ADMINISTRATIVE LAW SECTION
Newsletter
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Appellate Case Notes

By Tara Price, Melanie Leitman, Gigi Rollini, and Larry Sellers

Attorney's Fees—Entitlement to Fees for Participation in Bid Protest Process for an Improper Purpose
Univ. of Cent. of Fla. v. Boston Culinary Grp., Inc., 302 So. 3d 479 (Fla. 5th DCA 2020).

The court rejected the University of Central Florida's (University) appeal of an administrative law judge's (ALJ) award of attorney's fees against the University in a bid protest proceeding. Because the court found competent, substantial evidence to support the ALJ's conclusion that the University participated in the bid protest for an improper purpose, the court had no basis upon which to reverse the award of attorney's fees.

This case, however, is not notable for its majority per curiam opinion, but rather for Judge Harris's dissent. Judge Harris would have reversed the ALJ's order because he did not believe that competent, substantial evidence supported the conclusion that the University participated in the bid protest for an improper purpose. While Judge Harris concluded that the University's "hands [were] far from clean" based on the University's actions before and even during the bid protest proceeding, those actions could not constitute competent, substantial evidence that the University participated in that bid protest for an improper purpose. Judge Harris wrote that, pursuant to Florida Board of Governors Regulation 18.022(22), the ALJ was required to find that the University had participated in the bid protest proceeding primarily to harass the losing bidder, to cause delay, or for a frivolous purpose. Instead, the ALJ had concluded that the University's

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From the Chair

By Bruce D. Lamb

Your Administrative Law Section continues its efforts to serve you as members, recruit new members, and provide its members and the Bar generally with valuable continuing education content. The 2020 Pat Dore Administrative Law Conference was conducted via webinar this year and spread over three days, October 22, October 27, and October 29. Regrettably we were forced to postpone the Advanced Topics in Administrative Law Program. We continue to develop valuable continuing education programs presented via webinar, including the recent practicing Virtual Hearings Before DOAH program.

The committee assignments for this year have been posted on the Section's website. Please check the website to see if you have been appointed to a committee and reach out to the Chair of that committee in regard to scheduling a meeting if appropriate. As previously reported, we are working in a cooperative fashion with the State and Federal Government and Administrative Practice Certification Committee to revise the certification examination requirements in an attempt to increase the number of certified attorneys. I am happy to report that we did have two members sit for the certification exami-

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nation this year and both passed. Gregg R. Morton is an attorney with the Florida Public Employees Relations Commission. Daniel Nordby, a past Section Chair, is a partner with Shutts and Bowen, in their Tallahassee office. Please congratulate Gregg and Daniel on their accomplishment. We now have a total of 79 attorneys that are certified in State and Federal Government and Administrative Practice. With this issue, the Section continues a long tradition in providing quality information in its newsletter including appellate case notes, DOAH case notes, reports and agency snapshots. I would like to extend my appreciation to the editors and other participants in preparing this information for the benefit of our members and for the members of the Bar generally. The Section also has a strong tradition of contributing to other Florida Bar publications. If you have an idea for an article to be published in the newsletter or in The Florida Bar Journal, please contact Jowanna Oates, Chair of the Publications Committee at Oates.Jowanna@leg.state.fl.us.

We are always looking for participants to assistant us in our law school outreach program. We would greatly appreciate the input of any member who is willing to participate with any of the state's many law schools, or who has a contact within a law school so as to develop better relationships. If you wish to participate please contact Tabitha Jackson, Chair of the Law School Outreach Committee at TJackson@ls-law.com.

Thanks to all of our members for your participation in Section programs and activities.

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Log on to The Florida Bar's website (www.FLORIDABAR.org) and go to the "Member Profile" link under "Member Tools."

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

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DOAH Case Notes

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

Substantial Interest Proceedings—Equitable Tolling

Agency for Pers. with Disabilities v. Angel Heart Support Servs., Inc., Case Nos. 20-1772FL, 20-1773FL, and 20-1774FL (Recommended Order July 20, 2020). https://www.doah.state.fl.us/ROS/2020/20001772.pdf

FACTS: The Agency for Persons with Disabilities ("APD") is the state agency charged with regulating group home facilities in Florida. Angel Heart Support Services, Inc. ("Angel Heart") owns and operates five group homes for disabled adults. On January 23, 2020, APD filed four administrative complaints against the licenses of Angel Heart's group homes 1 through 4. The administrative complaints for group homes 1 through 3 arrived at Angel Heart's administrative office on January 30, 2020, and were signed for by Odra Kok, an Angel Heart employee. Ms. Kok placed the administrative complaints on a table in the office, and they were subsequently lost. The administrative complaint pertaining to group home 4 arrived at Angel Heart's administrative office on February 4, 2020, and Ms. Kok signed for that document. While Ms. Kok notified Angel Heart's principal, Eartha Mays, about the administrative complaint for group home 4, she did not notify Ms. Mays about the other administrative complaints. Ms. Mays had multiple contacts with APD representatives prior to the deadline for challenging the administrative complaints pertaining to group homes 1 through 3. Despite being aware of those administrative complaints, none of those APD representatives informed Ms. Mays about them prior to the deadline for requesting administrative hearings. While Ms. Mays timely challenged the administrative complaint associated with group home 4, APD issued default final orders revoking the licenses of group homes 1 through 3.

OUTCOME: In addition to finding that APD failed to demonstrate that Angel Heart did not comply with section 48.091, Florida Statutes, by having a registered agent present to accept service, the ALJ determined that equitable tolling excused Angel Heart's delay in challenging the administrative complaints pertaining to group homes 1 through 3. While finding that was no reason to believe that any APD representatives intended to prevent Ms. Mays from challenging all four administrative complaints, the ALJ did find that "their conduct misled and lulled Ms. Mays into inaction by believing that there was only one [administrative complaint]."

Dep't of Health, Bd. of Nursing v. Antoniak, Case No. 20-0895PL (Recommended Order July 20, 2020). https://www.doah.state.fl.us/ROS/2020/20000895.pdf

FACTS: At all relevant times, Respondent was a Florida-licensed registered nurse. On July 19, 2019, Respondent's attorney received an administrative complaint and an election of rights form from the Department of Health ("Department"). The last page of the administrative complaint notified Respondent that a written request for an administrative hearing had to be received by the Department within 21 days of Respondent receiving the administrative complaint. According to Respondent's attorney, she completed the election of rights form on July 22 or 23, 2019, physically handed it to her then legal assistant, and instructed the legal assistant to email the form to the Department. Respondent's attorney gave that direction despite determining around the same time that the assistant should be terminated due to incompetence. The Department did not receive the election of rights form and asked the Board of Nursing to rule that Respondent had waived his right to a formal administrative hearing. Respondent's attorney responded by asserting that equitable tolling excused Respondent's failure to file a timely hearing request. The Department referred the issue to DOAH for an evidentiary hearing on whether equitable tolling applied.

OUTCOME: The ALJ ruled that Respondent's election of rights form was untimely. Equitable tolling excuses an untimely filing when extraordinary circumstances prevent a party from asserting his or her rights. "When the party asserting equitable tolling has been represented by counsel, the party is generally bound by the actions and inaction of his lawyer. Unfortunately, that includes being bound by mistakes made by the lawyer and/or the lawyer's staff. Garden variety negligence . . . by the lawyer and/or the lawyer's staff is not considered an extraordinary circumstance warranting equitable tolling." According to the ALJ, "[t]he facts found here are not unique, not rare, not extraordinary, and not grounds for the sparing application of equitable tolling. [Respondent's attorney] was not shown to have engaged in misconduct, let alone egregious misconduct. Instead, she was negligent in not adequately supervising an assistant whose actions and inaction were shown to be negligent and in keeping with her error-riddled job performance that ultimately caused her termination."

Substantial Interest Proceedings—Pleading Requirements

City of Destin v. Wilson, Case No. 20-2123 F (Final Order August 6, 2020). https://www.doah.state.fl.us/ROS/2020/20002123.pdf

FACTS: Thomas Wilson filed a petition on June 5, 2019 seeking to challenge the Department of Envi-

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ronmental Protection's ("DEP") decision to issue a permit modification to the U.S. Army Corps of Engineers pertaining to a maintenance dredge of a section of East Pass in Destin, Florida. The petition was referred to DOAH and assigned case number 19-3356. There was also another case pending, case number 19-1844, which similarly involved the issuance of a permit to Destin to perform maintenance dredging of East Pass. A few months into case number 19-3356, the City of Destin ("Destin") filed a motion for attorney's fees pursuant to section 120.569(2)(e), Florida Statutes, on the basis that the proceeding was frivolous and duplicative given case number 19-3356.

At the outset of the final hearing for case number 19-3356 on November 20, 2019, the substantial similarities between case numbers 19-1844 and 19-3356 were discussed, and it was noted that a recommended order favorable to Destin had been issued on October 14, 2019 in case number 19-1844. However, a final order pertaining to case number 19-1844 had yet to be rendered.

After the final hearing in case number 19-3356 had convened, DEP rendered a final order in case number 19-1844, substantially adopting the recommended order favorable to Destin. A recommended order in case number 19-3356 was issued on February 20, 2020 that was also favorable to Destin, and Destin renewed its request for attorney's fees. In support, Destin argued that the petition in case number 19-3356 should have been withdrawn after issuance of the final order in case number 19-1844 and during the pendency of case number 19-3356.

OUTCOME: The ALJ rejected Destin's argument. In doing so, the ALJ noted that "[t]he fundamental question for determination under section 120.569(2) is not whether the evidence is ultimately sufficient to support the allegations in a pleading, but whether, *at the time the pleading is signed*, counsel conducted reasonable inquiry prior to signing the pleading at issue." The ALJ further noted that when the petition in case number 19-3356 was signed, "the issue of the propriety of depositing dredged spoil to the east of East Pass was very much in the air, and was the subject of opposing but firmly held expert opinions. It was not unreasonable for Respondent's counsel to sign [the petition in case number 19-3356] challenging the Corps Permit Modification in Case No. 19-3356 on the same grounds that Respondents challenged Destin's permit in Case No. 19-1844."

Substantial Interest Proceedings—Good Cause

Network Eng'g Servs., Inc. v. Dep't of Transp., DOAH Case No. 19-5130 (DOT Final Order July 16, 2020). https://www.doah.state.fl.us/ROS/2019/19005130_282_07282020_15194584_e.pdf

FACTS: Network Engineering Services, Inc. d/b/a Bolton Perez and Associates ("BPA") is an engineering firm specializing primarily in transportation-related engineering services such as bridge design and construction management. Florida International University ("FIU") initiated a project to build a bridge in Sweetwater, Florida. The structure had a unique, complex design that was intended to be a signature, architectural feature for the area. FIU contracted with BPA to provide construction engineering inspection ("CEI") services. As the CEI provider, BPA was to act as the liaison between FIU and the contractor, handle quality control, and monitor the project. On four occasions leading up to March 15, 2018, BPA expressed concerns about cracks in the bridge. However, FIGG Bridge Engineers, Inc., the project's engineer of record, stated each time that the cracks were no cause for concern. The bridge collapsed on March 15, 2018, killing six people and critically injuring 10 others. The Occupational Safety and Health Administration ("OSHA") investigated the collapse and issued a report in June 2019 concluding that BPA failed to take appropriate action in the days leading up to the collapse.

Section 287.055(3), Florida Statutes, requires any business seeking to provide professional services to a governmental agency to first be certified by the agency as fully qualified to render the required service. On July 11, 2019, the Department of Transportation ("DOT") issued notice that it intended to deny BPA's request for renewal of its qualification and that its decision was based on the OSHA report. BPA responded by requesting a formal administrative hearing, and the case was referred to DOAH.

OUTCOME: The ALJ found that DOT failed to demonstrate that BPA's actions as the CEI fell below the standard of care and that BPA "met all of its obligations pursuant to contract and state regulation." The ALJ also found that the OSHA report and a pending report from the National Transportation Safety Board were insufficient good cause for DOT to deny BPA's request for qualification.

DOT rendered a Final Order on July 20, 2020, rejecting the ALJ's recommendation that it lacked good cause to reject BPA's request for qualification. In doing so, DOT ruled that whether it had good cause was a legal question within its expertise. "The policy decision of whether good cause exists must be carefully reviewed by a single, experienced governmental body that is responsible for that function and responsive to the electorate."

Substantial Interests—Burden of Proof

Pac. Emp'rs Ins. Co. v. Dep't of Fin. Serv., Div. of Workers' Compensation, Case No. 20-2121 (Recommended Order Sept. 18, 2020). https://www.doah.state.fl.us/ROS/2020/20002121.pdf

FACTS: The Department of Financial Services, Division of Workers' Compensation ("Department") resolves reimbursement disputes between health care providers and payers. After the Department issued such a determination on July 15, 2019, Pacific Employers Insurance Company ("Petitioner") requested an administrative hearing before DOAH.

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Section 440.13(12)(b)(3), Florida Statutes, mandates that outpatient reimbursement for scheduled surgeries shall be reduced from 75 percent of charges to 60 percent of usual and customary charges, and the Florida Workers' Compensation Reimbursement Manual for Hospitals ("the Hospital Manual") incorporated by reference via Florida Administrative Code Rule 69L-7.501 provides that usual and customary charges are based on charges in a "specific geographic area." However, with regard to implants used in scheduled and unscheduled outpatient surgeries, Rule 69L-7.501 provides that the applicable charge shall be based on the hospital's "usual and customary charge." In its request for hearing, the Petitioner challenged the Department's application of the implant reimbursement standard to two charges on a health care provider bill the Petitioner had sought to reduce, arguing that the standard was an invalid exercise of delegated legislative authority.

OUTCOME: The ALJ ruled that the Department's "implant carve-out exception requires calculations not based on a percentage of the usual and customary charges in the hospital's geographic area, but rather, on a percentage of the hospital's usual and customary charges. This part of the rule is an invalid exercise of delegated legislative authority and cannot be the basis for determining [the Petitioner]'s substantial interests." Nevertheless, the ALJ recommended that the petition be dismissed because the Petitioner failed to present any evidence of the usual and customary hospital charges for implants used in scheduled outpatient surgeries in the relevant hospital's county. By failing to do so, the Petitioner failed to carry its burden of proving that it properly reduced the payment at issue.

Rule Challenges—Proposed Rules

Intuition Coll. Savings Solutions, LLC v. Fla. Prepaid Coll. Bd., Case No. 20-2933RX (Final Oder Sept. 25 2020). https://www.doah.state.fl.us/ROS/2020/20002933.pdf

FACTS: Intuition College Savings Solutions, LLC ("Intuition") is a third-party contractor that provides administrative services. The Florida Prepaid College Board ("Board") is the state agency that administers the Florida Prepaid College Plan and the Florida College Savings Program. Intuition and the Board have entered into a series of contracts over the previous 25 years, with their last contract requiring Intuition to provide records administration services to the Board. Anticipating an imminent contract dispute, Intuition challenged Florida Administrative Code Rules 19B-14.001, 19B-14.002, and 9B-14.003 ("the Rules") as being invalid exercises of delegated legislative authority. The Rules provide that the procedures set forth therein "shall constitute the sole procedure for the resolution of all" contract disputes between the Board and its vendors. In the event that there are disputed issues of material fact, disputes are referred to DOAH, but Rule 19B-14.003(5) precludes the party opposing the Board from submitting further information or amending its claims. However, the Board is not precluded from submitting information in response to the opposing party's claims.

OUTCOME: In concluding that the Rules were an invalid exercise of delegated legislative authority, the ALJ held that the Rules are "irrational" and create "an impossible one-sided stacked deck against the vendor seeking to challenge an adverse decision or action." While section 1009.971(4)(y), Florida Statutes, grants the Board power to adopt procedures governing contract disputes between itself and its vendors, the ALJ also held that the Board's statutory authority does not grant it the ability to impose procedures on another state agency governed by different statutes and rules.

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CALL FOR AUTHORS:
Administrative Law Articles

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

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Rule Challenges—Unadopted Rule

Broward Cty. Sch. Bd. v. Championship Acad. of Distinction at Davie, Inc. – 5422, Case Nos 19-4818 and 19-5310RU (Final Order July 31, 2020). https://www.doah.state.fl.us/ROS/2019/19004818.pdf

FACTS: Championship Academy of Distinction at Davie, Inc. - 5422 ("Championship") is a Florida not-for-profit corporation that holds the charter for numerous charter schools throughout Florida, including the charter for Championship Academy of Distinction at Davie, Inc. ("Charter School"). Charter schools in Florida are nonsectarian public schools that operate pursuant to a charter contract with a public sponsor, and the Broward County School Board ("School Board") was Championship's sponsor.

Section 1006.12, Florida Statutes, requires that a safe-school officer be assigned to every school in a school district, including charter schools. While the Charter School did not have anyone qualified under section 1006.12 present on August 14, 2019, the first day of the 2019-20 school year, it did have an armed security guard who met most of the safe-school officer requirements set forth in section 1006.23. In addition, the Charter School had submitted an application to the Davie Police Department to have private duty detail officers present until that security guard could complete the training necessary for satisfying the statutory certification requirements. Also, even though no contract was in place at the time between the police department and the Charter School, a police officer was present on the Charter School's campus on August 16 and August 19-22.

On August 20, 2019, the School Board voted to immediately terminate Championship's charter. Section 1002.33(8)(c), Florida Statutes, provides in pertinent part that "[a] charter may be terminated immediately if the sponsor sets forth in writing the particular facts and circumstances indicating that an immediate and serious danger to the health, safety, or welfare of the charter school's students exists." In support of its decision, the School Board cited Championship's failure to comply with section 1006.12 by having an armed security guard rather than a safe-school officer present at the Charter School for the first two days of the 2019-2020 school year. The School Board also based its decision on Champion's failure to have a fully-executed contract as of August 20, 2019, guaranteeing the presence of a police officer acting as a safe-school officer on the Charter School's campus. After the matter was referred to DOAH, Championship filed a petition alleging that the School Board's proposed action was based on multiple unadopted rules.

OUTCOME: The ALJ found that the School Board presented no evidence of any particular facts and circumstances showing that the Charter School's students were subjected to any immediate and/or serious danger on August 20, 2019. The ALJ also found that the School Board used an unadopted rule by deeming a charter school's failure to comply with section 1006.12 as a *per se* immediate and serious danger to the health, safety, or welfare of students. In doing so, the ALJ found that "[n]owhere does the statute's plain language speak to, or authorize, a school board to formulate a *categorical determination* that a defined set of facts and circumstances – here, noncompliance with section 1006.12 – *per se* constitutes an immediate and serious danger to the charter school's students." Accordingly, the ALJ ordered that Champion's charter school agreement be reinstated.

Law School Liaison

Fall 2020 Update from the Florida State University College of Law

By Erin Ryan, Associate Dean for Environmental Programs

This column highlights recent accomplishments of our Florida State University College of Law students and alumni. It also lists the rich set of programs the College of Law hosted this semester and reviews recent faculty activities.

The U.S. News and World Report (2021) has ranked Florida State University as the nation's 15th best Environmental Law Program, tied with George Washington University. FSU College of Law ranked 50th overall.

Recent Alumni Accomplishments

- Ashley Englund ('20) was awarded the 2020 Law Student Achievement Award from The Florida Bar Animal Law Section.
- Englund also won the Eighth Annual Animal Law Writing Competition with her article *Canines in the Courtroom: A Witness's Best Friend Without Prejudice.*

Recent Student Achievements and Activities

- President of the FSU Animal Legal Defense Fund, Catherine Awasthi, recently co-authored an article with alum Ralph DeMeo ('85) that was published in the September/October issue of *The Florida Bar Journal* entitled *The Fading Color of Coral: Anthropogenic Threats to Our Native Reefs.*
- Vice President of the FSU Animal Legal Defense Fund Mallory Umbehagen was selected for a clerkship with the national Animal Legal Defense Fund for this fall.

Faculty Achievements

- Professor Shi-Ling Hsu published *Prices Versus Quantities*, in Policy Instruments in Environmental Law (Richards, K.R. & J. can Zeben eds., 2020). Forthcoming symposium *Anti-Science Policies*, 75 U. Miami. L. Rev. __ (2021).
- Associate Dean Erin Ryan published *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 Va. Envtl. L.J. __ (2020), as well as *Rationing the Constitution vs. Negotiating It: Coan, Mud, and Crystals in the Context of Dual Sovereignty*, 2020 Wis. L. Rev. 165 (2020). Forthcoming publications include *The Twin Environmental Law Problems of Preemption and Political Scale*, in Environmental Law, Disrupted (Keith Hirokawa & Jessica Owley, eds., 2020).
- Professor Mark Seidenfeld published a book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, 199 Mich. L. Rev. __ (2020). He also published *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, 100 B.U. L. Rev. __ (2020).
- Assistant Professor Sarah Swan has two forthcoming publications: *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. Land Use & Envtl. L. __ (2021), and *Exclusion Diffusion*, 70 Emory L.J. __ (2021).
- Dean Emeritus Don Weidner has a forthcoming publication in The Business Lawyer titled *LLC Default Rules Are Hazardous to Member Liquidity*. Dean Weidner was also recently honored as the recipient of the campus-wide Dr. Martin Luther King, Jr. Distinguished Service Award at Florida State University.

Environmental Law Lecture

The College of Law hosted a full slate of impressive environmental and administrative law events and activities this semester.

Fall 2020 Environmental Distinguished Lecture: Visibility and Indivisibility in Resource Arrangements

Lee Fennell, Max Pam Professor of Law, University of Chicago Law School, presented the FSU College of Law's Fall 2020 Environmental Law Distinguished Lecture on October 21, 2020. Her lecture shed light on dilemmas in which a valued resource only retains value if it is left undivided.

The Longest Oil Spill in History

On September 28, 2020, Dr. Ian MacDonald, Professor of Oceanography in the Department of Earth, Ocean, and Atmospheric Science at Florida State University, presented his lecture The Longest Oil Spill in History: How Hurricane Ivan Created an Environmental and Legal Dilemma. A recording of the lecture is available at: https://fsu-my.sharepoint.com/:v:/g/personal/wab12c_fsu_edu/Ef3ilx4uKZRAqIIUaufrBRcBccYBl77HYuF2UYkz5xRDw?e=BwYiFi.

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Standing For Climate Change: Lessons from *Juliana v. United States*

Richard Murphy, AT&T Professor of Law, Texas Tech University, presented his lecture on Thursday, October 8, 2020. His lecture reflected on the rulings made for *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). This lecture can be viewed here: https://fsu.zoom.us/recording/detail?meeting_id=T1rqiAAYTzWBSvW2X12bdA%3D%3D.

Conservation of Sea Turtles in a Changing World

Mariana Fuentes, Assistant Professor for the Department of Earth, Ocean, and Atmospheric Science at Florida State University, presented her lecture on Tuesday, November 3, 2020.

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"improper purpose" was the continued pursuit of awarding the contract to the winning bidder in violation of the University's rules and the ITN, which Judge Harris opined was insufficient to conclude that the University participated in the bid protest primarily for an improper purpose.

Licensure—Emergency suspension order—Failure to comply with COVID-19 emergency orders—Motion to stay
Showntail the Legend, LLC v. Dep't of Bus. & Prof'l Regulation, 45 Fla. L. Weekly D2156 (Fla. 1st DCA Sept. 14, 2020).

The Florida Department of Business and Professional Regulation (DBPR) suspended Petitioner's alcoholic beverage license on an emergency basis due to its failure to comply with Florida's COVID-19 emergency orders. Petitioner sought review and moved to stay the order suspending its license. The motion to stay argued there was an insufficient factual basis for the suspension order and that Petitioner would suffer serious economic hardship from the suspension. A majority of the writs and motions panel denied the motion to stay in an unpublished order, with a notation that the third member of the panel would issue a dissent.

In his dissenting opinion, Judge Tanenbaum recounts the various emergency orders that were entered, including those authorizing limited sales of alcoholic beverages by restaurants, but noting that the allowance did not include night clubs, such as that operated by Petitioner, if the licensee derived more than 50 percent of its revenue from such sales. He noted that DBPR had asked the court to withhold the stay "entirely on conjecture and suspicion about the public health effects of COVID-19," and that the agency did not "present specific, concrete facts that showed a probable danger flowing directly from granting [petitioner] a stay." He also explained that the Administrative Procedure Act provides for a stay as a matter of right in almost all circumstances, except where the court determines that a stay will constitute "a probable danger to the health, safety, or welfare of the state." Because the statute requires the court to make the required determination, he would not defer to the agency's assertions about what it means to be a "probable danger," parenthetically noting the recent constitutional amendment precluding a state court from deferring "to an administrative agency's interpretation of [a] statute or rule" and requiring the court to "interpret such statute or rule de novo."

Reviewing the evidence offered by DBPR, Judge Tanenbaum opined that the agency offered nothing from which the court could logically infer that bars and other non-restaurant licensees selling alcohol on the premises pose a probable danger, while

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restaurant licensees selling alcohol on premises did not. Accordingly, he dissented from the majority's denial of the stay of the order suspending the license.

In response, the majority noted that the dissent addressed issues not properly before the court, as they were not raised in either the motion to stay or the merits petition.

Note: Eleven days after the issuance of this opinion, Governor DeSantis issued Executive Order No. 20-244 (Sept. 25, 2020), superseding the prior executive orders that were the basis for the suspension of Petitioner's license, and authorizing all restaurants *and* bars to open. The executive order also suspended the fines and penalties associated with COVID-19 orders. Shortly thereafter, this appeal was dismissed.

Licensure—Emergency suspension—Insufficient facts alleged and less restrictive means
Lang v. Dep't of Health, 298 So. 3d 1292 (Fla. 1st DCA 2020).

The Department of Health (Department) entered an emergency order (ERO) restricting Petitioner's license to practice medicine. The ERO was based on a female patient's allegation, which was confirmed by the Petitioner, that he had kissed and hugged her in an unsolicited manner during an appointment. The ERO prevented the Petitioner from seeing women patients until the final hearing.

The court found that the patient's conduct paired with the physician's admissions, as alleged in the ERO, were insufficient to establish "an immediate danger to the public health, safety, or welfare" as is required by section 120.60(6)(c), Florida Statutes. The court's conclusion rested on its determination that the Department had failed to allege that the patient interpreted the Petitioner's conduct as presenting a danger to her health, safety, or welfare. The court explained that in the absence of "factually explicit and persuasive allegations concerning the existence of a genuine emergency," and where the allegations present only conclusory terms alleging an emergency exists, the court was constrained from affirming the ERO. The court additionally held that to the extent there was any danger, the ERO was not the least restrictive means available for protecting public safety, as the Department could have considered the possibility of only allowing the Petitioner to see women patients if another medical professional was present.

Local land use decisions—Appeals—Scope of appellate court review—Second-tier certiorari review
Evans Rowing Club, LLC v. City of Jacksonville, 300 So. 3d 1249 (Fla. 1st DCA 2020).

Petitioner Evans Rowing Club filed a petition for second-tier certiorari review of a circuit court decision upholding a local administrative decision denying Petitioner's granted-then-revoked permit to operate a rowing club on Julington Creek. All three judges agreed that the petition must be denied. However, each wrote a separate concurring opinion. Two of these opinions discuss the recently adopted article V, section 21, of the Florida Constitution, which provides: "In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule and must interpret such statute or rule de novo."

Judge Brad Thomas concurred in the decision, but only because the standard of review was extremely restricted under binding case law. He expressed the view that this precedent should be reconsidered by the Florida Supreme Court in light of the electorate's command that courts no longer defer to administrative agencies in interpreting administrative actions pursuant to general law. Judge Thomas stated that he would have certified the following question:

> SHOULD THE STANDARD OF REVIEW IN SECOND-TIER CERTIORARI CASES BE REVISED TO PROVIDE PLENARY REVIEW OF LOCAL ADMINISTRATIVE LAND-USE DECISIONS IN LIGHT OF THE CONSTITUTIONAL REQUIREMENT THAT COURTS MUST NOT DEFER TO STATE ADMINISTRATIVE DECISIONS?

Judge Wolf disagreed with Judge Thomas, asserting that this provision does not apply because local land use regulations are not state statutes or rules, review of local land use decisions and regulations are not pursuant to general law, local governments are not "administrative agencies," and the decision being reviewed is not an interpretation of "state statute or rules."

Judge Makar also wrote separately, agreeing that the court was constrained in this case to deny relief due to the boundaries that precedent puts upon appellate judges. He noted that on second-tier certiorari review, a district court's review of a circuit court's appellate decision is limited and does not allow for granting relief just because legal error has been demonstrated. Instead, a departure from the essential requirements of the law—"a Rashomonic term of art"—that amounts to a miscarriage of justice must be shown.

Local land use decisions—Appeals—Second-tier certiorari—Scope of appellate court review
Neptune Beach FL Realty, LLC v. City of Neptune Beach, 300 So. 3d 140 (Fla. 1st DCA 2020).

In a per curiam decision, the court denied a petition for writ of certiorari. Judge Brad Thomas concurred specially to note that he did so only because the standard of review created by the Florida Supreme Court in second-tier certiorari review creates an impossible burden and deprives property owners of an appropriate level of judicial review. Quoting extensively from his opinion in *Evans Rowing Club v. City of Jacksonville*, described above, he again "urge[d] the Florida Supreme Court to reconsider its precedent in this area of the law in light of the declaration of the

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people of Florida that court's must exercise their independent judgement in cases involving local zoning decisions which both naturally and procedurally depend on administrative determinations."

Public Records—Agency Cannot Unlawfully Refuse to Provide Access to Public Records for Purposes of Attorney's Fees if Agency Did Not Violate the Public Records Act
B&L Serv., Inc. v. Broward Cty., 300 So. 3d 1205 (Fla. 4th DCA 2020).

Broward County (the County) was required to maintain the confidentiality of Uber's trade secret information pursuant to an agreement. B&L Service, Inc. (Yellow Cab) made a request for information that Uber had provided to the County and marked trade secret. The County responded that it could not provide Yellow Cab with Uber's trade secret information. Yellow Cab then filed a complaint against the County in the trial court, alleging violations of Florida's Public Records Act (the Act) and seeking unredacted copies of Uber's trade secret information.

The trial court held an evidentiary hearing and concluded that the information constituted protected trade secrets and the County had not violated the Act. Yellow Cab moved for rehearing, arguing that it sought disclosure of only portions of the information that Uber had marked trade secret. Yellow Cab did not request rehearing on the issue of whether the County violated the Act.

Following rehearing, the trial court modified the earlier order only to permit the disclosure of the limited information Yellow Cab sought. Following Uber's unsuccessful appeal, the trial court denied Yellow Cab's motion for attorney's fees, concluding that: (1) Yellow Cab waived attorney's fees when it failed to cross-appeal the trial court's order finding that the County did not violate the Act; and (2) the County's denial to produce the records could not be unlawful because the County based its decision on the trade secret exception to the Act. Yellow Cab appealed the trial court's denial of its motion for attorney's fees.

Citing section 119.12, Florida Statutes, the court noted that an award of attorney's fees is available only when an agency unlawfully refuses access to a public record. The court observed that an agency could not act unlawfully unless the trial court found that the agency had violated the Act. Here, the trial court made an express ruling that the County did not violate the Act, and Yellow Cab did not cross-appeal this portion of the trial court's order. Because Yellow Cab failed to challenge the trial court's ruling that the County violated the Act, the court concluded that the County could not have unlawfully refused to provide access to the public records.

The court did not address whether an agency could be forced to pay attorney's fees if the refusal to provide access was based on the trade secret exception to the Act. Thus, the court affirmed the trial court's order denying Yellow Cab's motion for attorney's fees.

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