Administrative Law Section Newsletter

Volume XIX, No. 1 Dan R. Stengle & Elizabeth W. McArthur, Co-editors September 1997

Local Administrative Law: All Plan Amendments are now Legislative Decisions

by Ralf G. Brookes, Morgan & Hendrick, Key West

In March 1997, the Florida Supreme Court held in *Martin County v. Yusem*, 22 FLW S156 (Fla. March 27, 1997) that all plan amendments are legislative, not quasi-judicial, decisions. In April 1997, the Third District Court of Appeals in *Debes v. City of Key West*, 22 FLW D827 (Fla. 3rd DCA April 2, 1997) reminded local governments that there must still be a rational basis for legislative plan amendments . . . regardless of whether the quasi-judicial or legislative test is applied.

In the arena of local government, decisions in the field of administrative law are generally not subject to Florida's Administrative Procedures Act, *Florida Statutes* Chapter 120. In recent years, rezonings and comprehensive plan amendments have become increasingly difficult for both local governments and administrative lawyers. Complex hearings are held before City and County Commissions that are historically and politically more adept at making legislative, rather than quasi-judicial, decisions. Judicial review of these local decisions under Florida's Growth Management Act led to differing District Court opinions and recent changes in the 50 year history

continued, page 2

From the Chair ... Your Section Wants You!!

by Robert M. Rhodes, Chair

This year offers our Section many continuing and new opportunities and challenges. I'll outline a few of our priorities.

First, membership. We need to grow the section, increase member participation in section activities, and recruit the next generation of section leaders. Several new Executive Council members joined us this year and they reflect the diversity of our membership — a strength that has enabled us to mold consensus positions which are generally viewed as balanced and objective. Nonetheless, all of our activities can benefit from increased member participation, particularly those of you who have not served in the past. I encourage each of you to contact any section officer or Executive Council member if you wish to participate in section activity. Elizabeth McArthur will chair the membership committee.

Second, we will continue our productive CLE programs. Donna Blanton, CLE committee chair, and Mike Maida will spearhead a fall CLE program devoted to mediation in the administrative forum. Additionally, we will consider programs addressing local government administrative practice and a review and assessment of recent revisions to the Administrative Procedure Act. Later in the year we will start planning the next Administrative Law Conference

continued, page 2

INSIDE:

FROM THE CHAIR

from page 1

which will provide a useful forum for discussing and exchanging ideas to improve administrative law, practice, and procedure. The next Conference tentatively is scheduled for fall, 1998.

Third, we will amplify our efforts to establish a student administrative law writing contest. We hope this competition will be up and running this coming year. Also, with the leadership of Jim Rossi and Johnny Burris, we will establish a stronger working relationship with each state law school to promote and support teaching state administrative law. We'll also consider joining with one of the law schools to produce a national forum on significant emerging administrative law issues.

Fourth, our Public Utilities Committee chaired by Doc Horton will work on a forum that will address from various perspectives deregulation of electric utilities. This should be a timely and provocative session that will bring together public, private, and citizen views on this important public policy issue.

Fifth, we will publish our regular newsletter and Bar *Journal* column. Dave Watkins and Seann Frazier will chair these efforts.

Finally, we will maintain the Section's active involvement in the development of administrative law policy and practice. We will continue to work with legislative staff and committees on possible further revisions to the APA. We will assess the effects of recent APA revisions and the recently adopted Uniform Rules of Procedure. We will offer our assistance to the Constitutional Revision Commission. Past chairs Linda Rigot and Bill Williams will lead these endeavors.

In all, we have another challenge-filled year, and I encourage those of you who have not actively participated in your Section, to become involved.

Join us. Let us hear from you.

LOCAL ADMINISTRATIVE LAW

from page 1

of zoning law. But the Supreme Court in *Yusem,* and the Third District Court of Appeals in *Debes*, recently shed some new light into the murky waters of this increasingly-complex area of administrative law, and remembered lessons of the past.

With the advent of Florida's Growth Management Act in 1985, the zoning of property, previously treated as a purely "legislative" decision, must now survive an increasingly technical array of standards, criteria and different avenues of judicial review. Legislative actions are reviewable under the fairly debatable standard in an original action. *Martin County v. Section 28 Partnership, Ltd.*, 676 So.2d 532 (Fla. 4th DCA 1996). The denial of a quasi-judicial application is reviewable by petition for writ of certiorari, if you are the applicant. *Section 28 Partnership, Ltd. v. Martin County*, 642 So.2d 609 (Fla. 4th DCA 1994). If you are an affected citizen alleging that an action is inconsistent with the comprehensive plan, judicial review is available solely in an original action under *Florida Statutes* §163.3215.

Although ultimately subject to judicial review, it is the local governments that must initially decide whether an action is legislative or quasi-judicial because each type of action has its own procedures, standards and methods of review. *See, Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993); *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3rd DCA 1991), *review denied*, 598 So.2d 75 (Fla. 1992). To make this determination, the Florida Supreme Court required local governments to conduct a functional analysis of each application. Actions which result in the "formulation" of a general rule of policy are legislative. But actions which result in the "application" of a general rule of policy are quasi-judicial. *Snyder*. From *Snyder* (in 1993) until now, this functional analyses was applied to both rezonings and plan amendments on a case-by-case basis. Plan amendments or rezonings could be either quasi-judicial or legislative. And every case required analyses.

But in *Yusem*, the Supreme Court restored a bit of common sense to the process and held that amending a plan was just like adopting an original plan. A plan amendment was legislative because it involved the formulation of a general rule of policy, regardless of the size of the parcel or number of people affected. All plan amendments are legislative. *Martin County v. Yusem*, 22 FLW S156 (Fla. March 27, 1997). The Supreme Court also confirmed that judicial review of a plan amendment, a legislative act, is available in an original action filed in circuit court. *Yusem*, *citing Hirt v. Polk County Board of County Commissioners*, 578 So.2d 415, 416 (Fla. 2d DCA 1991).

Although all plan amendments

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

Robert M. Rhodes, Tallahassee ..... Chair
M. Catherine Lannon, Tallahassee ..... Chair-elect
Mary F. Smallwood, Tallahassee ..... Treasurer
Dan R. Stengle, Tallahassee ..... Secretary
Elizabeth W. McArthur, Tallahassee ..... Co-editor
Dan R. Stengle, Tallahassee ..... Co-editor
Jackie Werndli, Tallahassee ..... Program Administrator
Lynn M. Brady, Tallahassee ..... Layout

are conclusively legislative, the functional analyses must still be applied to rezonings. Comprehensive rezonings that affect a large area or portion of the public are legislative determinations subject to the fairly debatable standard of review. But rezonings that affect a limited area or number of persons are quasi-judicial decisions, subject to a higher degree of scrutiny under the two prong test set forth in *Snyder*. In a quasi-judicial rezoning, the applicant has the burden of proving that the application is consistent with the comprehensive plan and complies with procedural requirements. Once this burden is met, the burden shifts to local government to demonstrate a valid, legitimate public purpose for maintaining the existing designation. *Snyder* at 474-476.

This sounds simple enough. Plan amendments are legislative. Rezonings require functional analyses. But what if applications for a plan amendment and rezoning are filed at the same time? The District Court cases that arose in *Snyder*'s wake often considered applications that combined rezonings with plan amendments, and the reviewing Courts failed to make a distinction between the two applications, further leading to the confusion.

These dual applications were processed at the same time in order to reduce the extraordinary amount of time needed to proceed on a plan amendment and then a subsequent rezoning under Florida's Growth Management Act, *Florida Statutes* §§ 163.3184 and 163.3187. Proposed plan amendments must first be transmitted to various state agencies including the Department of Community Affairs. Only after review can an amendment be adopted and must be submitted to DCA once again for a second compliance review under the Growth Management Act. *Florida Statutes* §163.3184. Generally, larger-scale plan amendments can only be adopted twice per year, but smaller scale amendments affecting less than 10 acres can be submitted more frequently. Florida Statute §163.3187. Rezonings can be accomplished more quickly and frequently. But rezonings must still be in compliance with each and every element of the comprehensive plan, i.e., frequently necessitating the simultaneous plan amendment.

Because different standards apply to legislative plan amendments and rezonings, it would be easier to defend decisions in which plan amendments are heard first, in a separate hearing prior to the rezoning. All to frequently, a plan amendment and a rezoning application are heard together in one hearing, usually at the request of an eager applicant whose project awaits approval. The best strategy, in light of *Yusem*, is to decide the legislative plan amendment first. Even if both hearings occur at the same meeting. The first decision, a legislative plan amendment, is easier to uphold. In most cases, the legislative decision on the plan amendment will form the basis for a quasi-judicial decision on the underlying rezoning application. Only then should the hearing on the quasi-judicial rezoning application be heard. A separate hearing meeting the substantive and procedural requirements of *Snyder* can then be convened.

Remember, even a quasi-judicial rezoning application that is consistent with the plan or adopted plan amendment can be denied if a legitimate public purpose exists to keep the existing zoning in place under the second prong of the test set forth in *Snyder*. *Snyder* at 476. Does this "legitimate public purpose" standard closely parallel the "fairly debatable"or "rational basis" test applied to purely legislative decisions? And in the end, is there any real, practical difference? The Supreme Court reminded us in *Snyder* (1993), and again in *Yusem* (1997), that a "land use plan must be based on adequate data and analysis in providing for gradual and ordered growth in the future use of land." Even legislative plan amendments must still have a rational basis that is supported by competent, substantial evidence. That is the underlying constitutional basis for all modern zoning and growth management systems.

We must not forget the historical, constitutional basis for zoning established in *Euclid v. Ambler*, 272 U.S. 365 (1926). It is worth remembering that only on a motion for rehearing in *Euclid* was the United States Supreme Court persuaded to change its collective mind and hold zoning constitutional. *Land Use*, Callies and Freilich, West Publishing (1986), p. 47, note 9. Since the *Euclid* decision in 1926, zoning has become a part of almost all local government codes. It is also in *Euclid* that the "fairly debatable" standard was first enunciated in the context of zoning; "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." The *Euclid* court also discussed in detail many public purposes that formed the rational basis for zoning districts limiting the allowable uses of land.

Two years after *Euclid*, United States Supreme Court again examined a residentially-zoned parcel adjoining established industrial uses. The Court held that the line of separation between the residential and industrial district, which transected an existing commercial building, was unconstitutional because it lacked a rational basis. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The zoning district was not supported by a fairly debatable rational basis. Usually, the rational basis, or lack of a rational basis, can be found by looking at a map of the surrounding uses and asking a simple question: "Does it make sense?" (see, *Nectow*, zoning map, included in the opinion).

After nearly 50 years of zoning decisions and growth management legislation, the Third District recently brought us back to earth. In *Debes*, the Third District reversed the denial of even a "legislative" plan amendment (from Residential to Commercial) because it resulted in "discriminatory spot zoning — or, in this context, spot planning — in reverse." Under the Court's analysis even a legislative decision must have some rational basis supported by competent, substantial evidence, especially in cases that raise the old specter of "spot zoning," or the creation of small zoning islands or pockets unsupported by any rational basis.

The City's stated reasons for maintaining the residential zoning in *Debes* lacked both a rational basis and could not be supported by competent, substantial evidence. The Court found that the City's general-

continued...

LOCAL ADMINISTRATIVE LAW
from page 3

ized concerns about additional traffic that would be generated by commercial uses was insufficient to retain residential spot zoning. Traffic concurrency and levels of service were properly considered during site plan review once a specific project was proposed. In addition, the City's desire to build affordable housing on the privately-held parcel was also an insufficient basis to deny the application. The plan amendment or rezoning application should be considered "without regard to the one particular use which the owner might then intend to make of the various uses permitted under a proper zoning category" *Debes, citing Porpoise Point Partnership v. St. John's County*, 470 So.2d 850 (Fla. 5th DCA 1985). Affordable housing, although desirable, could have supported condemnation for that use, but "emphatically may not be promoted on the back of a private property owner . . ."

Even the "fairly debatable" test applied to legislative acts, could not rescue the City from what the District Court called a decision that "so fundamentally and seriously departs from the controlling law that a miscarriage of justice has resulted . . ." The Court noted that regardless of whether the decision was characterized as legislative or quasi-judicial, the decision to deny the request could not be upheld under any test. "As we suspect is *very often the case*, the application of any possible formulation of the showing necessary either to support or to overturn a local government's decision of the present kind, including the "fairly debatable" standard deemed appropriate in *Martin County v. Yusem* . . . would yield the same result." *Debes*, 22 FLW at D828, n.4. (emphasis added).

Local governments must not only determine whether a rezoning application is consistent with each and every element, policy and objective in the Comprehensive Plan under *Snyder* and *Machado v. Musgrove*, 519 So.2d 629, 635 (Fla. 3rd DCA 1987), there must be a rational basis to support the designation and the district's boundaries. *Euclid Nectow*. Without a fairly-debatable, rational relationship to the health, safety or morals of the community and competent, substantial evidence to support the rational basis and district boundary, the Third District held that the zoning designation "is based on no more than the fact that those who support it have the power to work their will." *Debes*. The United States Supreme Court stated in 1926 that such an ordinance "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Euclid v. Ambler*, 272 U.S. 365 (1926).

Although the early Supreme Court cases of *Euclid* and *Nectow* were not cited in *Yusem* or *Debes* they should not be forgotten by local governments or local administrative law practitioners. Although many state and regional land use schemes have been adopted[1] in the 50 years since these early cases, a rational basis supported by competent, substantial evidence is still required for all modern comprehensive plans and zoning designations.

[1] *E.g.*, Hawaii's state land use act, Oregon's and Florida's Growth Management Act and the Tahoe Regional Planning Act, which was the subject of a recent United States Supreme Court opinion in *Suitim v. Tahoe Regional Planning Council*, Slip Op. 96-243 (May 27, 1997).

Case Notes, Cases Noted and Notable Cases

by Elizabeth McArthur

In a key land use law case, the Florida Supreme Court in *Martin County v. Yusem*, 22 Fla. L. Weekly S156 (Fla. Sup. Ct., March 27, 1997), took out its bright line marker and answered in the negative the following question certified by the Fourth DCA as being of great public importance: Can a rezoning decision which has limited impact under *Snyder* but does require an amendment of the comprehensive land use plan still be a quasi-judicial decision subject to strict scrutiny review?

The *Snyder* case referenced in the certified question is *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), in which the Florida Supreme Court had held that rezoning actions that have a limited impact on the public and that can be seen as policy applications rather than policy setting, are quasi-judicial decisions. The *Snyder* decision suggested that a functional test was to be applied to determine whether the impact of the action is limited, looking at such factors as whether the parcel of land at issue was owned by only one person. That was the situation presented in the *Yusem* case, involving one 54-acre parcel owned by one person for which a density rezoning and comprehensive plan amendment were sought.

However, in *Yusem*, the Court receded from any notion that a functional test could be applied to determine that a rezoning decision had limited impact and was therefore quasi-judicial, where the rezoning request also requires a comprehensive plan amendment. As the Court held, "While we continue to adhere to our analysis in *Snyder* with respect to the types of rezonings at issue in that case, we do not extend that analysis or endorse a functional, fact-intensive approach to determining whether amendments to local comprehensive land use plans are legislative decisions. Rather, we expressly conclude that amendments to comprehensive land use plans are legislative decisions." 22 Fla. L. Weekly at S158. As legislative decisions, comprehensive land use plan amendment decisions are subject to the fairly debatable standard of review, which, as the Court reminded, is a

"highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." *Id.*

* * *

The court held that a license applicant has standing to move to dissolve an injunction addressed only to the licensing agency, in *Memorial Health Systems, Inc. d/b/a Memorial Hospital Flagler v. Halifax Hospice Inc. d/b/a Hospice of Volusia/Flagler and Agency for Health Care Administration*, 22 Fla. L. Weekly D566 (Fla. 1st DCA, February 26, 1997). AHCA had determined that Memorial Health Systems was entitled to an exemption from a certificate of need to establish a hospice. Absent the exemption, Memorial would have had to obtain a CON as a prerequisite to licensure. A competitor of Memorial, Halifax Hospice, filed suit in circuit court against AHCA, alleging that Memorial was not entitled to an exemption and therefore did not qualify for a license without a CON. Halifax sought and obtained a temporary injunction that enjoined AHCA from issuing a hospice license to Memorial. Memorial was not made a party to the lawsuit nor was Memorial given any notice of the motion for temporary injunction. Memorial then moved to quash the injunction, but the motion was stricken. Memorial appealed under Rule 9.130(a)(3)(B), and the First DCA reversed. The court addressed only the narrow standing question, and held that Memorial, as the license applicant, does have standing: "While nominally running against AHCA only, the injunction MHS seeks to dissolve has MHS as an unmistakable target." 22 Fla. L. Weekly at D567. The court gratuitously noted that, although its holding was narrow, other important questions were looming in the background of this case, notably exhaustion of administrative remedies.

* * *

Section 120.57(1)(j) (f/k/a 120.57(1)(b)10., f/k/a 120.57(1)(b)9.) received some attention again this last quarter, this time with respect to the penalty provision. *Werner v. State, Department of Insurance and Treasurer*, 22 Fla. L. Weekly D671 (Fla. 1st DCA, March 13, 1997), was a disciplinary proceeding that raised an assortment of interesting issues, including 120.57(1)(j). The proceeding was brought against a licensed insurance agent for disciplinary action based on the agent's sale of an annuity without disclosing the material terms to the purchaser. Following an administrative hearing at which the purchaser testified for the department and the insurance agent testified on his own behalf, the hearing officer ("as he was then known") found that the agent violated various provisions of the insurance code and recommended a penalty. The department's final order adopted some, but not all, of the violations recommended by the hearing officer, and adopted the hearing officer's recommended penalty.

On appeal, the insurance agent argued that the department had failed to carry its burden of proving violations by clear and convincing evidence because there was conflicting testimony, and there was only one witness testifying to a version of the facts that would support the findings. The court, however, found that it was for the hearing officer who heard the conflicting testimony to decide whom to believe, and the court rejected a blanket rule that the testimony of one witness could not ever constitute clear and convincing evidence that a licensing act has been violated. On this point, the court acknowledged conflict with *Daniels v. Gunter*, 438 So. 2d 184 (Fla. 2d DCA 1983).

In the insurance agent's favor, the court reversed the department's conclusion that the single annuity sale transaction could form the predicate for a violation of the statutory prohibition against fraudulent or deceptive practices. As the court reasoned, the statutory predicate must be "practices," contemplating more than a single lapse, whereas this case only involved one episode of misconduct.

The court then turned its attention to the final order's penalty, and found that it violated Section 120.57(1)(j), which requires that an agency seeking to increase a recommended penalty must first review the complete record and state with particularity the reasons for increasing the penalty, with appropriate citations to record. The department argued that Section 120.57(1)(j) was not applicable because the final order *adopted* the recommended penalty. However, the court held that an agency's imposition of the same penalty as was recommended, for less numerous or less severe offenses than were found in the recommended order, is functionally equivalent to imposing a greater penalty than recommended.

Finally, the court held that in determining an appropriate penalty, the hearing officer and the department impermissibly relied on an administrative rule promulgated more than two years after the events transpired, citing to *Gwong v. Singletary*, 683 So.2d 109 (Fla. 1996). The court remanded the case for reconsideration of an appropriate penalty.

* * *

The theme of the next case was apparently "if at first you don't succeed . . ." In *Roberts v. Department of Corrections*, 22 Fla. L. Weekly D923 (Fla. 1st DCA, April 9, 1997), the Department of Corrections sought to suspend a career service employee. A formal hearing was conducted before a PERC hearing officer, who found the employee guilty of conduct unbecoming a public employee, but recommended a reprimand rather than suspension. No exceptions to the recommended order were filed, and no transcript was prepared. PERC's final order rejected the recommended reprimand, and imposed a 5-day suspension. On appeal, the court confirmed that PERC hearings are governed by the APA, including Section 120.57(1)(j)'s parameters for entering final orders, and that discipline of career service employees is treated as penalty. As such, a recommended penalty cannot be reduced or increased without a review of the entire record. The court cited two other cases in which the absence of a transcript meant that the agency had no authority to reduce or increase the recommended penalty. In those other cases, such as *Inlet Mortgage Company v. State Department of Banking and Finance*, 582 So. 2d 764, 765 (Fla. 1st DCA 1991), the result was that "the final order must be reversed and

CASE NOTES
from page 5

the matter remanded with directions for the Department to enter an order adopting the penalty set forth in the recommended order." Yet here, the result was different: "Recognizing that this employee's victory may prove Pyrrhic, inasmuch as PERC has by now obtained a transcript, we reverse and remand." 22 Fla. L. Weekly at D923.

* * *

Agency for Health Care Administration, et al. v. Mount Sinai Medical Center, et al., 22 Fla. L. Weekly D886 (Fla. 1st DCA, April 1, 1997), is notable for several reasons. First, the court no longer had to resort to parentheticals to make clear that when it refers to a hearing officer it does so knowingly because that is what he or she was at the time. This case, presented to the court by petition for mandamus and accepted as a non-final appeal, addressed the actions of an administrative law judge taken when he already was one.

The case is also notable because the opinion is drafted in an unusual style that is a little difficult to follow. A quick read-through will have the reader attributing to the court various statements that, upon closer reflection, are nothing more than the court's summary of the arguments made by one side or another. Although the various sections of the opinion are labelled for clarity, the sections summarizing the parties' arguments are so long that by section's end it is easy to forget the label warning that the views expressed are not necessarily those of the court's. The Florida Administrative Law Reports publication illustrates this point, where the cover's summary of this case attributes three statements to the court when two of the three were actually recitations of parties' arguments.

Certainly also worthy of note is the unusual procedural manner in which the *Mount Sinai* case arose. A consolidated administrative proceeding at DOAH involved a gaggle of certificate of need applicants seeking approval for nursing beds, some in community nursing facilities, and others in subacute units in hospitals. A CON rule had established a numeric methodology for calculating the need for nursing beds, and had specifically provided that all nursing bed applicants, whether in community nursing facilities or in hospitals, had to apply in the same batch to compete for the calculated need. However, well before this particular gaggle arrived at DOAH, the First DCA invalidated the CON rule's requirement that hospital applicants had to apply to compete with the community nursing facility applicants for the calculated need.

When the gaggle of applicants at issue arrived at DOAH, some of the applicants decided that, based on the First DCA's rule invalidation decision, other applicants did not belong in the gaggle, and moved to sever them from the case. The ALJ remanded the matter to AHCA for its policy guidance on how the ALJ was to implement the First DCA's rule invalidation decision. Instead, AHCA remanded the case back to the ALJ, ordering him to proceed with the administrative hearing without regard to the First DCA's decision, which AHCA determined would only apply to future calculations of need for future applicants. The ALJ, however, refused to conduct the administrative hearing as instructed by AHCA. Stalemate.

A petition for mandamus was filed by those parties seeking to go forward as AHCA had instructed, i.e., without regard to the First DCA's rule invalidation decision. They argued that when an agency forwards a matter to DOAH for hearing, the assigned ALJ has a ministerial duty to accept the petition and conduct the hearing as the agency has requested. However, the court in *Mount Sinai* was unwilling to go that route. Instead, the court adeptly chose to treat the mandamus petition as a petition for review of a non-final order. That way, the court could address the merits of AHCA's prescription for the hearing.

Addressing the merits, AHCA and flock argued that the calculated need was fixed and could not change throughout initial agency review or subsequent administrative hearing, regardless of any subsequent changes that would affect the calculation, such as an appellate court decision invalidating the rule used to calculate need. The court disagreed, and instead held that the law in effect at the time of an agency's final decision applies. The court remanded the case to DOAH, entrusting to the ALJ the task of determining how to proceed with the gaggle, but without a valid rule methodology.

* * *

Prudential Insurance Company of America v. Florida Department of Insurance, 22 Fla. L. Weekly D1037 (Fla. 2d DCA, April 25, 1997), was another case involving review of non-final agency action, here an order compelling discovery over attorney work product objections. The court found that non-final review was appropriate: "An order requiring discovery is a proper subject for review, since an erroneously compelled disclosure, once made, may constitute irreparable harm which cannot be remedied by way of appeal." On the merits, the court reversed the order compelling discovery, finding that the department did not make the required showing of need and inability to obtain the factual information sought by other means without undue hardship.

* * *

An interesting case addressing investigatory subpoena and hearing power is *Florida Department of Insurance and Treasurer v. Bankers Insurance Company*, 22 Fla. L. Weekly D965 (Fla. 1st DCA, April 16, 1997). In that case, Bankers Insurance Company had admitted hiring a private investigator to conduct covert surveillance of a high-level department employee. The private investigator hired by Bankers ended up pleading guilty to federal charges of illegally tapping the employee's phone. The department issued investigatory subpoenas and a notice and order of investigatory hearing, to investigate whether Bankers attempted to alter department policy by employing a private investigator to uncover wrongdoing by the em-

ployee. Bankers refused to honor the subpoenas or appear at hearing. The department then filed an emergency petition in circuit court for enforcement of its subpoenas and notice/order of investigatory hearing. The petition was denied, but on appeal, the First DCA reversed.

First, the court noted that while agencies are creatures of statute, "an agency's own views on where its jurisdictional bournes lie reflect a putative expertise." 22 Fla. L. Weekly at D966. If the bournes are fuzzy, the court should defer to the agency.

Then, the court observed that agency investigative authority within its statutory bournes has been analogized to grand jury investigations which may proceed on a reasonable suspicion of a possible violation of criminal law. And, the court added, an agency may also investigate to assure itself that no violation of laws it is charged with enforcing has occurred.

Turning to the Department of Insurance, the court found statutory delegation of power to conduct such investigations of insurance matters as the department may deem proper to determine whether there is a violation of the insurance code or to secure information useful to lawful administration of any code provision. The court rejected Bankers' argument that an allegation of a violation of the insurance code is a prerequisite to an investigation. The court found that such a requirement would be inappropriate for investigations, and more akin to the requirements for formal discovery in an adjudicatory proceeding.

Instead, the court approved of the formulation in *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43, 70 S. Ct. 357, 94 L. Ed. 2d 401, 410-11 (1950), under which an agency's investigatory subpoenas and other investigative devices are presumptively entitled to be given judicial effect if the inquiry is within the agency's authority, the demand is not too indefinite, and the information sought is reasonably relevant.

That brought the court around to the central issue argued by Bankers: that the department was seeking to investigate events unrelated to the insurance code, matters that should be left to criminal prosecutors. That argument sent the court off on a tour of the insurance code, where it found some broad statutory language about insurance company actions that are "hazardous or injurious to policyholders or the public," plus a few assorted references to "trustworthiness," "engaging in illegal activities" and similar bad stuff. The court summarized its tour by emphatically rejecting any suggestion that the insurance code and criminal law are "neatly dichotomous."

As applied to the circumstances before it, the court found that the department was entitled to investigate whether Bankers has taken action to intimidate insurance regulators or otherwise undermine, manipulate, or subvert the regulatory process. To put it in terms of the bad stuff buzz-words, the court found that the investigation might show that Bankers is untrustworthy, or that Bankers' conduct of business was injurious to policyholders or the public, or that Bankers lacks fitness or trustworthiness to engage in the business of insurance, through engaging in illegal activity. The court concluded that the department's investigation was clearly within its bournes.

* * *

Attorneys' fees were assessed against the appellant in *Life Care Centers of America, Inc. v. Health Care and Retirement Corporation of America and Agency for Health Care Administration*, 22 Fla. L. Weekly D1052 (Fla. 1st DCA, April 23, 1997), based on the court's finding that the appeal was frivolous. The court pointed out that the only arguments raised on appeal were rejected as not supported by the record, and even if they had been, the appellant never alleged that the asserted errors were dispositive of the outcome.

* * *

A good review of the definition of "final order" is set forth in *Hill v. Division of Retirement*, 22 Fla. L. Weekly (Fla. 1st DCA, February 25, 1997), in an Order Discharging Order to Show Cause. The Order to Show Cause was issued by the court to, in effect, consider extending to administrative cases the rule of law in civil proceedings in circuit court that an order granting a motion to dismiss does not constitute a final, appealable order, but that an order which actually dismisses a complaint is final and appealable. *See, e.g., Board of County Commissioners of Madison County v. Grice*, 438 So. 2d 392, 394 (Fla. 1982); Fla. R. App. P. 9.110(m). The court's analysis of what constitutes a "final order" under the APA led it to conclude that the Division of Retirement's order was indeed final and subject to appeal.

* * *

The decision in *Florida Power & Light Co. v. State of Florida, Siting Board, et al.*, 22 Fla. L. Weekly D1225 (Fla. 1st DCA, May 14, 1997), wins the prize for most amusing or bemusing, quotable quote:

> Finding this order so deficient concerning the APA's requirement to specify the findings of fact which are being rejected and the reasons for rejecting those findings [how deficient was it???] that the order **defies judicial review** . . .

the court vacated the final order and remanded the case for entry of a final order satisfying the APA requirements.

To defend its final order, the Siting Board tried a well-worn argument, maintaining that none of the hearing officer's (yes, another pre-October 1996 hearing) findings were actually rejected; the Board simply made supplemental findings. But, as the court quickly pointed out, it is well-settled that an agency has no authority to make supplemental findings.

Moreover, the court found that the plain language of the final order compelled the conclusion that the Siting Board rejected some findings of fact. Giving a little nudge in the right direction, the court posited that the Siting Board must have rejected some findings because they were actually mixed questions of law and fact, and were incorrectly decided. However, the court went on to observe that it was impossible to tell which findings were rejected. The court concluded that the final order

continued...

CASE NOTES
from page 7

violates a fundamental precept of the APA that an agency may not reject or modify findings of fact without reviewing the entire record and stating with particularity which findings were rejected and why. That's Section 120.57(1)(j), you know.

The Siting Board then attempted to salvage its final order by invoking Public Policy. The Board argued that it is the final authority charged with determining the public policy of the state regarding use of certain fuels in power plants, and that it acted within its statutory authority by making a policy determination that use of cleaner fuels than that proposed is in the best interests of citizens. The court agreed that extensive discretion is vested in the Siting Board, but that it must exercise its discretion in accordance with the APA. The court could not address whether the asserted policy decision was within the Board's authority when such policy was not even mentioned in the final order as the basis for the decision, let alone supported by appropriate record citations. Invoking the landmark *McDonald* decision, the court reminded the Board that an agency must explain its exercise of discretion based on the record, so that the agency action can be subject to judicial review.

* * *

McDonald was invoked again, in *Schrimsher v. School Board of Palm Beach County*, 22 Fla. L. Weekly D726 (Fla. 4th DCA, March 19, 1997), this time to uphold the School Board's final order that rejected the hearing officer's findings of fact, conclusions of law and recommendations. The case arose from a petition filed by the School Board to demote Schrimsher, an Assistant Superintendent, based on assorted allegations of incompetence and misconduct. The School Board then abolished Schrimsher's position and suspended him with pay. The matter proceeded to a formal administrative hearing. Although the parties had entered into a prehearing stipulation that the issue of entitlement to attorneys' fees and costs would be reserved, with no evidence on that presented at hearing, the hearing officer directed the parties to file motions for attorneys fees and costs with their proposed recommended orders so that he could make findings of fact on that issue in his recommended order. Both parties moved for attorneys' fees and costs, as directed.

The hearing officer thereafter entered a recommended order finding no evidence of incompetency and recommending that Schrimsher be reinstated, but denying the motions for attorneys' fees and costs. Schrimsher moved for an evidentiary hearing to determine his entitlement to fees and costs, but that motion was denied. The School Board then filed extensive exceptions to the recommended order and Schrimsher filed late exceptions to the denial of fees and costs.

Before the final order was entered, Schrimsher died, but the case proceeded to address entitlement to back pay, fees and costs. The School Board's final order rejected the hearing officer's findings of fact, conclusions of law, and recommendations, and remanded the case to DOAH for resolution of the School Board's entitlement to attorneys' fees and costs. On remand, the hearing officer summarily denied the motion for fees and costs, without an evidentiary hearing.

On appeal, the three-member panel wrote three opinions, with one special concurrence and one partial concurrence, partial dissent. The majority opinion laid out the legal principles explained in *McDonald* and other cases for sorting out the court's review role of the final order, given the deference it was required to give the final order, while also applying the limitations in Section 120.57(1)(j) on the School Board's ability to reject the hearing officer's findings, conclusions, and recommendations. The court concluded that the School Board properly rejected the hearing officer's "interpretation of the facts" because the issue of whether Schrimsher's actions constituted misconduct or incompetence sufficient to warrant discharge is a matter of opinion infused with policy considerations for which the School Board has special responsibility. But special expertise? The facts at issue seem to fit more squarely in the category of garden-variety facts capable of ordinary proof.

The court recognized that it was approving the School Board's "expansive definition" of incompetency, to wit: "There are various statutes, rules, and directives which help comprise the milieu of factors that pertain to the exercise of reasonable care under the circumstances herein. It is not important that there be proven that there is a specific violation of them, but rather, that they exist and must be considered by the reasonable man along with other factors." 22 Fla. L. Weekly at D729. The court noted that Schrimsher's position as Assistant Superintendent was one of public trust, and as such, the School Board had the discretion "to establish guidelines for acceptable behavior in order to avoid even the appearance of an impropriety, and to hold Schrimsher to that standard." *Id.* Yet the court also noted that it was an "unwritten district policy" that required the avoidance of the appearance of impropriety. *Id.* The court did not address the propriety of holding an employee to unwritten standards.

Lastly, the court addressed the issue of attorney's fees and costs. Both parties to the appeal argued that the case should be remanded for an evidentiary hearing on entitlement to fees and costs, and the court agreed that in light of the prehearing stipulation, the hearing officer should not have refused an evidentiary hearing. The court held that the hearing officer was bound by the parties' prehearing stipulation reserving the hearing officer's jurisdiction. But query whether parties really have the right to stipulate to how a hearing will be conducted, and thereby bind the administrative law judge. A safer course of action for the parties would have been to file a pre-hearing joint motion requesting that the hearing officer reserve jurisdiction, so that the parties could safely defer presenting evidence on that issue.

Judge Sorondo's partial concurrence, partial dissent did not agree that proper application of the legal standards laid out in the majority opinion could lead to anything other than reversal of the final order. He concurred only with the remand to consider entitlement to fees and costs.

Minutes

Administrative Law Section Executive Council Meeting

June 27, 1997
Orlando, Florida

I. Call to Order

Section Chair William E. Williams called the meeting to order.

Members Present: Robert M. Rhodes, M. Catherine Lannon, Dan R. Stengle, Linda M. Rigot, Johnny C. Burris, Katherine A. Castor, John D.C. Newton (by telephone), W. David Watkins, Ralf G. Brookes, Robert C. Downie, II, Mary F. Smallwood. Also present was the liaison with the Board of Governors Jack P. Brandon.

Members Excused: G. Steven Pfeiffer, Betty J. Steffens, Karla Olson-Teasley, William L. Hyde, and P. Michael Ruff.

Members Not Excused: Richard T. Donelan, Jr., Diane D. Tremor, Seann M. Frazier.

Others Present: Jackie Werndli, Section Liaison; Lisa S. Nelson; Elizabeth McArthur; Donna Blanton; Floyd R. Self; Booter Imhof; Charles Stampelos; Debbie Kearney; Larry Sellers; Jim Rossi; Ralph DeMeo; and Mary Judd.

II. Preliminary Matters

A. The minutes of the April 11, 1997, meeting of the Executive Council were accepted with one correction and that was the correction of the word "indicted" to "indicated" on page 3, item III. H.

B. Dan Stengle, Treasurer, presented the Treasurer's report.

C. Chair's report was deferred until final remarks by outgoing Chair Williams.

II. Committee Reports

A. Continuing Education Committee: Donna Blanton reported that there is a CLE planned on Mediation. Charles Stampelos suggested that she include the First DCA Mediator in the program. Donna invited program ideas for the spring and said she would welcome volunteers for the Program Chair. John Newton suggested having a CLE on *trying* cases in the Division of Administrative Hearings.

B. Publications: Dave Watkins reported that the Section has an urgent need for articles for the newsletters. For the coming year, Elizabeth McArthur will co-edit the Newsletter with Dan Stengle. Seann Frazier will do the case notes. Bobby Downie reported on the Bar *Journal* status, saying that the October issue will cover the Glitch Bill and Uniform Rules. The article was prepared by Linda Rigot and Ralph DeMeo. Michael Ruff will do a future article on the web site for the Division of Administrative Hearings. Bobby Downie reported that the Public and Member Information Committee of The Florida Bar discussed publishing lawyer information on a web site, possibly including discipline, and also discussed an issue concerning using The Florida Bar as an E-mail point between members of the Bar. He noted that there were public record questions involving that issue.

Linda Rigot reported that the Administrative Practice Manual was out and that the Administrative Law Section will soon be included in the Bar's web site. Our web page includes a link to the DOAH web site. The DOAH web site will include uniform rules, DOAH rules, the DOAH booklet, and DOAH orders.

John Newton reported on the Technology Summit meeting of The Florida Bar. He stated that they discussed hardware and software plans. The consultant for The Florida Bar is Andy Atkins. John mentioned that there are some considerations of the Bar setting up a web site division within the Bar, similar to the Publications Division. He further informed the members that The Florida Bar is of the opinion that everything in their web site is a public record.

Jim Rossi noted that FSU coordinated the web site for the ABA Section on Administrative Law and Regulatory Practice. He offered to help the Administrative Law Section with our web site issues and plans.

C. Legislation: Linda Rigot reported that the Glitch Bill became law and that the Section lobbyists stopped some APA exemptions such as one bill which had the Department of Revenue doing "guidelines," but not rules. She informed the Council that there is already talk about an APA bill for next year and that she understands that Carroll Webb is already working on a draft.

D. Public Utilities Law Committee: Floyd Self is filling in for Karla Olsen-Teasley because Karla has moved out of state. The Public Utilities Law Committee had a CLE on ethics issues. Approximately 50 to 60 people attended. The new Chair of the committee will be Norman "Doc" Horton. He will try to get more regular articles in the newsletter and present regular CLE's.

E. Membership: Bill Williams discussed the draft of the proposed Membership Pamphlet and Bob Rhodes noted that John Newton had brought in some new folks to work on the pamphlet. John Newton informed the Council that the Committee had sent letters to local Bar Associations offering speakers and articles. One of the local Bars had taken us up on it and an article was sent. The pamphlet was prepared by Karen Walker. We currently have 991 members in the Section.

F. Law School/Student Writing Liaison: Johnny Burris reported that this Committee has a pamphlet and a structure, but it still needs $1000. Dan Stengle moved that the Executive Council appropriate $1000 from our budget. After a comment from Jackie Werndli to the effect that we needed to appropriate the entire amount for this project, and not just the remainder, Dan moved that we appropriate from our budget the amount we need to go forth on this

MINUTES
from page 9

project. The motion was passed unanimously. One of the rules of the writing contest will be that students can use papers done for class, but will not be able to do ones that have been previously published because we want to be able to publish the winners.

IV. Old Business

Bill Williams reported that Judge Barfield wrote a letter to the Appellate Workload Committee conveying our report on the Appellate Workload issues. Charles Stampelos pointed out that we were the only Section that gave any input to that Committee.

V. New Business

A. Dan Stengle addressed the issue of Uniform Rules and exceptions. He explained that the Governor and the other Cabinet Officers are asking agencies to comply with the Uniform Rules as soon as possible. The department of Banking and Finance had petitioned for exception from the response time for responses to exceptions to recommended orders, but gave a short notice for the Cabinet meeting (4 days). That request was put off. In the future, the Governor's office will analyze a request and make recommendations. It is the Governor's office position that agencies must get approval for *any* variance from the Uniform Rules of Procedure. If there are questions, people can call Theresa Tinker 488-7793 or Jim Rhay 488-3494. The Section agreed to at least monitor exceptions being requested for Uniform Rules of Procedure so that the Section can evaluate whether the exceptions requested are in keeping with the philosophy of the Uniform Rules of Procedure.

B. Dan Stengle reported that he had been asked by Judge Marguerite Davis to be Chair of the Administrative Law Sub-committee of the Appellate Rules Committee.

C. Bob Rhodes discussed the Administrative Law Conference, and, in particular, when would be a good time to schedule the next one. It would routinely be scheduled for next spring. After some discussion, there was a consensus that this was one of the best things we do and it was a very special activity of this Section. The consensus was that, perhaps, the fall of 1998 would be a more appropriate time to have the next conference so that there would be more time to gain perspective on issues relating to implementation of the new APA and the new Uniform Rules of Procedure.

Johnny Burris suggested that if we do wait until fall, we might have some Constitution Revision Commission issues to include on the program. Charles Stampelos also suggested that perhaps we include a section in the Pat Dore Conference on pet peeves of Administrative Law Judges and pet peeves of the Administrative Law Division of the District Court of Appeal.

D. Elections: Linda Rigot moved the slate and by unanimous vote the following officers were elected for the 1997-98 year:

Chair: Robert M. Rhodes
Chair-Elect: M. Catherine Lannon
Secretary: Dan R. Stengle
Treasurer: Mary F. Smallwood

For the Executive Council positions, Bob Rhodes moved the slate and by unanimous vote the following persons were elected:

Terms expiring in 1998:
Johnny C. Burris
Terms Expiring in 1999:
Ralph A. DeMeo
Patrick L. (Booter) Imhof
Elizabeth W. McArthur
Lisa S. Nelson
Linda M. Rigot
Charles A. Stampelos
W. Davis Watkins

VI. Outgoing Chair Bill Williams gave his final remarks. He mentioned how much he enjoyed being the Chair and how proud he was of the Pat Dore Administrative Law Conference. He noted the hours and hours of agonizing work on the Uniform Rules of Procedure and gave special praise to Debbie Kearney, Linda Rigot, and Dan Stengle. He also gave special praise to Linda Rigot and Ralph DeMeo for The Florida Bar *Journal* special issues, to Linda Rigot for the Administrative Law Practice Manual, to Charles Stampelos for the Appellate Workload Project, and to all of the people involved in publications for the fine publications this Section had put out. He was proud of the increased visibility on legislative issues that this Section has accomplished.

VII. The meeting closed with the remarks of the incoming Chair Bob Rhodes. Among other things, he encouraged us to do ALJ's biographies, he looked forward to seeing how the uniform rules implementation process goes, he indicated that he intended to invite Carroll Webb to participate with this Section, and he commented on the constitutional revision process.

VIII. The next meeting will be on September 12, 1997, in Tallahassee.

The Florida Bar Continuing Legal Education Committee
and the Administrative Law Section present

Mediation in the Administrative Process

ONE LOCATION:
October 10, 1997
The Florida Bar Annex
650 Apalachee Parkway
Tallahassee

Course No.: 7968R

8:30 a.m. – 9:00 a.m.
Late Registration

9:00 a.m. – 9:05 a.m.
Introduction
Michael G. Maida, Tallahassee

9:05 a.m. – 9:50 a.m.
Mediation Overview and Case Law Update
Michael G. Maida, Tallahassee

9:50 a.m. – 10:35 a.m.
A Bench Perspective—Views from a Past ALJ
J. Stephen Menton, Tallahassee

10:35 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:30 a.m.
Administrative Law Mediation, A Private Sector Perspective
Douglas P. Manson, Tampa

11:30 a.m. – 12:15 p.m.
The Public Service Commission's Approach to Mediation
Robert Vandiver, Tallahassee

12:15 p.m. – 1:30 p.m.
Lunch (on your own)

1:30 p.m. – 2:15 p.m.
Great Expectations — Whose Mediation is this Anyway?
Larry G. McPherson, Jr., Tallahassee

2:15 p.m. – 2:30 p.m.
Break

2:30 p.m. – 4:30 p.m.
Mock Mediation with Panel Discussion

CLER PROGRAM
(Maximum Credit: 7.0 hours)
General: 7.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Maximum Credit: 3.5 hours)

Appellate Practice	3.5 hours
City, County & Local Government	2.0 hours
Criminal Trial	1.0 hour

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURNYOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

ADMINISTRATIVE LAW SECTION
Robert M. Rhodes, Jacksonville — Chair
M. Catherine Lannon, Tallahassee — Chair-elect
Donna E. Blanton, Tallahassee — CLE Chair

CLE COMMITTEE
Deborah Crumbley, Chair
Michael A. Tartaglia, Director, Programs Division

FACULTY & STEERING COMMITTEE
Michael G. Maida — Program Chair
Douglas P. Manson, Tampa
J. Stephen Menton, Tallahassee
Larry G. McPherson, Jr., Tallahassee
Robert Vandiver, Tallahassee

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/audiotapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests.

Register me for "Mediation in the Administrative Process" Seminar

(054) TALLAHASSEE, THE FLORIDA BAR ANNEX, (10/10/97)

TO REGISTER OR ORDER TAPES/BOOKS, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON SITE REGISTRATION, ADD $15.00. **On-site registration is by check only.**

Name ______________________ Florida Bar # ____________

Address ______________________

City/State/Zip ______________________

(JW) **Course No.: 7968 R**

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (check one):

❑ Member of the Administrative Law Section: $95

❑ Non-section member: $110

❑ Full-time law college faculty or full-time law student: $55

❑ Persons attending under the policy of fee waivers: $0

Includes Supreme Court, DCA, Circuit and County Judges, General Masters, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. *(We reserve the right to verify employment.)*

METHOD OF PAYMENT (check one):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only!) ❑ MASTERCARD / ❑ VISA

Name on Card: ______________________ Card No. ______________________

Expiration Date: _____/_____ Signature: ______________________
(MO./YR.)

❑ Enclosed is my separate check in the amount of $20 to join the Administrative Law Section. Membership expires June 30.

COURSE BOOK — AUDIOTAPES — RELATED PUBLICATIONS

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after October 10, 1997. PRICES BELOW DO NOT INCLUDE TAX.

______ COURSE BOOK ONLY: Cost $25 plus tax TOTAL $ _______

______ AUDIOTAPES (includes course book)
Cost: $85 plus tax (section member), $90 plus tax (nonsection member) TOTAL $ _______
RELATED PUBLICATIONS: Call (850)561-5843 to order.

- Florida Administrative Practice (5th Edition) 205H $100 + Tax

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course books or tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

Recyclable

brochure\E072597A.pm6

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

BULK RATE
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43