NEWSLETTER

VOL. XLIV, NO. 4 JOWANNA N. OATES AND TIFFANY RODDENBERRY, CO-EDITORS WINTER 2025

From the Chair

By Louise St. Laurent

In the words of Bob Dylan, the times they are a-changin'. I recently had the opportunity to represent the Administrative Law Section ("ALS") at two important meetings, and I want to share some key takeaways with you.

At the Florida Bar's Winter Meeting in Orlando, I attended as the ALS representative to the Council of Sections. One notable update from this meeting is that the upcoming Annual Florida Bar Convention will be the last one held in Boca Raton. Historically, the Bar has alternated convention locations between Orlando (even-numbered years) and Boca Raton (odd-numbered years). While the new location has not yet been announced, we remain hopeful that it will be more accessible for members.

Additionally, as many of you may know, the Florida Bar has decided to remove the section management support contribution to voluntary bar sections beginning in the 2025-2026 Fiscal Year. This change has significant financial implications, prompting 16 of the 22 voluntary bar sections to increase dues in the upcoming year. However, I am pleased to report that the ALS is one of the six sections maintaining current dues.

The change is not without consequence to the ALS, however. In October 2024, our Executive Council voted to dissolve the joint membership opportunities previously available with the Government Lawyers Section and the Criminal Law Section. The Florida Bar charges the full per-person section administrator fee to each of the sections offering joint and reduced section dues, making the previously low-cost joint memberships financially unsustainable. While you will not see the joint section membership offerings in your upcoming Bar renewal statements, the Executive Council remains committed to exploring ways to reinstate joint memberships in a fiscally responsible manner.

To address concerns about the increased section management fees, the Florida Bar is hosting a town hall and section leadership workshops in early 2025. These events will provide section leaders with a platform to discuss funding concerns, collaborate on solutions, and ensure the long-term financial sustainability of voluntary sections.

In January, I also had the privilege of meeting with Florida Bar President Roland Sanchez-Medina and Executive Director Josh Doyle at the Bar headquarters. President Sanchez-Medina and Director Doyle were extremely supportive in discussing strategies to enhance ALS participation, financial success, and visibility.

The Bar has recently appointed a new Marketing Manager, and we have been invited to collaborate on marketing initiatives, sponsorship opportunities, and other promotional strategies. We are excited to explore new ways to strengthen our social media presence and professional development offerings to better serve our members.

A significant takeaway from these meetings is the Florida Bar's commitment to improving communication with voluntary bar sections. The recent changes to section funding highlighted the need for more direct and meaningful communication beyond standard email notifications that often get lost in the inboxes of busy practitioners. Going forward, the Bar intends to ensure that section leaders have increased access to Bar leadership and insight into decision-making processes.

Florida Bar leadership—including President Sanchez-Medina, President-Elect Sia Baker-Barnes, and Michael Fox Orr—are dedicated to supporting all members and sections. Their vision is that the Florida Bar President should not just be a figurehead but an active resource for the entire legal community. Additionally, our liaison to the Board of Governors, Melissa VanSickle, is a devoted member of the ALS and takes pride in serving as our voice on the Board of Governors.

I encourage all members to reach out with any questions or concerns about the ALS or the practice of administrative law in Florida. Your participation is not only voluntary but invaluable, and we want to advocate for our members in every possible way. Please feel free to connect with me, any of our Officers, our Board of Governors liaison, or any Executive Council members to share your thoughts and ideas.

Thank you for your continued involvement in the ALS. We look forward to serving you and enhancing our section's impact in the legal community.

Appellate Case Notes

By Gigi Rollini, Johnny ElHachem, Larry Sellers, and Laura Dennis

Elections—Vacancy Calculation Timing Under Resign-to-Run Law

Golden v. Satcher, 395 So. 3d 207 (Fla. 2d DCA 2024).

Richard Tatem, an incumbent school board member, resigned his school board position to run for the legislature. § 99.012(3)(a), Fla. Stat. (2024) ("No officer may qualify as a candidate for another state, district, county, or municipal public office if the terms or any part thereof run concurrently with each other without resigning from the office he or she presently holds."). The letter provided that his resignation was effective November 5, 2024, the same day he would assume office if elected to the House.

Golden desired to run for Tatem's vacated school board seat. Upon learning that Tatem submitted his letter of resignation, Golden visited the Manatee County Supervisor of Elections' office with the intent to submit qualifying paperwork for the 2024 election. The Supervisor refused to accept the paperwork on the basis that no election was being held to fill Tatem's school board seat.

Golden filed a petition for writ of mandamus in the circuit court seeking to compel the Supervisor to hold an election to fill Tatem's school board seat. The court summarily dismissed the petition with prejudice, reasoning that under the Florida Constitution and section 99.012, Florida Statutes (the resign-to-run law), an election was not required because the vacancy created by Tatem's resignation would be filled by gubernatorial appointment until the November 2026 election.

On appeal, the court explained that to be entitled to a writ of mandamus, the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available.

Here, unless the Florida Constitution elsewhere provides, the length of "the remainder of the term" of an elective county office dictates how a vacancy in that office must be filled. Art. IV, § 1(f), Fla. Const. If the remainder of the term for an elective office is less than twenty-eight months, the vacancy must be filled by gubernatorial appointment for the remainder of the term. If not less than that remains, the governor must still appoint a successor, but that successor only serves until the first Tuesday after the first Monday following the next general election and the office is thereafter filled by election. § 100.111(1)(a), Fla. Stat.

The appeals court analyzed the central question of whether "the remainder of the term" should be calculated from the date on which a resignation is tendered or the date on which it is effective.

If calculated from when Tatem tendered his resignation, the Supervisor would be constitutionally required to hold an election to fill the vacancy. If calculated from the effective date of Tatem's resignation, however, the Governor would appoint the successor to serve until the November 2026 election.

The appeals court concluded that the constitution is silent as to whether a vacancy upon resignation of an incumbent occurs on the date resignation is tendered or the effective date. But the resign-to-run law makes clear that "[t]he office is deemed vacant *upon the effective date of the resignation* submitted by the official in his or her letter of resignation." § 99.012(3)(f), Fla. Stat. (emphasis added). Therefore, the remainder of the term of office should be calculated from the effective date of the resignation.

Based on that calculation, the Supervisor was correct that there would be no election for Tatem's vacated seat until the November 2026 election. Thus, the court affirmed dismissal of Golden's mandamus petition.

In so holding, the appeals court rejected Golden's argument that the court should ignore the plain language of section 99.012(3)(f) in favor of *Advisory Opinion to the Governor re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d 1218, 1222 (Fla. 2006), under which the remainder of the term would be calculated from the date on which Tatem's resignation was tendered.

The court concluded the advisory opinion is inapposite because the resign-to-run law has been materially amended since the opinion issued. While the constitution does not preclude Golden's definition, it also does not preclude the legislature's and "[w]here a constitutional provision is susceptible to more than one meaning, the meaning adopted by the legislature is conclusive." *See, e.g.*, *Vinales v. State*, 394 So. 2d 993, 994 (Fla. 1981).

Exhaustion of Administrative Remedies—Not Required To Assert Section 790.33(3) Claim

Pretzer v. Swearingen, 394 So. 3d 175 (Fla. 1st DCA 2024).

Appellants sued the Florida Department of Law Enforcement ("FDLE") under section 790.33(3)(f), Florida Statutes, alleging that FDLE violated the statute's preemption

Continued on next page...

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

Louise R. Wilhite-St. Laurent - Chair
lstlaurent@panzamaurer.com

Elizabeth M. Fernandez - Secretary
elizabeth.fernandez@watermatters.org

Brittany B. Griffith - Treasurer
brittanygriffithesq@gmail.com

Tiffany Roddenberry - Co-Editor
Tiffany.Roddenberry@hklaw.com

Jowanna N. Oates - Co-Editor
oates.jowanna@leg.state.fl.us

Benjamin Morris - Program Administrator
bmorris@floridabar.org

Regina Baker - Production Artist
rbaker@floridabar.org

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.

provision when it adopted a policy, rule, or regulation regulating firearms without specific authorization from the legislature. Specifically, appellants claimed that FDLE created a new category of potential firearm purchasers which deviated from the statutory process set forth in section 790.065. The trial court granted final judgment in favor of FDLE, classifying the complaint as a rule challenge and finding that appellants failed to exhaust their administrative remedies. Appellants appealed.

The First District Court of Appeal reversed. In reaching its decision, the court carefully examined the 2011 amendments to section 790.33, Florida Statutes. In 2011, the statute's preemption of local regulations regarding firearms was expanded. Namely, as amended, the statute states that except as provided in the State Constitution or general law, the legislature is "occupying the whole field of regulation of firearms and ammunition . . . to the exclusion of all existing and future county, city, town, or municipal ordinances or *any administrative regulations or rules adopted by local or state government* relating thereto" (emphasis added).

Effectively, the 2011 amendment un-delegated some regulatory power previously provided to state agencies, such that agencies may only regulate firearms and ammunition under a specific grant of rulemaking authority. In addition, the 2011 amendments created a mechanism for plaintiffs to sue governmental entities that violate the statute. *See* § 790.33(3)(f), Fla. Stat. Under the amended statute, plaintiffs can seek injunctive relief, damages, and fees against governmental officials and governmental entities.

Against this backdrop, the appellate court rejected the trial court's interpretation of the statute as limiting an agency's rulemaking authority regarding the regulation of firearms to the Constitution, the APA, and an agency's enabling statute. The court, relying on its prior decision of *Florida Carry, Inc. v. University of North Florida,* 133 So. 3d 966 (Fla. 1st DCA 2013), reasoned that the trial court's interpretation renders the statute's preemption language meaningless. Instead, the 2011 amendment "preempts the regulation of the right to bear arms from state governmental entities as well as local government. To rule otherwise and permit a state agency to enact rules or policies restricting the right to bear arms without a specific legislative delegation would render the 2011 amendment superfluous" (emphasis omitted).

The appellate court next addressed the issue of exhaustion of administrative remedies. The trial court held that appellants were required to file a rule challenge pursuant to section 120.56, but the appellate court found that the statute belied the claim. Section 120.56(1)(e), Florida Statutes, states: "Failure to proceed under this section does not constitute failure to exhaust administrative remedies." Accordingly, the court concluded that the statute "unequivocally states that no such action is necessary."

Regardless, the appellate court explained that a plaintiff is not required to exhaust administrative remedies before filing a suit under section 790.33(3)(f)1., Florida Statutes. Here, the 2011 amendments created a cause of action authorizing persons or organizations to file suit for any violation of the preemption provision. Thus, the statute does not require a plaintiff to exhaust any administrative remedies before filing suit. Moreover, under section 790.33(3)(f)2, Florida Statutes, if after filing a complaint, the defendant voluntarily changes the ordinance or regulation at issue with or without court action, then the plaintiff is considered the prevailing party. The appellate court reasoned that this provision establishes that the legislature was not interested in permitting a government entity to avoid liability by correcting its errors. If an agency were to use the administrative exhaustion requirement to correct its errors and avoid a lawsuit, it would conflict with the intent of the statute that imposes liability even after any correction.

In further support of its holding that no administrative exhaustion was required, the appellate court compared a rule challenge under section 120.56 with a suit under section 790.33, finding them contradictory. First, the APA imposes a different standard than section 790.33. Under a rule challenge, the question is whether the rule is an invalid exercise of delegated legislative authority. In contrast, section 790.33 evaluates whether the regulation or rule at issue was expressly provided by the Constitution or general law. Second, the available remedies differ. Under the APA, the person challenging the rule can receive a determination that the rule is invalid, whereas section 790.33 provides for actual damages incurred.

Lastly, the court receded from its prior decision in *Florida Carry v. Thrasher*, 315 So. 3d 771 (Fla. 1st DCA 2021). In that case, the court held that a plaintiff was required to exhaust its administrative remedies before filing an action under section 790.33(3)(f) against a university and its president regarding university firearms regulation. However, the administrative remedies at issue in that case were found in section 1001.706(2)(c), which permits the Board of Governors to adopt rules for universities and requires a process for those affected to challenge unlawful regulations. The court explained the *Thrasher* opinion found that an administrative remedy under section 1001.706(2)(c) can co-exist with a cause of action under 790.33(3)(f) without depriving a party of its constitutional or statutory rights.

In this case, the court noted that it is undisputed that a statutory cause of action can co-exist with administrative remedies—that a person could file a rule challenge under section 120.56 rather than a suit under section 790.33(3)(f). However, the court noted that *Thrasher* did not discuss how that administrative process could adequately vindicate the rights of a person under section 790.33(3)(f) or explain why the court should condition a statutorily created cause of action on an administrative process that "not only does the statute not require, but also. . . is inconsistent with the statute."

Accordingly, the court reversed the trial court's judgment in favor of FDLE and found that appellants were not required to exhaust an administrative remedy before filing suit under section 790.33(3).

Caranna v. Glass, 392 So. 3d 296 (Fla. 1st DCA 2024).

This case arises from the appeal of a trial court's order dismissing a complaint against the Florida Department of Law Enforcement (FDLE) for failing to exhaust administrative remedies. The complaint alleged FDLE violated section 790.33, Florida Statutes, by promulgating and enforcing a rule requiring Florida Concealed Weapon or Firearm License Holders ("CWFL Holders") to submit to supplemental criminal history checks when they were exempt from section 790.06, Florida Statutes, and by requiring the CWFL Holders to pay fees for processing the supplemental criminal history checks.

The complaint sought declaratory and injunctive relief. The trial court dismissed the complaint for failing to exhaust administrative remedies.

On appeal, the court relied on its decision in *Pretzer v. Swearingen*, 394 So.

Continued on next page...

Appellate Case Notes
Continued from previous page

3d 175 (Fla. 1st DCA 2024), finding that a plaintiff suing a state agency under section 790.33(3)(f) is not required to exhaust administrative remedies. Instead, within section 790.33(3), the legislature expressly provided for a judicial remedy. Accordingly, the appellate court reversed the order dismissing the complaint.

Exhaustion of Administrative Remedies—Not Required to Assert, and Post-Suit Correction Does Not Moot, Section 790.33(3) Claim

Heffron v. Fla. Dep't of Agric. & Consumer Servs., 391 So. 3d 667 (Fla. 1st DCA 2024).

This case arises from the appeal of an order dismissing Heffron's complaint against the Florida Department of Agriculture and Consumer Services ("FDACS") and the Florida Department of Law Enforcement ("FDLE"). Heffron challenged actions of FDACS and FDLE in relation to the initial denial of her application for a concealed firearms license. Heffron alleged the agencies violated section 790.33, Florida Statutes, which preempts the whole field of firearms regulation and provides a statutory cause of action for persons adversely affected by ordinances and regulations in violation of the statute. The trial court dismissed Heffron's complaint on three grounds: (1) Heffron failed to exhaust her administrative remedies; (2) Heffron failed to establish a sufficient need for declaratory judgment because she later received her license after filing another application; and (3) FDLE was not a proper party.

The First District Court of Appeal reversed on all grounds. First, the court, relying on *Pretzer v. Swearingen*, 394 So. 3d 175 (Fla. 1st DCA 2024), found that no exhaustion of administrative remedies is required before bringing a claim under section 790.33, Florida Statutes.

Second, the appeals court found that Heffron's eventual receipt of the license did not nullify her declaratory judgment claim because section 790.33(3)(f)2., Florida Statutes, expressly contemplates situations where a defendant may voluntarily remedy its violation after being sued. In that instance, the statute does not require dismissal, but instead provides that the plaintiff is the prevailing party.

Lastly, the court held Herron's allegations which challenged an interagency agreement and memorandum of understanding between FDACS and FDLE were sufficient to find that FDLE was a proper party to the litigation. For these reasons, the appellate court reversed the trial court's order of dismissal.

Jurisdiction—Exhaustion of Administrative Remedies

Higgins v. Citrus Hill Property Owners Ass'n, 392 So. 3d 602 (Fla. 5th DCA 2024).

Higgins owns a parcel located in Fox Run Estates, a community served by Appellee, the Citrus Hills Property Owners Association, Inc. (the "Association"). When the Association began the process of revitalizing a declaration of covenants that applied to Fox Run Estates, Higgins sued, seeking injunctive relief and statutory relief under chapters 712 and 720, Florida Statutes.

Shortly after Higgins filed his complaint, the Florida Department of Economic Opportunity ("DEO") approved the Association's proposed revitalization. Thereafter, the Association moved to dismiss Higgins' lawsuit for lack of subject matter jurisdiction, arguing that the trial court lacked jurisdiction because, to the extent that Higgins' rights had been affected by DEO's ruling, under section 120.569, Florida Statutes, and the exhaustion of administrative remedies doctrine, Higgins' only avenue of recourse was to file a petition for administrative proceeding.

Following a hearing on the Association's motion to dismiss, the trial court entered an order dismissing Higgins' complaint, ruling that it lacked subject matter jurisdiction because DEO "has exclusive jurisdiction over all issues raised by Plaintiff." The trial court also denied Higgins' motion to amend his complaint. Higgins appealed.

On appeal, the appellate court affirmed per curiam without a written opinion. Judge Kilbane wrote a concurring opinion. She noted that both the parties and the trial court proceeded as though the issue of exhaustion of administrative remedies was one of subject matter jurisdiction, and she wrote separately in an effort "to provide clarity on that issue."

Specifically, Judge Kilbane explained that subject matter jurisdiction is granted and bounded by the Constitution and is expressly conferred upon a court by the Florida Constitution or by statutes enacted pursuant to that Constitution. As such, she opined that here the application of the exhaustion doctrine did not deprive the trial court of subject matter jurisdiction.

While the doctrine of exhaustion of administrative remedies precludes judicial intervention where available administrative remedies can afford the relief a litigant seeks, the doctrine is not jurisdictional. Rather, the exhaustion requirement is a court-created prudential doctrine; it is a matter of policy, not of power.

The doctrine of exhaustion of administrative remedies is based on the need to avoid prematurely interrupting the administrative process and to enable the agency to apply its discretion and expertise in the first instance to technical subject matter. The exhaustion doctrine promotes judicial efficiency by giving the agency an opportunity to correct its own mistakes, thereby mooting controversies and eliminating the need for court intervention. The exhaustion doctrine is a prudential rule promulgated by the courts whereas the jurisdiction of the state's trial courts is established by the Florida Constitution. It is axiomatic that a court-made rule, such as the exhaustion doctrine, can neither expand nor restrict that jurisdiction.

Judge Kilbane also explained that, while the exhaustion issue is not one of jurisdiction, it can still be relevant, and sometimes determinative, in a trial court's consideration of a party's claims. In that regard, she observed that district courts of appeal have held that the exhaustion doctrine is an affirmative defense. She also noted that, while her court (the Fifth DCA) has concluded that the exhaustion doctrine is both prudential in nature and an affirmative defense, it has not taken the additional step of holding that the doctrine's application does not deprive a court of subject matter jurisdiction. Accordingly, Judge Kilbane would hold that the exhaustion doctrine does not implicate a trial court's subject matter jurisdiction and, as a court-created prudential rule, the exhaustion doctrine alone cannot deprive a trial court of that Constitutional grant.

Finally, she expressed the view that, for the exhaustion issue to be properly before the trial court, it must be raised, either by motion or as an affirmative defense, and ultimately proven by a party to serve as the basis for entering a final adjudication on a claim.

Licensing—Revocation Order Reversed for Evidentiary Hearing to Determine if Licensee Received Hearing Notice

Aristilde v. Dep't of Health, Bd. of Nursing, 391 So. 3d 964 (Fla. 4th DCA 2024).

Appellant applied to the Florida Board of Nursing (the "Board") for licensure as a registered nurse, indicating that he attended and graduated from Palm Beach School of Nursing. The Board permitted Appellant to

Continued on next page...

Appellate Case Notes
Continued from previous page

sit for the registered nurse examination and subsequently issued his license to practice nursing in 2020. Appellant's license was renewed in 2022. Subsequently through an FBI investigation, it was discovered that Appellant (and other students) received a fraudulent diploma and transcript from the Palm Beach School of Nursing.

An administrative complaint followed. During the resulting administrative proceedings, a notice of informal hearing that included the time and location was mailed to the same address of record to which prior papers that were received were mailed.

After Appellant failed to appear at the informal hearing, the Board entered a final order revoking his nursing license.

Thereafter, Appellant filed a motion for reconsideration and supporting affidavit, arguing that he did not receive notice of the hearing. Appellant then filed a notice of appeal of the final order, which was stayed pending the outcome of the appeal.

On appeal, Appellant argued he did not receive notice of the informal hearing and the final order was entered without affording him an opportunity to be heard.

While the record reflected that the notice was mailed to Appellant's address of record, which creates a presumption that Appellant received it, the presumption is rebuttable. The court explained that while a denial of receipt of a hearing notice "does not automatically overcome this presumption, … it does create a question of fact that must be resolved through an evidentiary hearing," citing *Reich v. Dep't of Health*, 868 So. 2d 1275, 1276 (Fla. 1st DCA 2004).

Because the Board never provided Appellant an opportunity to prove that he did not receive notice of the informal hearing, the appeals court reversed the final order revoking his license and remanded for an evidentiary hearing to determine whether Appellant received notice of the informal hearing.

Licensing—Revocation Following *Alford* Plea

Sanchez-Del Valle v. Dep't of Agric. & Consumer Servs., 393 So. 3d 826 (Fla. 3d DCA 2024).

Sanchez-Del Valle appealed a final order from the Florida Department of Agriculture and Consumer Services ("FDACS") which revoked his security officer's license under section 493.6118(2)(e), Florida Statutes. Sanchez-Del Valle pled to the felony of fleeing and eluding an officer and to the misdemeanor of resisting an officer without violence. His adjudication was withheld and he was placed on probation.

The appellate court affirmed the order of revocation finding the Department appropriately considered the mitigating circumstances as it related to the presumption of guilt arising from his *Alford* plea.

Rule Challenge—Agency Policy or Interpretation that Imposed Terms Beyond Statute's Plain Text Was Unadopted Rule

Fla. Gaming Control Comm'n v. Tampa Bay Downs, Inc., 395 So. 3d 619 (Fla. 1st DCA 2024).

Tampa Bay Downs filed a successful unpromulgated rule challenge against the Florida Gaming Control Commission after the Commission denied their request for a tax refund. Tampa Bay Downs argued that under subsection 550.0951(3)(c)1., Florida Statutes, they should be taxed at a reduced rate of 0.5% on their pari-mutuel handle (the total contributions to pari-mutuel pools), instead of the higher 5.5% rate. Tampa Bay Downs claimed they qualified for the lower tax rate as a guest track involved in intertrack wagering on simulcast events, thus meeting the statute's criteria for the reduced rate.

The Commission's denial was based on its interpretation of the term "market area" as it appears in the statute. According to the Commission, Tampa Bay Downs did not meet the statutory requirements because the reduced 0.5% tax rate only applies if the guest track is within 25 miles of another thoroughbred permitholder conducting a live race meet. The term "market area" is defined under section 550.002(18), Florida Statutes, as "an area within 25 miles of a permitholder's track or fronton," and the Commission interpreted this to mean that Tampa Bay Downs would need to be located within 25 miles of a different thoroughbred permitholder to qualify for the reduced tax rate.

The ALJ disagreed with the Commission's interpretation, ruling in favor of Tampa Bay Downs. The ALJ accepted Tampa Bay Downs' position that they qualified as a guest track under the statute while also being a thoroughbred permitholder. The ALJ concluded that Tampa Bay Downs satisfied the statutory requirements for the 0.5% tax rate because, as a thoroughbred permitholder, they operated a pari-mutuel facility that conducted intertrack wagering and met the relevant criteria under subsection 550.0951(3)(c)1.

The Commission appealed, asserting that the ALJ misinterpreted the statute and that the reduced tax rate could only apply if Tampa Bay Downs were within the "market area" of another, separate thoroughbred permitholder hosting a live meet. They argued that Tampa Bay Downs' interpretation allowed a single track to serve both as a host and a guest track, which they claimed was inconsistent with the statute.

The appellate court rejected the Commission's argument. The court held that the Commission's interpretation added conditions to the statute that were not present in its plain language. The statutory language only requires that a guest track be located within the market area of a thoroughbred permitholder conducting a live race meet but does not explicitly preclude a thoroughbred permitholder from qualifying as both a guest track and a host track for the purposes of the tax rate.

Additionally, the court emphasized that the Commission's interpretation of "market area" as requiring separate thoroughbred permitholders was not readily apparent from the text of the statute. The Commission's approach effectively imposed new conditions that were not set forth in the statute, which amounted to an unpromulgated rule—a policy or interpretation not properly established through the statutory rulemaking process.

The court's analysis of "market area" was central to its decision, as it clarified that the plain language of the statute did not require a thoroughbred permitholder to be geographically distinct from the guest track for the reduced tax rate to apply. By going beyond the statutory text and adding terms not explicitly stated, the Commission's interpretation was found to be an unadopted rule, subject to challenge under section 120.56(4)(a), Florida Statutes.

Ultimately, the appellate court affirmed the ALJ's ruling that Tampa Bay Downs was entitled to the 0.5% tax rate and rejected the Commission's unadopted rule imposing a more restrictive reading of the term "market area."

*****

Gigi Rollini *practices in the Tallahassee office of Florida Government Law Partners, PLLC.*

Larry Sellers and Johnny ElHachem *practice in the Tallahassee and Miami offices of Holland & Knight LLP.*

Laura Dennis *is a professor at the Florida State University College of Law.*

DOAH Case Notes

By Gar Chisenhall, Matthew Knoll, Tiffany Roddenberry, and Katie Sabo

Public Accommodation Discrimination—What Qualifies as a Place of Public Accommodation

***Alexander v. Wal-Mart Stores, Inc*., Case No. 24-0055; *Jackson v. Wal-Mart Stores, Inc*., Case No. 24-0061 (DOAH Recommended Order July 19, 2024; FCHR Final Order Sept. 12, 2024) (Telfer, ALJ).**

BACKGROUND: Wal-Mart Stores, Inc. ("Wal-Mart") operates a retail store ("the store") located in Apopka, Florida. The store sells food, but that food is not intended for consumption on the store's premises. In addition, the store does not provide an area where customers can sit and dine. Charley's Cheesesteaks and Wings ("Charley's") leases space within the store and offers food and beverages for consumption on its premises. Other than leasing physical space to Charley's, Wal-Mart is not involved in Charley's operations, and Wal-Mart does not hold itself out as serving Charley's patrons. While Wal-Mart operates and manages all of the restrooms in the building, those restrooms are available to anyone who enters the building, regardless of whether they purchase anything within the store or dine at Charley's.

Shon Alexander and Andra Jackson ("the Petitioners") filed public accommodation complaints of discrimination with the Florida Commission on Human Relations ("the Commission") alleging the store discriminated against them based on race. After the cases were referred to DOAH and consolidated, Wal-Mart filed a motion for summary adjudication asserting that it was not a public accommodation within the meaning of the Florida Civil Rights Act ("the Act").

OUTCOME: The Act defines "public accommodations" as "lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments." The Petitioners argued that Wal-Mart is a place of public accommodation because: (1) Charley's sells food for consumption on the premises and is physically located within the store; and (2) Wal-Mart serves Charley's patrons because any patrons of Charley's who wish to use a restroom must use the restrooms operated by Wal-Mart. The ALJ noted that the Petitioners' first argument has been rejected by DOAH and multiple federal tribunals. As for the Petitioners' second argument, the ALJ ruled that the Petitioners "have not identified any legal authority for the proposition that a business that allows the general public to utilize its restrooms without restriction holds itself out as serving patrons of other businesses (including covered businesses) in the same building." Accordingly, the ALJ recommended that the Commission dismiss the Petitioners' cases. The Commission rendered Final Orders on September 12, 2024 adopting the ALJ's recommendation.

License Revocation—Lay Testimony Not Sufficient to Establish Clear and Convincing Evidence on These Facts

***Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco v. Courtyard on Broadway, LLC*, Case Nos. 24-2164 & 24-2165 (DOAH Recommended Order Oct. 10, 2024; DBPR Final Order Nov. 12, 2024) (Chisenhall, ALJ).**

BACKGROUND: The Department of Business and Professional, Division of Alcoholic Beverages and Tobacco ("the Division") is the state agency responsible for regulating alcoholic beverage licensees. Courtyard on Broadway, LLC ("Courtyard") was a licensed retailer of alcoholic beverages. During a compliance check of Courtyard's bar, a Division employee noticed that the amount of liquid in an unsealed Smirnoff bottle was higher than the amount of liquid in a sealed Smirnoff bottle. While both bottles were full, the Division employee observed that the difference in the amount of liquid in the two bottles amounted to "the thickness of a standard number 2 pencil." According to the Division employee, this was an indication that Courtyard had violated section 565.11, Florida Statutes (2023), which prohibits the refilling of liquor bottles. The Division employee testified during the final hearing that liquor manufacturers are very precise with regard to the amount of liquor poured into their bottles.

OUTCOME: With regard to the aspect of the Division's administrative complaint alleging that Courtyard violated section 565.11, the ALJ found that the Division did not prove by clear and convincing evidence that Courtyard violated that statute. The Division did not seek to have any of its witnesses "accepted as experts regarding the amount of alcohol that liquor manufacturers typically place into their bottles." Accordingly, when a Division employee "opined that an amount equivalent to 'the thickness of a standard number 2 pencil' was sufficient to demonstrate that the unsealed bottle of Smirnoff had been refilled," the ALJ concluded that the Division employee "was going beyond the permissible scope of a lay witness's testimony under section 90.701, Florida Statutes (2024)." In making this ruling, the ALJ cited *Bartlett v. State*, 993 So. 2d 157, 164 (Fla. 1st DCA 2008), for the proposition that "[t]he scope of section 90.701 is usually limited to matters relating to distance, time, size, weight, form, and identify, which are easily observable."

Rule Challenge—What Constitutes a Rule

***First Protective Ins. Co. v. Florida Hurricane Catastrophe Fund*, Case No. 24-2261RX (DOAH Final Order July 19, 2024) (Pratt, ALJ).**

FACTS: The Florida Hurricane Catastrophe Fund ("the Fund") is a trust fund used to reimburse insurers for a portion of their catastrophic hurricane losses. The State Board of Administration ("the SBA") is a constitutional entity that administers the Fund. Section 215.555, Florida Statutes, requires every residential property insurer in Florida to enter into an annual reimbursement contract with the SBA and pay a reimbursement premium. In exchange, the Fund reimburses a portion of their losses from covered events based on the terms of their respective reimbursement contracts. The statute also requires the SBA to annually adopt a model reimbursement contract. The model is then used as a template for the specific contracts entered into between the SBA and individual insurers. Each year, the SBA incorporates the model reimbursement contract by reference via Florida Administrative Code Rule 19-8.010.

First Protective Insurance Company ("FPIC") offers residential property and casualty insurance coverage. In 2018, FPIC paid claims relating to losses incurred from

Continued on next page...

Hurricane Michael. When FPIC sought reimbursement from the SBA, part of its request was denied due to a short-term rental exclusion within FPIC's 2018 reimbursement contract with the SBA. In 2024, FPIC alleged that the short-term rental exclusion in the model reimbursement contract and its own contract exceeded SBA's grant of rulemaking authority by prohibiting reimbursements for losses not excluded by statute. The ALJ identified two main jurisdictional issues with FPIC's petition: (1) whether FPIC was challenging an "existing rule" that was "in effect" under section 120.56(3)(a), Florida Statutes; and (2) whether the relief sought by FPIC was available in an existing rule challenge proceeding under section 120.56(3)(b).

OUTCOME: The ALJ concluded that DOAH lacked jurisdiction over the merits of FPIC's challenge to both the 2018 model reimbursement contract and the contract between FPIC and SBA. First, the ALJ determined the 2018 model reimbursement contract had been completely superseded by the 2023 model reimbursement contract, and that the 2023 version did not contain the short-term rental exclusion at issue. Therefore, the 2018 model reimbursement contract was not in "effect," and thus not subject to challenge as an existing rule under section 120.56, Florida Statutes. Second, the ALJ concluded that the 2018 contract between FPIC and the SBA did not meet the definition of a "rule" under section 120.56(16), Florida Statutes. Because the contract between FPIC and SBA only bound the two parties, it could not be considered a statement of general applicability.

Environmental Permitting—Challenge to Permit Modification

***GB Retail, LLC d/b/a Grand Boulevard v. Fla. Community Services Corp. of Walton Cnty.*, Case No. 24-0455 (DOAH Recommended Order Aug. 16, 2024; DEP Final Order Sept. 25, 2024) (Early, ALJ).**

BACKGROUND: GB Retail, LLC, d/b/a Grand Boulevard ("GB Retail") owns and operates Grand Boulevard, a commercial center with retail, office, and restaurant establishments 10 miles east of Destin, Florida. Florida Community Services Corporation ("Florida Community Services") operates the Sandestin Wastewater Treatment Plant ("wastewater treatment plant") pursuant to lease, management, and franchise agreements with Walton County. Grand Boulevard is due south and shares a property line with the wastewater treatment plant, which is capable of handling 4.0 million gallons per day of domestic wastewater. On occasion, when the wind is from the north, odors from the wastewater treatment plant drift across Grand Boulevard. The smell is not pleasant and can be a nuisance, particularly for restaurants with outdoor seating.

Florida Community Services applied to the Department of Environmental Protection ("the Department") for a permit to modify the wastewater treatment plant and expand its capacity to six million gallons per day. The Department issued notice of its intent to issue the requested permit. GB Retail filed a petition alleging that the odors from the wastewater treatment plant are a chronic nuisance to the businesses operating in Grand Boulevard and that the proposed modifications would not abate the nuisance.

OUTCOME: The ALJ found that the odors are "predominately, if not exclusively, from" the surge tank and the headworks next to the wastewater treatment plant's boundary with Grand Boulevard. However, the permit application called for the surge tank and headworks to be substantially modified or replaced. The ALJ determined that "[a] preponderance of the competent substantial evidence, including the complete application for the permit, establishes that [the wastewater treatment plant], as modified, will not result in odors as to adversely affect neighboring residents, be potentially harmful or injurious to human health or welfare, or unreasonably interfere with the enjoyment of life or property, including outdoor recreation." Accordingly, the ALJ recommended that the Department issue the permit. The Department rendered a final order granting the permit.

Fair Housing Act—Failure to Accommodate

***Truong v. Canterbury Lake Homeowners Ass'n*, Case No. 24-0336 (DOAH Recommended Order Aug. 7, 2024; FCHR Final Order Oct. 17, 2024) (Dickson, ALJ).**

BACKGROUND: Robert Truong and his daughter, Jane Doe, reside at a home in the Canterbury Lakes subdivision. Ms. Doe is severely disabled and requires in-home care 24 hours a day, seven days a week, from nine separate caregivers. The Canterbury Lakes subdivision is under the purview of the Canterbury Lakes Homeowners Association ("the HOA"), and Excelsior Community Management LLC ("Excelsior") began managing the HOA in 2020.

In 2011, the HOA had granted Mr. Truong's request to allow his driveway to be widened in order to accommodate a wheelchair accessible van and wheelchair accessible walkway for Ms. Doe's use. After the driveway was widened, it could accommodate only two other cars side-by-side while leaving a ten foot space for van ingress/egress. Additional vehicles could not fit behind the van and the two side-by-side cars without parking on grass or blocking the sidewalk.

In 2020, Excelsior began issuing notices of parking violations to Mr. Truong and his daughter's caregivers for parking on grass or blocking the sidewalk. On November 18, 2020, Mr. Truong asked Excelsior to rescind the notices by stating his daughter was homebound and that "homeowner associations have an affirmative duty to make accommodations in their policies and practices to provide physically and mentally disable[d] residents full enjoyment of their property." Even though Mr. Truong reiterated that request multiple times in 2021 and 2022, he never received an answer and ultimately paid all of the parking fines associated with the notices.

On March 3, 2023, Mr. Truong filed a housing discrimination complaint with the Florida Commission on Human Relations ("the Commission") alleging that Excelsior and the HOA failed to grant a reasonable accommodation. After the Commission determined that there was no reasonable cause to find that a discriminatory housing practice had occurred, Mr. Truong filed a petition for relief, and the case was referred to DOAH.

OUTCOME: Excelsior and the HOA argued that the information provided by Mr. Truong was not sufficient for them to understand that he was submitting a reasonable accommodation request. The ALJ rejected that argument and ruled that Excelsior and the HOA violated the Florida Fair Housing Act because Mr. Truong had "expressly stated to Excelsior that a resident of the house was 'homebound,' there were nine home health aides that came to the home to render care, and that homeowners' associations were under a legal duty to make reasonable accommodations to their rules . . . That information, coupled with Respondents' actual knowledge that multiple caregivers' cars could not fit in Petitioners' driveway at the same time as the wheelchair van and its loading zone of ten feet . . . gave Respondents ample information upon which to make a meaningful review of Petitioners' request for a waiver of the parking rules."

Florida State University College of Law Center for Environmental, Energy, and Land Use Law Winter 2025 Update

Erin Ryan, Associate Dean for Environmental Programs

Erin Ryan

Happy New Year to all, from FSU! As we welcome 2025, we want to formally welcome our new Program Associate, Madison Maurer, who has fast become an integral member of our team. Madison graduated from Sarah Lawrence in 2020 with a degree in literature and creative writing, and she recently moved back to the U.S. from Berlin, where she worked in communications. She has already brightened our halls with enthusiasm and dedication to our mission, students, and events. Outside of work, Madison enjoys writing, growing flowers and vegetables on her South Georgia farm, and witnessing the constant surprises that nature provides. Madison, we are lucky to have you with us!

We also want to invite all of you to join us for another stirring programmatic series this semester, headlined by our Spring 2025 Distinguished Lecturer, Professor John Leshy of the UC College of Law in San Francisco, who presents *America's Public Lands: What Will Donald Trump's Legacy Be?* on Feb. 26, 2025. We are also honored to be joined by Professors William Eskridge of Yale Law School, Kristin Hickman of the University of Minnesota Law School, and FSU's own Mark Seidenfeld and Brian Slocum for a Zoom event on Jan. 29, exploring the significance of the Supreme Court's decision last Term in *Loper Bright Enterprises v. Raimondo*. All events are open to the public.

Finally, we invite students to mark your calendars for our Spring '25 Environmental Course Tasting Menu on March 19, to learn about our Fall 2025 offerings over lunch, and to join us on a walking field trip to the Elinor Klapp-Phipps Park on April 2, to explore the magical forests, wetlands, and wildlife of the Red Hills region. Look for more on how to register in the coming months! Sending warm wishes for all good things in the year to come.

Recent Faculty Scholarship and News

Shi-Ling Hsu, D'Alemberte Professor

Carbon Pricing: History and Context, Ch. __ in Institutions for Effective Climate Action (Metcalf, C. and S. Stern, eds., forthcoming 2025).

Climate Resilience: A Typology, __ UMKC L. Rev. __ (forthcoming symposium, 2025).

Recruiting Capitalism for Environmental Protection, in Can Democracy and Capitalism Be Reconciled? (Milkis, S. and S. Miller, eds, forthcoming 2024).

Erin Ryan, Elizabeth C. & Clyde W. Atkinson Professor

Environmental Law and the New Separation of Powers after West Virginia, Sackett, Loper-Bright, and Corner Post, 109 Minn. L. Rev. ___ (2025).

Saving Mono Lake: The Prologue, Epicenter, and Implementation of the Landmark Audubon Society Public Trust Litigation, 58 U.C. Davis L. Rev. ___ (2025).

Public Trust Principles and Environmental Rights: The Hidden Duality of Climate Rights Advocacy and the Atmospheric Trust, 49 Harv. Envt'l. L. Rev. ___ (2024).

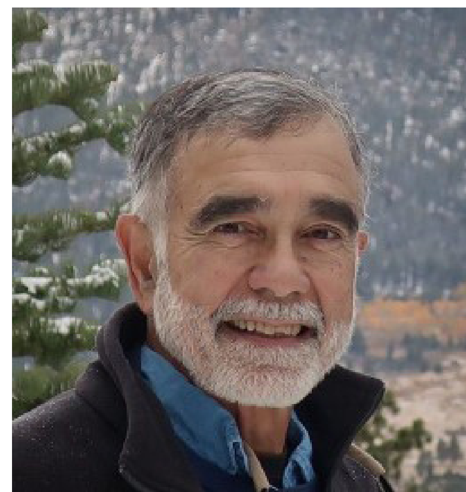
Mark Seidenfeld, Patricia A. Dore Professor of Administrative Law

Conceptions of Sovereignty and American Federalism, ___ F.S.U. L. Rev. ___ (forthcoming 2025).

Upcoming Events

Spring 2025 Distinguished Lecture

On February 26th, the Center proudly welcomes our Spring '25 Distinguished Lecturer John Leshy, Emeritus Harry D. Sunderland and Distinguished Professor of Real Property Law at UC Law SF. John Leshy will present, *America's Public Lands: What Will Donald Trump's Legacy Likely Be?*



John Leshy

As Professor Leshy will discuss, public lands, comprising nearly 30% of the nation's real estate (along with hundreds of millions of acres of submerged land offshore), are an important American institution. For a century and a half, the almost unbroken trend has been for the U.S. to acquire and to protect more land from intensive industrial development in order to serve the objectives of biodiversity and cultural resource preservation, education, inspiration, and recreation.

Doubts are being raised about whether that trend will continue, given an increasingly polarized and dysfunctional political system, more strident calls for "drill baby drill," a more activist and conservative federal judiciary, and the challenges of coping with an increasingly unstable climate and dramatic loss of biodiversity.

Drawing on his comprehensive public lands history published in 2022, Our Common Ground, his extensive experience in public land policy and administration, and relevant events in the first Trump Admin-

istration, Professor Leshy will sketch out possible answers to the question posed in the lecture title and offer some preliminary predictions.

Join us Wednesday, February 26th at 3:30pm in the law rotunda, with a reception to follow.

Student Organization Spotlight

Samantha Joles, President of the Student Animal Legal Defense Fund ("ALDF"), is a 2L working for Pets Ad Litem, a non-profit animal welfare and activism organization founded by FSU Animal Law Professor, Ralph DeMeo. Samantha is also the owner and director of a nonprofit 501(c)(3) cat rescue, Feline Fine Animal Rescue. She hopes to continue her work in animal welfare throughout her law school career.

Karelis Albornoz, Vice President of SALDF, is a 2L working for the Medical Prosecution Unit at the Department of Health. She spent her summer with her 3 dogs, interning at DOAH, and doing a study abroad in Italy. She hopes to continue with her passion of trial advocacy and to grow her fur family in the future.

Julia Willis, Secretary of SALDF, is a 2L who spent her summer working at the Public Defender for the 3rd Circuit, where she sharpened her legal research skills and solidified her interest in a career in litigation. Next summer, she plans to explore civil litigation as a Summer Associate at RumbergerKirk in Orlando, Florida.

Cate Coates, Treasurer of SALDF, is a 2L who spent the summer working at Gray Robinson, P.A. in Tallahassee, where she conducted legal research and drafted motions on a variety of civil litigation matters such as administrative and regulatory litigation. She is an avid animal lover and is excited for the upcoming legislative session and the opportunities it brings to advocate on behalf of animals.

Jacob Cremer

Alumni Spotlight

Jacob Cremer, FSU Law JD, MSP 2010 was selected by The Best Lawyers in America® as Lawyer of the Year, Litigation - Land Use and Zoning (Tampa), 2025!

Jacob is a shareholder at Stearns Weaver Miller in Tampa, where he has been lead counsel on a variety of complex permitting and economic development matters. He excels in complicated matters requiring both environmental and land use permitting, including brownfield designations, urban redevelopment, and master-planned communities. He has extensive experience protecting environmental and land use permits against challenges, defending against government compliance and enforcement issues, and litigating property rights issues, including before the United States Supreme Court.

CALL FOR AUTHORS:

ADMINISTRATIVE LAW ARTICLES AND OTHER FEATURES

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to the *Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for the *Florida Bar Journal*, please email Lylli Van Whittle (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) and Tiffany Roddenberry (tiffany.roddenberry@hklaw.com). 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. If you have interest in submitting items to be included in the Section's social media posts, please send those to Tiffany Roddenberry (tiffany.roddenberry@hklaw.com).