law does recognize limited authority for an agency to modify its final orders within a reasonable time to eliminate undisputed and inadvertent clerical errors on a motion to amend. However, Florida Rule of Appellate Procedure 9.600(a), entitled "Concurrent Jurisdiction," applies with equal force in administrative appeals, and Rule 9.600(a)'s jurisdictional limits prevent an ALJ from making corrections after appeal is taken without the court's permission. As noted in the concurring opinion, the ALJ would not have known of DOR's notice of appeal unless DOR had informed the ALJ.

The orders were therefore entered without subject matter jurisdiction, and such jurisdiction could not otherwise be conveyed on the ALJ. Accordingly, the court quashed the orders as a nullity.

Administrative Hearing – Disputed Issues of Fact
DeRosa v. Department of Financial Services, 175 So. 3d 946 (Fla. 4th DCA 2015).

John DeRosa and A. Maples Insurance Agency appealed a final order of the Department of Financial Services (DFS) revoking the agency's license after an informal proceeding pursuant to section 120.57(2), Florida Statutes. DFS subsequently agreed that it should have conducted a formal hearing because there were material facts in dispute. Noting that where it becomes apparent during the course of an informal hearing under section 120.57(2) that materials facts are in dispute, a formal hearing should be convened, the court reversed the order on appeal and remanded for a formal hearing pursuant to section 120.57(1).

Applicability of APA to State University
Rivera v. University of South Florida St. Petersburg, 176 So. 3d 363 (Fla. 2d DCA 2015).

Jason M. Rivera sought review of the final determination by the University of South Florida (USF) revoking its earlier offer of readmission as a student. In response, USF questioned the appellate court's jurisdiction. The

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court concluded that a determination as to the admission of a student made by a university of the state university system is reviewable by certiorari in the appropriate circuit court because the university is acting pursuant to its authority under Article IX, Section 7(d) of the Florida Constitution, and therefore is not an agency under the Administrative Procedure Act (APA).

The court noted that a state university is an "educational unit" and thus an "agency" under the APA, when it is acting pursuant to statutory authority derived from the Legislature. See § 120.52(1)(a) & (6), Fla. Stat. (2014). However, to the extent that a governmental entity otherwise defined as an APA "agency" is acting pursuant to powers derived from the State Constitution, the entity is not an "agency" for purposes of the APA.

The State University System's Board of Governors has as one of its constitutional responsibilities the regulation of admissions to the state universities. As such, the appellate procedures described in the APA do not apply. Instead, USF's determination regarding Rivera's admission is reviewable by certiorari, and such review is to be undertaken by the circuit court. Accordingly, the court transferred the case to the circuit court for treatment as a petition for writ of certiorari.

Attorney's Fees – "Substantial Justification"
McCloskey v. Department of Financial Services, 172 So. 3d 973 (Fla. 5th DCA 2015).

William McCloskey appealed a final DOAH order denying his application to collect attorney's fees from the Department of Financial Services (DFS) under section 57.111, Florida Statutes (2011). McCloskey sought such fees after prevailing in his defense of a DFS administrative complaint that accused McCloskey of selling, without the required license, viaticals that DFS asserted constituted securities.

McCloskey, the prevailing small business party in the underlying licensing enforcement action, argued on appeal that he was entitled to fees because DFS failed to demonstrate it was substantially justified in filing the administrative complaint against him at the time it was filed.

The appellate court determined that DFS failed to demonstrate it was substantially justified to avoid section 57.111 fees, explaining that agency action is substantially justified if there is: 1) a reasonable basis in law; 2) a reasonable basis in fact; and 3) the reasonable basis, in both law and fact, existed at the time the administrative complaint was filed.

For an action to be substantially justified, an agency must have a solid though not necessarily correct basis in fact and law for its position. Importantly, substantial justification must exist at the time the agency initiates the action, and cannot be based on subsequent discoveries. Nor can the agency establish substantial justification merely by showing that the action was not frivolous—there must be a steady foundation for the action, both factually and legally.

In this case, McCloskey sold the viaticals using forms approved by OIR, prior to legislative amendments that classified viaticals as securities. The sales at issue occurred before the case law on which DFS relied for its action actually existed, and that case law pertained to a somewhat related, but different, question. Moreover, in discovery, DFS admitted it conducted no analysis on whether the legislative amendments retroactively applied securities rules to viaticals closed or pending before their enactment.

As a result, the court found DFS's legal foundation for filing the administrative complaint to be unsteady, and rejected DFS's argument that it had a reasonable basis in law and fact at the time it filed the administrative complaint.

Competent Substantial Evidence – CCCL Permit
Capital City Bank v. Department of Environmental Protection, 176 So. 3d 361 (Fla. 1st DCA 2015).

Capital City Bank appealed a final order from the Department of Environmental Protection (DEP) issuing an after-the-fact permit to Franklin County to construct a revetment along County Road 370 on Alligator Point. The Bank owns property across the street from the proposed construction, and argued that the County failed to meet statutory siting requirements relating to protecting property adjacent to a revetment. It challenged the facts found in the ALJ's recommended order, as well as DEP's final order adopting those facts as being supported by competent, substantial evidence.

The Bank argued that the requirements for protecting adjacent properties from construction projects seaward of the coastal construction

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control line were not met. In particular, the Bank cited rules requiring DEP to deny applications that would result "in a significant adverse impact" to adjacent structures in the area. The Bank argued that the County's failure to address these requirements in its application should have foreclosed approval of the after-the-fact permit.

The court concluded that it was not error for the ALJ to rely on evidence gathered at the hearing, as well as that provided in the County's application, in formulating his recommendation on the permit. In addition, the court found that DEP was entitled to rely on expert testimony presented at the hearing in formulating final agency action. Moreover, the court found that the ALJ (and hence DEP) properly could favor the testimony of this expert, who had visited the site dozens of times, over that of the Bank's expert who inspected the site only once. The court noted that it is not the reviewing court's role to reweigh the evidence when reviewing findings of fact.

Accordingly, the court found no error in the ALJ's conclusion that the new revetment satisfied applicable citing criteria, and it affirmed DEP's final order approving the permit.

Declaratory Statement – Florida Building Commission

Keddo Enterprises, LLC v. The Florida Building Commission, 175 So. 3d 346 (Fla. 5th DCA 2015).

Keddo Enterprises, LLC (Keddo) appealed an order by the Florida Building Commission granting in part and denying in part its petition for a declaratory statement. On appeal, Keddo argued that the declaratory statement was clearly erroneous because, while it correctly concluded its plywood-alternative window protection product against hurricanes and windstorms was exempt from the Commission's statewide approval requirement, the Commission also should have determined it was exempt from local approval.

The appellate court looked to the statutory and rule authority that governs the Commission to determine that Keddo misconstrued the Commission's powers. The court concluded that pursuant to section 553.842(5), Florida Statutes, products sold, provided, or marketed for windstorm, hurricane, or impact protection must receive either statewide approval or local approval under section 553.8425, Florida Statutes, to avoid being subject to the Florida Deceptive and Unfair Trade Practices Act.

Because the Commission correctly determined that Keddo's product was not subject to statewide approval, it was required to receive local approval, the court affirmed. The court noted that to the extent Keddo sought an exemption from that requirement, it was beyond the scope of a declaratory statement because the Commission would have to amend the Florida Building Code to grant it. While the Commission is responsible for adopting and modifying the Florida Building Code, to do so, it must first engage in the rulemaking process set forth in chapter 120, Florida Statutes.

Disqualification of Members of Agency Head

Port Everglades Pilots Association v. Florida-Caribbean Cruise Association, 170 So. 3d 952 (Fla. 1st DCA 2015).

Port Everglades Pilots Association (PEPA) filed a petition for writ of prohibition, seeking review of the orders entered by Commissioners Thomas Burke and Enrique Miguez of the Pilotage Rate Review Committee (Committee) that denied PEPA's motion to disqualify them from participating in the proceeding initiated by the Florida-Caribbean Cruise Association (FCCA) to reduce pilotage rates.

The Committee is responsible for setting the rates of pilotage in each port. The composition of the seven-member committee is established by statute and is required to include members who are actively engaged in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry.

The FCCA initiated the underlying proceeding by applying to the Committee for a 25 percent decrease in the pilotage rates charged to passenger vessels, including cruise ships, calling on Port Everglades. In its application, the FCCA asserted that it is a not-for-profit trade organization composed of fifteen member cruise lines, including Carnival Cruise Lines and Royal Caribbean.

PEPA filed a motion to disqualify Commissioners Burke and Miguez pursuant to section 120.665, Florida Statutes, alleging that the Commissioners were senior executives of two of the largest cruise lines of the applicant FCCA. Commissioner Burke has been employed by Royal Caribbean for over eleven years, and Commissioner Miguez has been employed by Carnival Cruise Lines for over seventeen years.

PEPA asserted that a reasonably prudent person would not consider Commissioners Burke and Miguez to be sufficiently insulated from "bias, prejudice, or interest" to be objective members of the Committee. PEPA also asserted that "a reasonably prudent person would fear that [they] will protect the interests of their companies—and the savings their companies would enjoy if the application were granted—rather than predicate their decisions on an objective assessment of the evidence." PEPA argued that because a reasonably prudent person would fear that the proceedings would not be fair and impartial, Commissioners Burke and Miguez must be disqualified.

Each of the Commissioners entered an order declining to recuse himself. PEPA then filed its petition for writ of prohibition.

Section 120.665, Florida Statutes, provides that "any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest" when any party to the proceeding shows just cause.

The court found that a motion to disqualify filed pursuant to this section should be granted if the facts alleged would prompt a reasonably prudent person to fear that he or she will not obtain a fair and impartial hearing, citing *Charlotte County v.*

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IMC-Phosphates Co., 825 So. 2d 298, 300 (Fla. 1st DCA 2002). Here, the court found that, although the FCCA is the named party in the underlying proceeding, its member cruise lines—including the two Commissioners' employers, Carnival and Royal Caribbean—are *de facto* parties.

The court noted that the statute contemplates participation of interested parties on the Committee, including employees of the cruise industry. PEPA did not seek to disqualify Commissioners Burke and Miguez simply because they are associated with the commercial passenger cruise industry, but rather, alleged that it is the Commissioners' employment by members of the applicant itself, the FCCA, that demonstrates bias, prejudice, or interest.

The court agreed that, under the circumstances of this case, a reasonably prudent person would fear that he or she would not obtain a fair and impartial proceeding before the Committee members who are senior executives of the *de facto* parties that initiated the proceeding. The court therefore concluded that the motion to disqualify was legally sufficient and should have been granted.

Accordingly, the court granted the petition for writ of prohibition, and quashed the orders denying the motion.

License Revocation – Adequate Service

Gouzhen Shang v. Department of Health, 171 So. 3d 829 (Fla. 1st DCA 2015).

Gouzhen Shang appealed a final order of the Department of Health (DOH) revoking her license to practice massage therapy. The appellate court reversed because the record did not support DOH's finding that the licensee was properly served by publication.

Section 120.60(5), Florida Statutes, permits service by publication in the county of the licensee's last known address, but only "[w]hen personal service cannot be made and the certified mail notice is returned undelivered."

Because DOH's attempt at service by publication was not in the county of Shang's last known address, and the Department did not establish that the prerequisites to service by publication were met, the license revocation order was reversed.

In reversing, the court rejected DOH's argument that it actually served Shang by certified mail, where the final order did not find that such service was made, and instead found that the service was made by publication. The court noted that it could not employ the tipsy coachman doctrine in this circumstance because to do so would usurp the role of the fact finder.

Licensing – Prior Mistake

Prevor v. Department of Health, Board of Psychology, 40 Fla. L. Weekly D2117 (Fla. 3d DCA Sept. 9, 2015).

Dr. Ruth C. Prevor appealed a final order entered by the Florida Board of Psychology that denied her application for licensure by endorsement. Dr. Prevor had filed an application for licensure by endorsement pursuant to section 490.006(1)(c), Florida Statutes, which requires that an applicant, among other things, possess "a doctoral degree in psychology as described in s. 490.003[.]" To meet the programmatic accreditation requirement of section 490.003(3)(b)2., Florida Statutes, the psychology program must be accredited by the American Psychological Association ("APA").

Dr. Prevor, a psychologist licensed in Puerto Rico with more than twenty years of experience, graduated with a Ph.D. in psychology from Carlos Albizu University in Puerto Rico in 1988. At that time, the psychology program at Carlos Albizu University was not accredited by the APA. Based on the lack of "programmatic accreditation," the Board concluded that Dr. Prevor's degree did not meet the educational requirements of section 490.003(3), Florida Statutes, and denied her application.

The court found no error in the Board's statutory interpretation, notwithstanding Dr. Prevor's undisputed allegation that the Board allowed one of her similarly-situated classmates to submit a comparability study, and thereafter, approved his application for licensure by endorsement under section 490.006(1)(c).

The Board acknowledged that it allowed Dr. Prevor's classmate to submit a comparability study and that it subsequently approved his application. The Board, however, argued that it mistakenly did so, since no provision in sections 490.006(1)(c) or 490.003(3)(b) allows an applicant seeking licensure by endorsement under section 490.006(1)(c) to establish the educational requirements through a comparability study.

The court agreed with the Board, holding that the Board's mistake in granting a previous application on an invalid basis did not entitle Dr. Prevor to a license on that same erroneous basis. The court concluded that the Board's prior mistake did not require the Board to accept comparability studies for future applications for licensure by endorsement under section 490.006(1)(c).

Public Records – Partially Exempt Records

Barfield v. City of Tallahassee, 171 So. 3d 239 (Fla. 1st DCA 2015).

Michael Barfield appealed an order denying a petition seeking public records from the Tallahassee Police Department (TPD). The trial court had concluded that an email and attachment forwarded to TPD that alleged an incident of domestic violence were exempt from disclosure under section 119.071(2)(c)1., Florida Statutes, because they related to an active and ongoing criminal investigation.

The appellate court reversed. The court relied on section 119.011(3)(c)1., Florida Statutes, and Florida Freedom Newspapers v. Dempsey, 478 So. 2d 1128, 1132 (Fla. 1st DCA 1985), explaining that while "active criminal investigative information" is considered exempt from public records disclosure requirements under section 119.071(2)(c)1., the statute expressly excludes "[t]he time, date, location, and nature of a reported crime" from the exemption under section 119.011(3)(c)1.

Accordingly, to the extent records were sought that included non-exempt

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information, that non-exempt information was required to be produced.

Recovery of Medicaid-Covered Expenses
Agency for Health Care Administration v. Hunt, 165 So. 3d 868 (Fla. 1st DCA 2015).

The Agency for Health Care Administration (AHCA) appealed a DOAH order that excused Elsa and Eric Hunt and the Estate of their son, Ethan Hunt (the Hunts), from repaying Medicaid-covered medical expenses after they settled a wrongful death lawsuit.

Ethan Hunt experienced a neurological injury and severe disabilities arising from birth complications, and received medical care paid by AHCA through the Medicaid program. AHCA recorded a Medicaid lien in 2005 related to the Medicaid payments, and was automatically subrogated and assigned rights to recover medical expenses from liable third parties. The Hunts later filed a wrongful death action against health care providers based on Ethan's death and received a settlement from the litigation.

After the settlement, the parties disputed the amount that AHCA should be reimbursed for Medicaid-provided medical assistance. The Hunts availed themselves of the statutory dispute settlement process, placed settlement funds in an interest bearing trust account for the benefit of AHCA, and filed a petition with DOAH, contesting the amount designated as recovered medical expense damages payable to the agency.

Pursuant to statute, the Hunts bore the burden of proving that a lesser amount was due than the amounts asserted by AHCA. The Hunts' petition claimed that the amount sought by AHCA was too high based upon the settlement received by the Estate, and they asked DOAH to limit AHCA's recovery based upon the settlement amount.

At the final hearing, however, the Hunts changed their argument. They asserted that AHCA should receive nothing because its lien had expired and it had not yet sought to enforce its subrogation and assignment rights. The ALJ agreed, and entered a final order concluding that AHCA should take nothing.

The court reversed the final order, concluding that the ALJ's responsibility was to resolve the amount of medical expenses reimbursable to AHCA, irrespective of the unalleged statute of limitations defense that the Hunts might assert in an enforcement proceeding. The court noted that, when

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the Hunts invoked DOAH's jurisdiction under the statute—well before the statute of limitations deadline—the Hunts did not attack AHCA's right to reimbursement. Rather, the Hunts conceded an obligation to reimburse AHCA. Under the Hunts' petition, all that remained of the parties' dispute was for the ALJ to decide between competing views of the correct reimbursement amount pursuant to the statute's provision of an "exclusive method for challenging *the amount of* third-party benefits payable to the agency." § 409.910(17)(b), Fla. Stat. (emphasis added). The court therefore concluded that the Hunts' belated argument was not appropriate under the circumstances.

Accordingly, the court reversed and remanded for the ALJ to calculate the amount of recovered medical expenses payable to AHCA.

Statutory and Rule Construction – Work Experience

Muratti-Stuart v. Department of Business and Professional Regulation, 174 So. 3d 538 (Fla. 4th DCA 2015).

Victor O. Muratti-Stuart appealed from a final order of the Florida Construction Industry Licensing Board denying his application for a certified marine specialty contractor's license for failure to demonstrate the required experience.

In an informal administrative hearing, Muratti-Stuart challenged the Board's denial decision and submitted two affidavits that he had not included in his original application. One affidavit was from his supervisor at a previous job outside of Florida. The other affidavit, from his supervisor at his current job of two years, stated that he was "exposed to substantial field work including marine construction related activities…."

On appeal, Muratti-Stuart argued that the Board erroneously interpreted the work experience requirement and exceeded its authority by imposing additional criteria to the work experience requirement. He based his argument on statements made by Board members during the informal hearing. He also argued that there was no evidence to sustain the Board's finding.

After reviewing the relevant statute and rule, the court concluded that the Board did not err in interpreting the law regarding the requisite experience, and the record of the informal hearing did not show that the Board imposed "additional criteria" to the experience requirement.

The court also concluded that evidence supported the Board's finding that Muratti-Stuart did not have the requisite experience, as he conceded that the former supervisor's affidavit did not meet the requirements of rule 61G4-15.001. In addition, the court concluded that it was within the Board's discretion to find that the affidavit submitted by his current supervisor stating that he was "exposed to substantial field work including marine construction related activities" was insufficient to establish the requisite experience. The court noted that the Board reasonably could have found that mere exposure to "marine construction related activities" was insufficient, noting it was unclear to what specific marine construction related activities he was exposed, or over what period.

Accordingly, the court affirmed the final order denying the application.

Statutory Construction – Gaming License

Gretna Racing, LLC v. Department of Business and Professional Regulation, 40 Fla. L. Weekly D2242 (Fla. 1st DCA Oct. 2, 2015) (on motion for rehearing).

Editor's Note: For a summary of the original opinion, see the September 2015 issue of this Newsletter.

Gretna Racing, LLC (Gretna Racing) appealed the final order of the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (DBPR) denying Gretna Racing's application for a license to conduct slot machine gaming at its horse track facility in Gadsden County.

In November 2011, Gadsden County Commissioners voted to place a referendum regarding slot machine gaming on the ballot for an election held on January 31, 2012. At that election, a majority of those voting in the countywide referendum approved slot machines for use at the pari-mutuel horse track facility in Gretna. Almost two years later, Gretna Racing applied to DBPR for a license to conduct slot machine gaming at its horse track facility in Gretna.

DBPR denied the application, relying on an Attorney General opinion interpreting the following definition of "eligible facilities" where slot machines may be located, appearing in what the court called the "third clause" of section 551.102(4), Florida Statutes:

> any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in a respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this Chapter.

DBPR's final order of denial concluded that "the January 31, 2012 referendum in Gadsden County was not held pursuant to a statute or constitutional provision: (1) specifically authorizing a referendum to approve slot machines, and (2) enacted after s. 551.102(4) of the Florida Statutes became effective on July 1, 2010."

In its initial opinion, the appellate court reversed. However, on motion for rehearing, the majority affirmed. Newly-assigned Judge Bilbrey (who replaced recently-retired Judge Clark on the panel) joined in that part of Judge Makar's opinion that agreed with DBPR's interpretation of the statute, concluding that slot machines are allowed only in those counties where a referendum was held after the legal "authorization" for such referendum was enacted after the section's effective date.

The majority also certified the following question as one of great public importance:

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> Whether the Legislature intended that the third clause of section 551.102(4), Florida Statutes, enacted in 2009, authorize expansion of slot machines beyond Miami-Dade and Broward counties via local referendum in all other eligible Florida counties without additional statutory or constitutional authorization after the effective date of the act?

Judge Benton dissented, noting that the statute does not contain the word "enacted." As such, he concluded that it is sufficient that the referendum simply be held after the effective date of the amendment to section 551.102(4), Florida Statutes, i.e., after July 1, 2010.

Statutory Construction – Works of District Permits
Florida Audubon Society v. Sugar Cane Growers Cooperative of Florida, 171 So. 3d 790 (Fla. 2d DCA 2015).

The Florida Audubon Society appealed from a final order entered by the South Florida Water Management District (SFWMD). The order rejected Audubon's challenges to certain permits requested by several sugar cane growers to discharge water from their farms in the Everglades Agricultural Area into Works of the District (WOD).

Audubon's challenge to the WOD permits was premised on language found in the Everglades Forever Act:

> As of December 1, 2006, all permits, including those issued prior to that date, shall require implementation of additional water quality measures, taking into account the water quality treatment actually provided by the [Stormwater Treatment Areas (STAs)] and the effectiveness of the [Best Management Practices (BMPs)]. As of that date, no permittee's discharge shall cause or contribute to any violation of water quality standards in the Everglades Protection Area.

§ 373.4592(4)(f)4, Fla. Stat. Audubon's argued that the WOD permits violated this language in two respects: (1) they do not impose "additional water quality measures" beyond those imposed in permits issued before December 31, 2006; and (2) the discharges "cause or contribute to" ongoing water quality violations in the Everglades Protection Area. After reviewing the applicable legislative history and according great deference to the agency's interpretation of the statute, the court rejected both arguments.

As to the first argument, the court determined that SFWMD reasonably determined that the first sentence does not require WOD permits to include more aggressive BMPs because the treatment actually provided by the STAs and the effectiveness of the BMPs must be taken into account. The court noted that the record demonstrated that focusing on enhancements to the STAs is reasonable because the BMP program has far exceeded the goal of reducing phosphorus levels by twenty-five percent.

As to the second argument, the court concluded that SFWMD reasonably determined that the discharge from the STAs is not a violation of water quality standards because it has been approved by the STA permits and consent orders, notwithstanding that the discharges from the STAs into the Everglades Protection Area have not met the water quality criterion for phosphorous. The court found that to challenge the adequacy of the approved corrective measures and the authorization of the discharge into the Everglades Protection Area, Audubon should have challenged the STA permits approving these measures and allowing that discharge.

Accordingly, the court concluded that the SFWMD's interpretation of the statutory provisions was permissible, and affirmed the final order.

Larry Sellers *is a partner with Holland & Knight LLP, practicing in the firm's Tallahassee office.*

Gigi Rollini *is a shareholder with Messer Caparello, P.A., in Tallahassee, and AV-rated in both appellate and administrative law.*

DOAH CASE NOTES

Substantial Interest Hearings

Rebco Ent., Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco, DOAH Case No. 14-2486 (Recommended Order July 17, 2015).

FACTS: The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("DABT") is responsible for regulating Florida's alcoholic beverage industry. DABT is also responsible for recording liens against alcoholic beverage licenses. Under Florida law, an entity can perfect a lien or security interest against an alcoholic beverage license by recording it with DABT within 90 days of the lien's creation. After a lien is properly recorded, DABT must notify the lienholder when DABT: (a) initiates proceedings to suspend or revoke the license; and (b) issues an order suspending or revoking the license. DABT cannot re-issue a revoked quota license subject to a perfected and recorded lien until 180 days after mailing a copy of the order of revocation. Also, section 561.65(4), Florida Statutes, provides that any lien filed with DABT on or after July 1, 1995, expires five years after recordation unless the lien is renewed by the lienholder within six months prior to its expiration date.

On approximately April 18, 1997, Rebco Enterprises, Inc. ("Rebco") obtained a lien against alcoholic beverage license number 62-08383 ("the License") and properly recorded the lien with DABT on approximately May 1, 1997. Rebco renewed the lien in 2001 and 2006. However, DABT revoked the License in 2007 and re-issued it to a new licensee without providing either of the required notices to Rebco or notifying the new licensee of the outstanding lien. On approximately July 6, 2007, Rebco timely submitted a third request to renew its lien against the License, but DABT denied the request because the license had been revoked following publication of DABT's intended action in the St. Petersburg Times on May 2, 9, 16, and 23, 2007.

OUTCOME: The ALJ concluded that the 180-day period prior to which a revoked license can be re-issued never began to run because Rebco did not receive the statutorily-required notice. The ALJ also rejected DABT's argument that section 561.65, Florida Statutes, gave DABT discretion to reject a properly submitted request for lien renewal. Accordingly, the ALJ recommended that DABT enter a final order approving the renewal of Rebco's lien.

Good Fella's Roll-Off Waste Disposal, Inc. v. Citrus County, Bd. of County Comm'rs, DOAH Case No. 15-2826 (Final Order Sept. 4, 2015).

FACTS: Good Fella's Roll-Off Waste Disposal, Inc. ("Good Fella's") is a commercial waste hauler that collects and hauls waste in Citrus County. In August 2014, Good Fella's contracted to haul the Citrus County School Board's ("the School Board") solid waste to a landfill outside Citrus County. Upon learning of this agreement, Citrus County objected to Good Fella's disposing of the solid waste anywhere other than the Citrus County Landfill. In support thereof, Citrus County cited section 82-78 of the Citrus County Code which makes it "unlawful to dispose of solid waste generated within the county outside of the county." Good Fella's argued it was exempt from section 82-78's restrictions because the School Board's home-rule powers render section 82-78 unenforceable against it. However, the county administrator of Citrus County issued an Order on March 27, 2015, finding that Good Fella's violated section 82-78. For the violation, the Order imposed a $40,000 fine and required Good Fella's to pay $6,078.96 in lost revenue to Citrus County. Good Fella's exercised its right under the code to appeal the order to DOAH.

OUTCOME: Section 1001.32, Florida Statutes, sets forth the "home rule" powers of county school boards and provides in pertinent part that district school boards "may exercise any power except as expressly prohibited by the State Constitution or general law." In ruling that Good Fella's was not subject to penalty by Citrus County, the ALJ noted that the Attorney General has sensibly interpreted section 1001.32 as applying to any power exercised "for school purposes." According to the ALJ, "the means and methods of solid waste disposal appear to fall broadly within the concept of a 'school purpose' as regards the School Board's control of its own physical plant and property." Moreover, the ALJ concluded that, while section 403.713(1), Florida Statutes, gives certain local governments the authority to control the collection and disposal of solid waste generated within the territorial boundaries, the statute does not expressly prohibit the School Board from contracting to have its solid waste transported outside of Citrus County.

Disciplinary/Enforcement Actions

Office of Fin. Reg. v. Damiano, DOAH Case No. 15-2703 (Recommended Order July 21, 2015).

FACTS: Frankie Damiano is a Florida-licensed loan originator. On approximately March 24, 2015, an unidentified person allegedly stole $258 from Ms. Damiano's friend who was staying at Ms. Damiano's house. Ms. Damiano, the alleged victim, and three other individuals then drove to the suspected thief's house to demand the money's return. Upon arriving at the house, Ms. Damiano knocked on the front door, and a physical altercation involving multiple individuals quickly ensued. Ms. Damiano claims that she was battered, punched, and slammed to the ground. Moreover, the suspected

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thief's grandfather allegedly beat Ms. Damiano with a cane. As a result of the physical altercation, Ms. Damiano claims to have suffered injuries to her chin, neck, heart, and scalp. The Sarasota County Sheriff's Office arrested Ms. Damiano and charged her with committing occupied burglary, battery on a person over 65 years of age, and simple battery.

Based on these events, the Office of Financial Regulation ("OFR") issued an Emergency Order immediately suspending Ms. Damiano's loan originator's license. According to the Emergency Order, the actions leading to Ms. Damiano's arrest posed an immediate, serious danger to the public. Ms. Damiano requested a formal administrative hearing, and OFR referred the matter to the Division of Administrative Hearings.

OUTCOME: The ALJ concluded that OFR failed to "establish by clear and convincing evidence that immediately suspending [Ms. Damiano]'s loan originator's license during the pendency of her criminal case is 'action necessary to protect the public interest.'" In support thereof, the ALJ stated "this incident appears to be a one-time conflict," and OFR "did not produce any evidence of the likelihood that this type of 'backyard brawl' will happen again." The ALJ also concluded that OFR failed to demonstrate that Ms. Damiano "has assaulted or threatened her loan origination clients or that [her] possession and use of her loan originator's license has actually exposed her clients to risk of bodily harm." Accordingly, the ALJ recommended that OFR enter a final order rescinding its immediate suspension of Ms. Damiano's license.

Ag. for Health Care Admin. v. Murciano, DOAH Case No. 13-0795MPI (Final Order August 14, 2015).

FACTS: The Agency for Health Care Administration ("AHCA") administers Florida's Medicaid program and reimburses Medicaid providers for services rendered to Medicaid recipients. After retrospectively reviewing Medicaid claims submitted by Dr. Alfred Murciano between September 1, 2008 and August 31, 2010, AHCA notified Dr. Murciano that he had been overpaid by $1,051,992.99 for services that were not covered by Medicaid. AHCA also notified Dr. Murciano that the agency would be imposing $210,398.60 of sanctions and $3,349.86 of costs. After a formal administrative hearing, an ALJ issued a Recommended Order on May 22, 2014, concluding that AHCA's case should be dismissed because the claims at issue had not been reviewed by a "peer" as required by section 409.9131, Florida Statutes. The aforementioned statute defines a "peer" as a Florida-licensed physician who is, to the maximum extent possible, of the same specialty or subspecialty, as the physician whose Medicaid claims are under review. After the ALJ declined two remands from AHCA for additional factual findings as to whether Dr. Murciano had been overpaid on the claims at issue, the First District Court of Appeal granted AHCA's Petition for Review of Non-Final Agency Action and ordered the ALJ to make factual findings on the contested claims.

OUTCOME: Despite finding that the claims at issue were not reviewed by a "peer," the ALJ issued a Recommended Order making the findings on the contested claims, as directed by the appellate court, and concluding that Dr. Murciano had been overpaid by $1,051,992.99. In a Final Order rendered on August 14, 2015, AHCA accepted the ALJ's Recommended Order but rejected his determination that the statutorily-required "peer" review had not been performed.

Dr. Murciano appealed AHCA's Final Order to the Third DCA, and the appeal is pending as Case No. 3D15-2092.

Dep't of Fin. Servs., Div. of Workers' Comp. vs. Ford Co. Constr., Inc., DOAH Case No. 15-2561 (Final Order Sept. 23, 2015).

FACTS: The Department of Financial Services ("DFS") is charged with enforcing the the requirements in Chapter 440, Florida Statutes, for employers to obtain workers' compensation coverage. On September 12, 2011, DFS determined that the Respondent was not in compliance with workers' compensation coverage requirements and proposed a penalty of 1.5 times the amount that the employer would have paid in premiums had workers' compensation insurance been procured.

OUTCOME: In order to prove at the final hearing that the Respondent failed to secure workers' compensation coverage, DFS offered into evidence more than 1,200 pages of documents from the Respondent, including documents the Respondent had received from third parties such as subcontractors and vendors. But the documents were unaccompanied by a self-authenticating certification, and no records custodian appeared at the hearing to authenticate the documents. With regard to the documents that the Respondent received from third parties, the ALJ determined that with appropriate authentication, third party records integrated into the Respondent's business records could qualify as the Respondent's "business records" within the meaning of the business records exception to the hearsay rule. However, without any authentication by the records custodian, the ALJ concluded that those third-party records did not qualify for the business records exception. Accordingly, the ALJ ruled that DFS failed to prove by clear and convincing evidence that the Respondent failed to secure workers' compensation coverage during the time period in question.

Rule Challenges

A.R., A.S., Y.S., D.S., & Q.J., vs. Dep't of Health, DOAH Case No.15-3735RU (Final Order Sept. 22, 2015).

FACTS: The Florida Department of Health ("DOH"), Children's Medical Services, contracted with the Agency for Health Care Administration to serve children with special health care needs through the Children's

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Medical Services Network ("CMSN") Plan. CMSN is a statewide managed system for children with special health care needs, and is part of the Children's Medical Services program established by DOH. DOH created the Screening Tool to ensure that children enrolled in the CMSN Plan meet the clinical criteria for participation. CMSN nurse care coordinators call parents of children participating in the CMSN Plan and ask questions set forth in the Screening Tool in order to determine the children's CMSN eligibility. Pursuant to the Contract between DOH and AHCA, all 77,990 current plan participants and all potential participants must be screened for eligibility using the Screening Tool. Since the Screening Tool's implementation in May 2015, at least 5,922 children have been determined clinically ineligible for the CMSN Plan. A petition was filed on behalf of children who have been screened through use of the Screening Tool, challenging the Screening Tool as an unadopted rule.

OUTCOME: The ALJ concluded that the Screening Tool was a statement of general applicability that implements, interprets, or prescribes law or policy, because it is the primary instrument used to determine ongoing CMSN eligibility. Rather than arguing that the Screening Tool was not a rule or that rulemaking was infeasible or impracticable, DOH argued the Screening Tool was exempt from rulemaking requirements because section 409.961, Florida Statutes, exempts the contract from those requirements. However, the ALJ rejected that argument, concluding that "the exemption from rulemaking with regard to the Contract itself does not extend to statements of general applicability (which meet the definition of a rule) required to be created by the Contract. There is a distinction between a rule and a contract, which the Legislature envisioned when it enacted section 409.961."

The Hospice of the Florida Suncoast, Inc., d/b/a Suncoast Hospice v. Ag. for Health Care Admin., DOAH Case No. 15-3656RX (Final Order Sept. 28, 2015).

FACTS: The Agency for Health Care Administration ("AHCA") is the state agency responsible for administering Florida's certificate of need ("CON") program, by which AHCA determines whether there is a need in a particular area for regulated health care facilities and services. In order to further that objective, rule 59C-1.008(2) ("the Fixed Need Pool Rule") mandates that any person who identifies an error in AHCA's need calculation must advise AHCA of the error within 10 days of the date that AHCA publishes the need calculation in the Florida Administrative Register. On April 3, 2015, AHCA published its determination that there was a need for one new hospice program in Pinellas County. The Hospice of the Florida Suncoast, Inc. d/b/a Suncoast Hospice ("Suncoast"), the sole existing provider of hospice services in Pinellas County, did not advise AHCA by April 13, 2015, of any errors in AHCA's calculation. However, Suncoast notified AHCA on June 1, 2015, of an alleged error in the calculation. While acknowledging that the notification was untimely in light of the 10-day period set forth by the Fixed Need Pool Rule, Suncoast asserted the 10-day period was inapplicable because the alleged error was based on AHCA's changed interpretation of the hospice need methodology rule via a Final Order that was rendered on May 7, 2015. On June 2, 2015, AHCA denied Suncoast's request to correct the alleged error because the request was not filed within the 10-day period established by the Fixed Need Pool Rule. On July 24, 2015, Suncoast filed a petition alleging the 10-day period in the Fixed Need Pool Rule is an invalid exercise of delegated legislative authority because it enlarges, contravenes, or modifies the specific laws implemented. Suncoast also alleged that the Fixed Need Pool Rule was an illegal procedural rule that was void because it was legislatively repealed when the uniform rules of procedure were adopted and no exemption was obtained by AHCA.

OUTCOME: The ALJ rejected Suncoast's argument that the Fixed Need Pool Rule was an invalid exercise of delegated legislative authority. In doing so, the ALJ noted that section 408.039, Florida Statutes, serves as the specific law being implemented by requiring AHCA to provide a mechanism for comparative review, on a timetable basis, of applications seeking to fill the same need and by placing "AHCA at the helm of implementing a precise and fast-paced review process." As for the Petitioner's argument that the Fixed Need Pool Rule is illegal and void, the ALJ questioned whether this argument was cognizable in a section 120.56 rule challenge proceeding,

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noting that the basis for the challenge was not encompassed within the statutory definition of an "invalid exercise of delegated legislative authority." In addition, the ALJ found the Petitioner's argument undermined by the fact that the Legislature declared in 1997, and again in 2004, that AHCA's existing rules (included the Fixed Need Pool Rule) shall remain in effect and shall be enforceable until they are repealed or amended by AHCA.

Suncoast appealed the DOAH Final Order to the First DCA, and the appeal is pending as Case No. 1D15-4847.

Fla. Property and Casualty Ass'n, Inc. and First Protection Ins. Co. d/b/a Frontline Ins. v. Fla. Hurricane Catastrophe Fund & State, Bd. of Admin., DOAH Case No. 15-4811RX (Final Order Oct. 9, 2015).

FACTS: Prior to 2015, residential property insurers were required to report insured values by zip codes to the State Board of Administration ("SBA"). In order to assist the Florida Hurricane Catastrophe Fund's ("the CAT Fund") negotiations with reinsurers, the SBA decided to require street address data of the covered properties, and the SBA imposed this new requirement by amending Florida Administrative Code Rule 19-8.029. Pursuant to the rule, failure to transmit the required information is a violation of the Florida Insurance Code, which the CAT Fund is authorized to report to the Office of Insurance Regulation (OIR) for whatever action OIR deems appropriate. OIR has the authority to suspend or revoke the certificate of authority of any insurer failing to comply with the Florida Insurance Code. The Florida Property and Casualty Association ("the FPCA") is an industry trade group with a division consisting of 17 members that account for 40% of the homeowners' insurance written in Florida. Because street address data has great commercial value to its members and their competitors, the FPCA filed a petition on August 27, 2015, alleging that the portion of rule 19-8.029 requiring the transmission of street addresses is an invalid exercise of delegated legislative authority. Despite their objections to the amended rule, all of the FPCA's members (other than the intervenor Frontline Insurance) had provided the street address information by the September 1, 2015, filing deadline. As a result, the CAT Fund and the SBA argued that the FPCA's petition had been rendered moot.

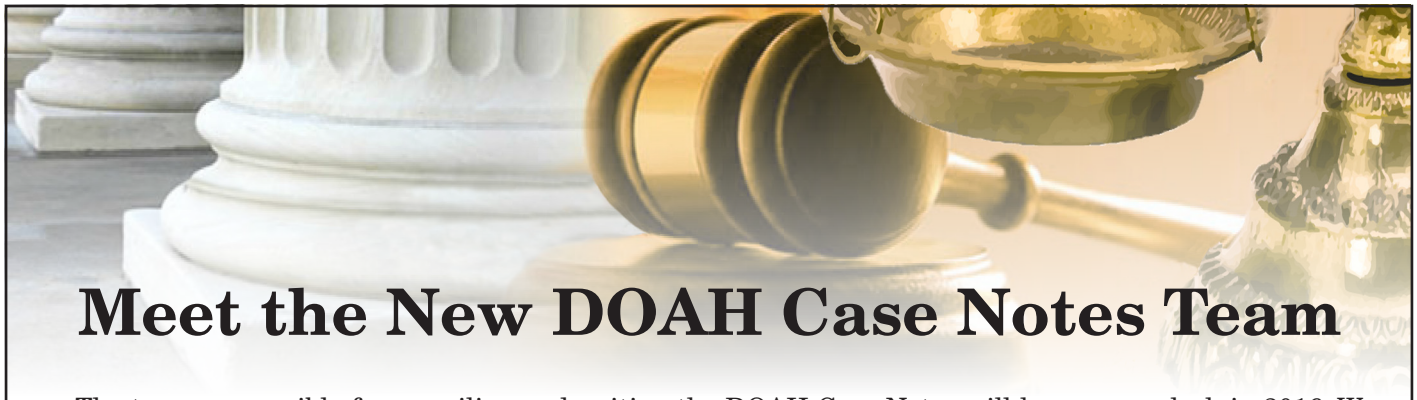
OUTCOME: The ALJ rejected the mootness argument because the street address information had only been disclosed to the CAT Fund and the SBA rather than to the general public. The ALJ also concluded, after a thorough analysis of past cases on standing, that the FPCA's members were substantially affected by the rule requirement for disclosure of the street address data, because of the risk that the disclosures would have to be made in the future. As for the merits, the ALJ concluded that the street address requirement was unsupported by a specific grant of rulemaking authority and was therefore invalid.

Bid Protests

Houston Street Manor Ltd. P'ship v. Fla. Housing Fin. Corp. and Powers Ave. Sr. Apts., Ltd., d/b/a Pine Grove Senior Apts., DOAH Case No. 15-3302BID (Recommended Order August 18, 2015).

FACTS: On November 21, 2014, the Florida Housing Finance Corporation ("FHFC") solicited applications for tax credits to develop affordable housing for elderly residents in Duval County. The evaluation was based on a point system, with the award going to the applicant with the highest score. An applicant's score was partially based on access to transit services, with public bus transfer stops generally more highly valued than regular public bus stops because transfer stops provide access to more routes. In the event of a tie, FHFC would utilize a sequence of six tiebreakers, with the sixth and final tiebreaker being a lottery. After all eight eligible applicants received the maximum score, Powers Avenue Senior Apartments Limited d/b/a Pine Grove Senior Apartments ("Pine Grove") won the tie-breaking lottery. Houston Street Manor Limited Partnership ("Houston Street") challenged the award by arguing that Pine Grove's application erroneously identified Stop # 4203 as a public bus transfer stop when it was actually a public bus stop, and Pine Grove conceded during the ensuing discovery that its application misidentified the public bus stop. Because Pine Grove would have been deemed ineligible for funding if its application had been correctly scored, FHFC announced that Pine Grove's application should be rejected. However, Pine Grove's application failed to note the presence of an existing public bus transfer stop in proximity to its proposed development. Given the presence of Stop #1397, Pine Grove asserted that its failure to correctly characterize Stop #4203 was simply a minor irregularity that conferred no competitive advantage on its application.

OUTCOME: The ALJ rejected Pine Grove's argument and found that Pine Grove's application contained a "material misrepresentation." In addition, the ALJ stated that he was "inclined to believe that a false statement of material fact in a bid or similar response to a public solicitation should almost always be deemed a material deviation. Agencies reasonably and justifiably rely upon the statements of fact contained in such documents, and therefore the disincentives to making factual misstatements, even innocently, should be strong and consistently applied." While the ALJ recognized that this outcome seems "somewhat unfair" given the existence of Stop #1397, the ALJ noted that any perception of unfairness is partially ameliorated by the fact that Pine Grove's initial selection was based on a lottery. Also, the ALJ noted that any unfairness is eliminated by the fact that section 120.57(3), Florida Statutes, prohibits FHFC from awarding an applicant points "for a quality established exclusively by information or evidence submitted" after bids are opened.



Meet the New DOAH Case Notes Team

The team responsible for compiling and writing the DOAH Case Notes will have a new look in 2016. We bid a fond farewell to Kurt Schrader and congratulate him on his new position with the Bill Drafting Services Office of the Florida Senate. In addition, Gar Chisenhall (who recently became an ALJ) will still assist the Team with editing but will no longer be the Team Coordinator. Instead, that role will be filled on a rotating basis by Paul Rendleman and Jaakan Williams. In addition, DOAH Case Notes welcomes two new team members, Brittany Griffith and Katie Sabo. Biographies for the team members (old and new) are listed below.

Brittany Griffith served as Article and Notes Editor and eventually as the Associate Editor of the *Journal of Land Use & Environmental Law* while earning her J.D. from the Florida State University College of Law. Following graduation, Brittany worked as a prosecuting attorney and the rules attorney for the Department of Business and Professional Regulation. Brittany currently serves as a retirement attorney for the Department of Management Services.

Dustin Metz earned his J.D. from the Florida State University College of Law and began his legal career with the Department of Children and Families prior to joining the Department of Business and Professional Regulation where he prosecuted cases before a variety of collegial bodies. Dustin is currently employed by the Department of Financial Services where he serves as a hearing officer, drafts final orders, and litigates disciplinary cases. Dustin is a certified volunteer firefighter and serves on the Board of Directors of his homeowner's association.

Paul Rendleman taught English in Europe and Central America before beginning his studies at the Florida State University College of Law. After receiving his J.D. in 2010, Paul worked in the Department of Business and Professional Regulation's construction and real estate prosecution units. In 2012, Paul joined the Florida Department of Education, where he currently works in the business operations unit.

Katie Sabo spent three years working as a prosecuting attorney for the Department of Business and Professional Regulation following her graduation from the Florida State University College of Law in 2011. During law school, she served as a certified legal intern for the City of Tallahassee and clerked for the Department of Environmental Protection. Katie currently serves as an appellate counsel for the Reemployment Assistance Appeals Commission.

Christina Arzillo Shideler is a 2011 graduate of the Florida State University College of Law and works for the Department of Economic Opportunity where she represents the Department in litigation pertaining to public records law, bid protests, and reemployment assistance. Prior to prosecuting real estate licensees for the Department of Business and Professional Regulation, Christina worked for the Senate Banking and Insurance Committee during the 2011 session researching and drafting bill analysis and clerked for the Attorney General's Office drafting appellate briefs for the criminal appeals division.

Jaakan Williams joined the Florida Elections Commission legal staff in 2012 where he prosecutes campaign finance and election code violations. Prior to working for the Commission, Jaakan was an Assistant General Counsel with the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, where he litigated complaints filed against alcoholic beverage licensees and tobacco permit holders. Jaakan is a graduate of Mercer University and the Thomas M. Cooley Law School.

Agency Snapshot: State University System of Florida Board of Governors

by Vikki Shirley and Iris Elijah

Background:

The State University System of Florida Board of Governors (Board) was created by an amendment to the Florida Constitution in November 2002. Article IX, section 7 of the Florida Constitution created a constitutionally autonomous governance structure for all public universities. The Board is responsible for operating, regulating, controlling, and managing the entire State University System (SUS). Responsibilities include the establishing SUS higher education policies, appointing five of the eleven citizen members of the university boards of trustees, establishing the powers and duties of the university boards of trustees, preventing wasteful or duplicative facilities and programs, ensuring articulation with public schools and community colleges, and ensuring the well-planned coordination and operation of the SUS. The SUS includes Florida A&M University, Florida Atlantic University, Florida Gulf Coast University, Florida International University, Florida Polytechnic University, Florida State University, New College of Florida, University of Central Florida, University of Florida, University of North Florida, University of South Florida, and University of West Florida. Each SUS institution is governed by a board of trustees. Boards of trustees are comprised of thirteen members, six of whom are appointed by the Governor and five appointed by the Board. These appointees are confirmed by the Senate for a five-year term. The remaining two members are the respective university's chair of the faculty senate and president of the student body. The boards of trustees are responsible for administering their constituent universities and are dedicated to the purposes of the SUS.

Board members:

Mori Hosseini, Chair
Tom Kuntz, Vice Chair
Richard Beard III
Matthew Carter II
Dean Colson
Daniel Doyle, Jr.
Patricia Frost
Tonnette Graham
H. Wayne Huizenga, Jr.
Ned Lautenbach
Alan Levine
Wendy Link
Edward Morton
Katherine Robinson
Pam Stewart
Norman Tripp

The Board is comprised of seventeen members, fourteen of whom are appointed by the Governor, and confirmed by the Senate for a term of seven years. The remaining three seats are held by the chair of the advisory council of faculty senates, the Commissioner of Education, and the chair of the Florida Student Association.

Chancellor: Marshall Criser III

The Chancellor serves as the chief executive officer of the Board, charged with the implementation of all Board regulations, policies, guidelines, and resolutions. The Chancellor assists the Board with the development of policies, programs, and procedures to guide the operations of the SUS and advises the Board on best practices in higher education. The Chancellor is responsible for the preparation and submission of annual legislative budget requests for the SUS and the Board office to the Board. As the chief executive officer, the Chancellor serves as the Board's liaison for communications with university boards of trustees, university presidents, the Legislature, the Office of the Governor, other state entities, external organizations, the media, and the public.

Chancellor Criser took office in January 2014 after serving as president of AT&T Florida. Chancellor Criser has a long history in education, having formerly served as vice chair of the University of Florida's board of trustees. He has also been a member of the Higher Education Coordinating Council since 2009.

Agency Clerk and General Counsel:

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(850) 245-0466

Hours for Filings:

8 a.m. – 5 p.m.

Vikki Shirley joined the Board as General Counsel in February 2006. Beginning in August 2014, Ms. Shirley assumed the responsibilities of corporate secretary and Agency Clerk. Prior to joining the Board, Ms. Shirley was a partner at the law firm of Huey, Guilday, Tucker, Schwartz, and Williams, P.A. Ms. Shirley has practiced in the areas of appellate, administrative, state, and federal civil litigation. Ms. Shirley holds a bachelor's degree in political science from the University of Florida and a Juris Doctor from the Florida State University College of Law.

Number of Lawyers on Staff: 2

Kinds of Cases:

The Office of the General Counsel is responsible for a broad range of legal services to the Board, Chancellor, and Board staff. These services include, but are not limited to, providing legal advice and counsel regarding educational law and policy matters to the Board and the Chancellor, issuing written legal opinions, overseeing litigation, preparing and/or reviewing contracts, developing Board regulations and rules, and analyzing proposed legislation affecting the Board and SUS. The Office of the General Counsel also works closely with university general counsels to create consistent SUS practices and interpretation of Board regulations and state and federal law.

Law School Liaison

Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column provides a summary of the programs the College of Law hosted this past fall. It also highlights recent accomplishments of our College of Law students.

Fall 2015 Events

Our fall semester featured several interesting and timely administrative law and environmental law programs, including our Fall 2015 *Environmental Forum* and our Fall 2015 Distinguished Lecture. More information on these events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events.

Fall 2015 Environmental Forum

The Fall 2015 Environmental *Forum*, entitled "The Clean Power Plan and Renewable Energy for Florida," was held on October 21, 2015. The *Forum* featured Peter Cocotos, Managing Attorney, Next Era Energy Resources/Florida Power & Light; Matthew Leopold, Of Counsel, Carlton Fields Jorden Burt; and Kevin Auerbacher, Director of Policy & Electricity Markets and Regulatory Counsel, SolarCity. Professor Hannah Wiseman moderated the *Forum*.

Fall 2015 Distinguished Lecture

Jonathan Wiener, William R. and Thomas L. Perkins Professor of Law, Duke University School of Law is the fall Distinguished Lecturer. The lecture was held on November 19, 2015.

Recent Student Achievements

- Sarah Logan Beasley has been invited to attend the Harvard Food Law Summit in October.
- Dylan Howard was awarded the Gunster Environmental Law Scholarship and Internship and will begin clerking at the firm in January.
- Stephanie Schwarz's recent article, entitled "Knot Your Average Bird: A Case Study of the Rufa Red Knot in the Face of Climate Change?" was accepted for publication by the Lewis & Clark Animal Law Review.

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> license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the license, permit, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. The permit applicant and agency may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance. Notwithstanding subsection (1), this paragraph applies to proceedings under s. 120.574.

APPLICABILITY OF THE BURDEN-SHIFTING LAW

Application of the burden-shifting law is limited to third-party petitions challenging the issuance of any license, permit, or conceptual approval under chapters 373, 378, and 403, Florida Statutes, which primarily provide for environmental regulatory authorizations. The law does not apply to any proceeding initiated by the applicant for the license, permit, or conceptual approval—the burden-shifting law applies only to proceedings filed by third party non-applicants. Note that the use of the phrase "any proceeding" in the burden-shifting law seems to suggest that it applies to informal hearings before the agency as well as formal administrative hearings before DOAH.

The burden-shifting law does not apply to challenges to regulatory authorizations issued under any other chapters of the Florida Statutes besides the three specifically listed above. For example, DOAH Recommended Orders and Department of Environmental Protection (DEP) Final Orders universally agree that the burden-shifting law does not apply to challenges to sovereign submerged lands authorizations. See, e.g., Spinrad v. Dep't of Envtl. Prot., Case No. 13-2254 (Fla. DOAH July 25, 2014; Fla. DEP Sept. 8, 2014) ("The consent to use [sovereign] submerged lands is an authorization issued under Chapter 253. Such authorizations are not subject to section 120.569(2)(p). Applicants therefore bear the burden of ultimate persuasion to demonstrate entitlement to that authorization.") (RO at ¶ 117).[1]

The case law is less uniform, however, in the context of challenges to exemptions and variances. See, e.g., Spinrad, supra, RO at ¶ 113. These issues are discussed in greater detail at the end of this article.

EFFECTS OF THE BURDEN-SHIFTING LAW

Before the burden-shifting law was enacted, the First District Court of Appeal's decision in Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), controlled the burden of proof in permit challenge cases. In J.W.C., the Department of Transportation's (DOT) permit application was initially approved by the Department of Environmental Regulation (DER), but challenged by third parties. Following an administrative hearing, the DOAH hearing officer issued a Recommended Order to deny the permit application, and DER's Final Order adopted that recommendation. DOT appealed the Final Order, arguing that the DOAH hearing officer incorrectly allocated the burden of proof. Id. at 781. The court affirmed the denial of the permit, holding that the hearing officer correctly placed the burden of proof on DOT because a permit applicant always carries the ultimate burden of persuasion. Id. at 787.

One purpose of the burden-shifting law is to abrogate the J.W.C. holding regarding the ultimate burden of persuasion in certain regulatory authorization cases.[2] The Florida House of Representatives Staff Analysis explained the purpose of the burden-shifting law as follows:

> Section 120.569(2), F.S., is amended by adding paragraph (p) to revise the order of presentation and clarify the burden of ultimate persuasion in administrative proceedings affecting a party's substantial interest under the following chapters[.] . . . Under current law the applicant bears the ultimate burden to prove its entitlement to the requested license, permit, or conceptual approval. The bill clarifies the burden of ultimate persuasion in proceedings by a non-applicant challenging a requested license, permit, or approval under the above 3 chapters. The petitioner initiating the action has the burden of ultimate persuasion and, in the first instance, has the burden of going forward with the evidence.

Fla. H.R. Comm. on Rules & Calendar, CS/CS/CS/HB 993 & 7239 (2011), Final Bill Analysis (June 28, 2011).

In Last Stand, Inc. v. Fury Management, Inc. and Department of Environmental Protection, Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013), the Administrative Law Judge (ALJ) described the burden-shifting law as changing the fundamental principle of administrative law established in the J.W.C. case that the applicant for the challenged regulatory authorization has the ultimate burden of persuasion to prove entitlement. Id., RO at ¶ 92. The ALJ noted that, under the burden-shifting law, the challenger now has ultimate burden of persuasion to prove that the applicant is not entitled to the permit. Id. DEP's Final Order adopted these conclusions. Id., FO at 9.

In cases in which the burden-shifting law applies, in addition to placing the ultimate burden of persuasion on the petitioner, the burden-shifting law also creates a three-phase order of presentation. See SRQUS, LLC v. City of Sarasota and S.W. Fla. Water Mgmt. Dist., Case No. 12-2161 (Fla. DOAH May 7, 2013); Washington Cnty. v. Bay Cnty. and N.W. Fla. Water Mgmt. Dist., Case Nos. 10-2983, 10-2984, and 10-10100 (Fla. DOAH July 26, 2012; Fla. DEP Sept. 27, 2012); and FINR II, Inc. v. CF Industries, Inc. and Dep't of Envtl. Prot., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 6, 2012).

Phase one is the respondents' prima facie case in which the applicant and agency must enter into evidence the application, the notice of

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intent (or other agency action document), and supporting materials, which demonstrate the applicant's entitlement to the permit and shift the burden of going forward with the evidence to the petitioner. FINR II, supra, RO at ¶ 92. Phase two is the petitioner's case in chief, in which the petitioner must establish that the applicant's project fails to satisfy one or more statutory or rule criteria for issuance of the permit. Id. Phase three is the rebuttal case, in which the applicant and agency are given the opportunity to submit any rebuttal evidence demonstrating that the applicant is entitled to the regulatory authorization, notwithstanding petitioner's specific claims of ineligibility. Id.

PHASE ONE: THE RESPONDENTS' PRIMA FACIE CASE

In Last Stand, the ALJ provided a thorough discussion of the first phase—the respondents' prima facie case—which was adopted by DEP in its Final Order. Last Stand, supra, RO at ¶¶ 89-95, FO at 10. The ALJ concluded from the description of phase one in the burden-shifting law that the law "clearly contemplates an abbreviated presentation of the applicant's prima facie case." Id., RO at ¶ 89.

The permit application and supporting materials presented in the prima facie case "may be received into evidence for the truth of the matters asserted therein, without being subject to hearsay objections." Id., RO at ¶ 91. To hold otherwise would vitiate one of the primary purposes of the statute—to create an abbreviated presentation of the applicant's prima facie case. Id.

The Last Stand Recommended Order explains this point by reference to the J.W.C. case, in which the court held that with regard to uncontroverted portions of the application, a prima facie case could be made by submitting the application and supporting material into evidence. As the ALJ explained:

> When the applicant had the burden of persuasion, it made sense to require the applicant to prove with normal formalities the contested aspects of the permit application. Now that section 120.569(2)(p) places the burden on the challenger in cases where the agency intends to issue the permit, there is no longer a reason to differentiate between the quality of proof required for the uncontroverted and the contested aspects of the permit application. It is consistent with the reasoning in J.W.C. that all aspects of the applicant's prima facie case of entitlement to the permit should now be subject to less formal proof through the admission into evidence of the permit application and supporting material.

Id., RO at ¶ 94.

Once an applicant establishes its prima facie case by admitting into evidence the permit application, supporting materials, and the agency's notice of intent, "[t]he permit application and supporting material that the agency determined was satisfactory to demonstrate the applicant's entitlement to the permit retains its status as satisfactory . . . it does not lose that status unless the challenger proves that specific aspects of the application are unsatisfactory." Id., RO at ¶ 90 (emphasis added). The fact that DEP adopted the emphasized language in its Final Order is significant here, because it means once an applicant successfully establishes its prima facie case, all of the applicable criteria for issuing the permit are considered satisfied unless and until the petitioner proves that one or more criteria for issuance have not been met.

The ALJ found that the applicant, Fury, "presented a prima facie case of its entitlement to the environmental resource permit, and, therefore, the burden of ultimate persuasion was on Petitioners to prove their case in opposition to the permit by a preponderance of the evidence." Id., RO at ¶ 95. Because the petitioners in Last Stand failed to carry their burden of ultimate persuasion, the ALJ recommended issuance of the challenged ERP. Id., RO at 28-29. DEP's Final Order adopted all portions of the ALJ's Recommended Order that are pertinent to this discussion, and accordingly, the ERP was issued to Fury.

Also part of phase one is the opportunity afforded to DEP to present "any direct evidence" after the applicant. Since these proceedings are "not a mere 'review' of action already taken by [the agency]," the statute preserves the agency's ability to participate as a "party litigant" in the proceeding and offer proof in support of its position. See § 120.569(2)(a), Fla. Stat.; Nicolitz v. Bd. of Opticianry, 609 So. 2d 92 (Fla. 1st DCA 1992); see also Disc Vill., Inc. v. Dep't of Corr., Case No. 92-7321BID (Fla. DOAH Feb. 26, 1993) (reflecting that if the agency changes its position, it can only do so as a party litigant offering proof in support of its new position at hearing).

Often the "permit file," which includes all documents that are needed to establish a prima facie case, will be a stipulated exhibit, such that little or nothing further is required of the respondents to meet their minimal initial burden.[3]

PHASE II: PETITIONER'S CASE IN CHIEF

It is well-recognized that "[e]ntitlement to a regulatory authorization is based on statutory and rule criteria." Retreat House, LLC v. Damico and Dep't of Envtl. Prot., Case No. 10-10767 (Fla. DOAH Oct. 14, 2011; Fla. DEP Jan. 12, 2012), RO at ¶ 37. Once a prima facie case is established by the respondents, the burden shifts to the petitioner to "prove that reasonable assurance of compliance with those criteria has not been provided." Id. Accord Helen J. Crenshaw v. Vista of Ft. Walton Bch., LLC and N.W. Fla. Water Mgmt. Dist., Case No. 12-3280 (Fla. DOAH Mar. 11, 2013; Fla. DEP Apr. 11, 2013).

In Crenshaw, the ALJ noted that the petition challenging the surface water management permit only disputed two rule criteria pertaining to the challenged permit. Id., RO at ¶ 15. Since the applicant established a prima facie case in Crenshaw, only the two disputed criteria were considered during the petitioner's case in chief, and accordingly the ALJ found that "[a]ll other rule and statutory

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requirements have been satisfied." Id. Ultimately, since the applicant in Crenshaw established that two disputed criteria were satisfied and established in its prima facie case that all of the other, unchallenged requirements were met, the ALJ recommended issuance of the permit. Id., RO at ¶ 16.

In Washington County v. Bay County and Northwest Florida Water Management District, supra, Case No. 10-2983, the applicant's eligibility for a consumptive water use permit was at issue. Respondents established their prima facie case, and the burden then shifted to petitioner. Id., RO at ¶ 241. As the ALJ noted, "[i]f the third-party challenger fails [to carry its burden], the applicant prevails by virtue of its prima facie case." If, on the other hand, the challenger presents evidence that the applicant has not demonstrated the conditions for issuance, the applicant has the opportunity to rebut the challenger's evidence." Id., RO at ¶ 242.

The petitioners in Washington County successfully carried their burden, demonstrating that reasonable assurances were not provided that the applicant's project would satisfy several applicable regulatory criteria. The ALJ neatly summarized the petitioners' burden in Washington County by use of the following example of a disputed criterion in that case:

> The meaning of the distinction between the applicant's responsibility and a third-party challenger's burdens of going forward and ultimate persuasion can be understood by examining a matter to which the parties devoted a considerable amount of evidence: the "reasonable-beneficial use" factor found in rule 62-40.410(2)(p): "whether the proposed use would significantly affect natural systems." Following Bay County and the District's prima facie case, Petitioners are not required to show that the Permit would, in fact, significantly harm or affect natural systems. Petitioners' burden is to prove that Bay County and the District did not provide reasonable assurances that natural systems would not be significantly affected.

Id., RO at ¶ 243.

While the respondents' prima facie case carried several of the factors for consideration of reasonable-beneficial use, "[a] weighing of the evidence under the Factors leads to the conclusion that Bay County's application should be denied. Petitioners proved by the evidence they presented that the application should not be viewed favorably under Factors that, based on a view of the entire case, are given the greatest weight." Id., RO at ¶¶ 257-58. Accordingly, the ALJ recommended denial of the application for consumptive water use permit in the Washington County case.

The Northwest Florida Water Management District adopted the ALJ's Recommended Order in Washington County, noting that, with respect to the ALJ's conclusions of law regarding burden shifting:

> The Governing Board does not have substantive jurisdiction regarding Chapter 120, Florida Statutes generally, nor does it have substantive jurisdiction specifically regarding the burden of proof in administrative proceedings as enunciated in Section l20.569(2)(p), Florida Statutes. The courts have clearly and repeatedly interpreted Section 120.57(l)(*l*), Florida Statutes, to restrict an agency's authority to reject or alter an ALJ's interpretation of legal issues that are outside of the agency's substantive jurisdiction, including interpretation of Chapter 120, Florida Statutes.

Washington Cnty. v. Bay Cnty. and N.W. Fla. Water Mgmt. Dist., supra, FO at 6.

PHASE III: RESPONDENTS' REBUTTAL CASE

It is clear from the statute that both the applicant and the agency "may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance." However, available Recommended Orders and Final Orders contain little discussion of the rebuttal phase of proceedings governed by the burden-shifting law, as the orders tend to identify the prevailing evidence without much discussion about when it was offered. See, e.g., Glisson v. City of Tallahassee and Dep't of Envtl. Prot., Case No. 11-2953 (Fla. DOAH Nov. 18, 2011; Fla. DEP Nov. 18, 2011), RO at ¶ 67 ("All testimony from experts knowledgeable about the minor permit revisions at issue established that the minor permit revisions will not impact Wakulla Springs or the Wakulla River.").

EXEMPTIONS AND VARIANCES

Exemptions

DOAH Recommended Orders and agency Final Orders apply the burden-shifting law to some exemption challenges, but not to others. See Spinrad, supra, RO at ¶ 113 ("Precedent is mixed as to whether an exemption is not a 'license, permit or conceptual approval[,]'" or another form of regulatory authorization, contrasting Padron v. Ekbolm and Dep't of Envtl. Prot., Case No. 12-3291 (Fla. DOAH Mar. 11, 2013; Fla. DEP Aug. 29, 2013), *aff'd*, 143 So. 3d 1037 (Fla. 3d DCA 2014) (burden shifting does not apply to exemption challenge) with Pirtle v. Voss and Dep't of Envtl. Prot., Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013) (burden shifting applies to exemption challenge)).

The issues in Spinrad were whether the applicants were entitled to a consolidated ERP and state lands authorizations or, alternatively, whether the project was exempt under section 373.406(6), F.S. Spinrad, supra, RO at 4. The ALJ began his analysis of the applicability of the burden-shifting law to exemption challenges with a discussion of the Padron case. Id., RO at ¶ 114. The ALJ noted that he relied upon the Padron analysis in reaching a preliminary ruling, prior to the final hearing in Spinrad, that the burden-shifting law would not apply to the exemption challenge at issue. Id.

In Padron, the ALJ considered whether the application to install a boatlift at an existing dock in a manmade water body is exempt from the need for an ERP. Padron, supra, RO at 1. The ALJ opined: "The burden of showing entitlement to an exemption is on the applicant. Because no permit is being issued by

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the Department, section 120.569(2)(p), Florida Statutes, does not apply." Id., RO at ¶ 31. In reaching this conclusion, the ALJ relied on Lardas v. Dep't of Envtl. Prot., Case No. 05-0458 (Fla. DOAH Aug. 24, 2005; Fla. DEP Oct. 21, 2005).[4]

However, after the final hearing commenced in the Spinrad case, Pirtle v. Voss and Dep't of Envtl. Prot., Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013), became final. The ALJ notes in the Spinrad Recommended Order that the Pirtle decision caused him to revisit his preliminary ruling that the burden-shifting law would not apply. Id. The ALJ quoted the following language in Pirtle in the course of reconsidering this issue:

> [T]he Department refers to Voss's "application" and states that the determination the proposed mooring pilings are exempt was made under section 373.406(6). That section requires a written request for a Department determination that proposed activities are exempt from permitting and advises the applicant that the activities shall not be commenced without the written determination of exemption … The Department's written determination is a license issued under chapter 373 and subject to section 120.569(2)(p). Therefore, Pirtle has the burden of ultimate persuasion that Voss is not entitled to the exemption.

Spinrad, supra, RO at ¶ 115.

The ALJ noted that the DEP Final Order in Pirtle adopted the Recommended Order in its entirety and included DEP's statement that "'[s]ection 120.52(10), F.S., defines a 'license' as 'a franchise, permit, certification, registration, charter, or similar form of authorization required by law,' and that 'the definition of 'license' in Section 120.52, Florida Statutes, encompasses the 'form of authorization' issued by the Department under Section 373.406(6), F.S.'" Id. After considering the Padron and Pirtle Orders, the ALJ concluded as follows in Spinrad:

> [I]n cases in which an exemption is subject to a case-by-case determination and written approval from the relevant regulatory authority, as is the case for exemptions under section 373.406(6), the Pirtle case controls. However, since this case was commenced while the Padron Final Order was the only applicable authority, and since the parties were governed by and relied upon the procedural rulings entered in reliance on the Padron Final Order, the Respondents are found to have the burden of proof with regard to the exemptions, and thus bear the burden of demonstrating, by a preponderance of the evidence, that the qualifying conditions for the exemptions have been met.

Spinrad, supra, RO at ¶ 116.

Ultimately, the ALJ concluded that in exemption challenge cases the burden-shifting law should apply if: (a) the applicable exemption law calls for a case-by-case analysis of each exemption request, and (b) a written determination of exemption from the agency is required for the project to be deemed exempt. The ALJ did not apply the burden-shifting law to the exemption at issue in the Spinrad case because, although the exemption at issue met these two criteria, the ALJ's preliminary ruling bound the parties.

In the Spinrad Final Order, DEP adopted the ALJ's reasoning, under the narrow facts presented:

> [T]he Department's interpretation of the "license" in section 120.569(2)(p), F.S., to include the "written determination" under section 373.406(6), F.S., was first announced in the December 2013 Pirtle final order. . . . The judge's ruling is supported by case law, which holds that where an agency's decision "might constitute a change of official position in a matter of [statutory] interpretation . . . [s]uch change should be given only prospective effect, never retroactive." Communications Workers of America, Local 3107 v. Fla. Industrial Comm'n, 174 So. 2d 751, 755-756 (Fla. 3d DCA 1965).

Spinrad, supra, FO at 20.

Accordingly, while DEP adopted the ALJ's recommendation in Spinrad, the Final Order recognized DEP's authority to adopt a different interpretation of its exemption statutes, albeit only on a prospective basis.

Variances

In Florida Wildlife Federation v. CRP/HLV Highlands Ranch, LLC and Department of Environmental Protection, Case No. 12-3219 (Fla. DOAH Apr. 11, 2013; Fla. DEP June 14, 2013), the issue was whether DEP's notice of intent to grant a mitigation bank permit and a variance under section 120.542, Florida Statutes, waiving the financial responsibility requirements applicable to mitigation banks should be upheld. The ALJ recommended granting a modified mitigation bank permit to the applicant and denying the applicant's variance request. Id., RO at 80. In the course of arriving at that recommendation, the ALJ concluded: "A variance is not a 'license, permit, or conceptual approval.' Therefore, the modified burden of proof established in section ¶ 120.569(2)(p) does not apply to the request for variance." Id., RO at ¶ 164.[5]

Conversely, in Pelican Island Audubon Society v. Indian River County and St. John's Water Management District, Case No. 13-3601 (Fla. DOAH Aug. 5, 2014; Fla. SJWMD Aug. 27, 2014), the ALJ applied the burden-shifting law to a variance challenge. See RO at ¶ 68. No exceptions were filed, and the ALJ's Recommended Order was adopted by St. John's Water Management District in its Final Order. The issues considered in Pelican Island were whether the water management district should approve the applicant's ERP request, and whether the water management district should approve the applicant's request for variance from certain requirements in the Applicant's Handbook: Management and Storage of Surface Waters. Id., RO at 2.

Considering whether the burden-shifting law should apply to the challenge of the proposed variance (which, unlike the one at issue in Highlands Ranch, was a variance under section 403.201, F.S.), the ALJ noted that there were no reported cases

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addressing the issue of whether the burden-shifting law applies to variance challenges. The ALJ reasoned: "The District's written approval of a variance is a 'form of authorization' or a 'license' under Chapter 373 and is therefore subject to the requirements of section 120.569(2)(p)." Pelican Island, supra, RO at ¶ 68. In reaching that conclusion, the ALJ cited the Spinrad, Pirtle, and Padron orders, which analyze whether the burden-shifting law applies to exemption challenges.

SUMMARY

The burden-shifting law applies only to third-party challenges of environmental regulatory authorizations under chapters 373, 378, and 403, Florida Statutes. It does not apply to sovereign submerged lands authorizations. The burden-shifting law may apply to exemptions and variances issued under one of the aforementioned chapters, especially if: (a) the applicable exemption law calls for a case-by-case analysis of each exemption request, and (b) a written determination of exemption from the agency is required for the project to be deemed exempt. Note that the burden-shifting law may technically apply to informal proceedings, as well as summary hearings and final hearings before DOAH.

Phase I: When the burden-shifting law applies, the respondents have the initial burden of going forward with evidence sufficient to establish their prima facie case. Although the petitioner has the ultimate burden of persuasion, the act of presenting the respondents' prima facie case is necessary to trigger this burden. The respondents' prima facie case may be established by simply placing the permit file into evidence, which should include: the permit application, any requests for additional information and responses thereto, expert studies and reports, other supplemental information provided by the applicant, and the final agency action documents. Respondents may find it helpful to provide some testimony to place the permit file in context for the ALJ and to make preliminary arguments during this phase.

Phase II: Once the prima facie case is established, the petitioner has the burden of going forward with the evidence as to petitioner's case in chief. Any regulatory criteria not specifically challenged in the petition or not addressed by petitioner in petitioner's case in chief are deemed satisfied.

Phase III: During this phase, respondents must rebut the petitioner's competent and substantial evidence, if any, that one or more regulatory criteria have not been met. This is a matter that agency attorneys should be prepared to address at the beginning of the hearing.

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Endnotes:

[1] Note that in cases involving sovereign submerged lands authorizations as well as regulatory authorizations under chapters 373, 378, or 403, the burden-shifting law is applied only to the third party challenges directed to the regulatory authorizations, not to third party challenges to sovereign submerged lands authorizations. See Spinrad, supra, Case No. 13-2254, RO at ¶ 117 (burden-shifting law controlled environmental resource permit (ERP) challenge but not challenge to sovereign submerged lands authorization). Although no reported decisions are available construing the burden-shifting law in the context of a joint coastal permit (JCP), it is reasonable to anticipate that any claims directed to the sovereign submerged lands authorization and the coastal construction control line permit in a case involving a third party's challenge to a JCP would not be subject to the burden-shifting law, while that law would control the ERP challenges. See, e.g., Sherry v. Okaloosa Cnty. and Dep't of Envtl. Prot., Case No. 10-0515, RO at ¶ 276 (Fla. DOAH June 29, 2011; Fla. DEP Aug. 30, 2011) ("A Joint Coastal Permit is a legislatively mandated combination of three forms of authorization issued by the State of Florida . . . a coastal construction permit under section 161.041, sovereign submerged land authorization under chapter 253, and an environmental resource permit under Part IV of chapter 373.").

[2] The J.W.C. holding would still control the burden of proof issue in proceedings involving challenges to regulatory authorizations issued under any provision of law besides chapters 373, 378 or 403, Florida Statutes, and in challenges filed by petitioners who are not third parties, such as permit applicants themselves challenging the denial of their own applications.

[3] For a discussion of items that may be included among the documents used to establish an applicant's prima facie case, see Washington County v. Bay County and Northwest Florida Water Management District, supra, Case No. 10-2983, RO at ¶¶ 110-113 (application file included permit application, requests for additional information and responses thereto, expert studies and reports, and the agency's notice of intent; applicant also provided testimony from several witnesses during its prima facie case).

[4] The Lardas Recommended Order, which was entered about five years before the burden-shifting law was enacted, relied on several Florida appellate court decisions holding that exemption laws must be strictly construed against the party claiming the exemption, to reach the conclusion that the applicant has the burden to prove entitlement to the exemption. Lardas, supra, RO at ¶ 16 (citing Robinson v. Fix, 113 Fla. 151, 151 So. 512 (Fla. 1933) (exemptions strictly construed against claimant); Pal-Mar Water Mmt. Dist. v. Martin Cnty, 384 So. 2d 232 (Fla. 4th DCA 1980) (same); Green v. Pederson, 99 So. 2d 292, 296 (Fla. 1957) ("It is well settled that he who would shelter himself under an exemption clause in a tax statute must show clearly he is entitled under the law to [the] exemption."); accord Dep't of Banking and Fin., Div. of Sec. and Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977)). The Lardas case concluded with a recommendation to deny the petitioner's exemption request, and that recommendation was adopted in DEP's Final Order.

[5] Because the ALJ construed sections 120.542 and 120.569(2)(p), Florida Statutes, DEP adopted this conclusion in its Final Order. Highlands Ranch, supra, FO at 29-30.

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