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Florida State University Journal of Land Use and Environmental Law

Volume 17
Number 1 *Fall 2001*

Article 13

April 2018

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Recommended Citation

Cardillo, John T. (2018) "Recent Developments in Land Use & Environmental Law," *Florida State University Journal of Land Use and Environmental Law*: Vol. 17 : No. 1 , Article 13.
Available at: https://ir.law.fsu.edu/jluel/vol17/iss1/13

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Recent Developments in Land Use & Environmental Law

Cover Page Footnote
The Recent Developments Section was researched and written by John T. Cardillo, expected J.D. 2003, The Florida State University College of Law. The author would like to thank his computer for not breaking down.

This article is available in Florida State University Journal of Land Use and Environmental Law: https://ir.law.fsu.edu/jluel/vol17/iss1/13

RECENT DEVELOPMENTS

JOHN T. CARDILLO*

Table of Contents

I. INTRODUCTION

This section highlights recent developments in federal and state environmental and land use case law, as well as notable legislation recently passed by the Florida Legislature. In addition to the sources cited in this section, the reader is encouraged to consult the official websites of the Florida Legislature,[1] the Florida Department of Environmental Protection,[2] and the Florida Department of Community Affairs.[3] Other useful sources the reader may wish to consult include the website of the Environmental & Land Use Law Section of The Florida Bar,[4] and the FLORIDA ENVIRONMENTAL COMPLIANCE UPDATE, available through Business & Legal Reports, Inc..[5]

II. FEDERAL DECISIONS

Palazzolo v. Rhode Island, et al., 121 S. Ct. 2448 (2001).

In *Palazzolo*, the Supreme Court reinforced landowners' rights in regulatory takings cases. If the government interferes with a landowner's ability to develop his land, the government may have to compensate that landowner for a regulatory taking.[6]

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* The Recent Developments Section was researched and written by John T. Cardillo, expected J.D. 2003, The Florida State University College of Law. The author would like to thank his computer for not breaking down.

1. www.leg.state.fl.us
2. www.dep.state.fl.us
3. www.dca.state.fl.us
4. www.eluls.org
5. www.blr.com
6. *See* Palazzolo v. Rhode Island, et al., 121 S. Ct. 2448 (2001).

The issues surrounding *Palazzolo* stem back to the 1960s. In 1959, Anthony Palazzolo, and associates, formed Shore Garden, Inc. ("SGI"), and purchased more than twenty acres of land in Westerly, Rhode Island.[7] The property, immediately across the street from the beach, faced Winnapaug Pond.[8] Most of the property was, and still is, salt marsh, subject to tidal flooding.[9] SGI submitted three different proposals for development, each with a different request to fill in part of the wetland.[10] All three petitions were denied.[11]

Before the next application for a permit to fill the land, two germane events occurred. First, in 1971, the Rhode Island legislature created the Council, an agency whose duty was to protect the coastal lands of Rhode Island.[12] The Council designated lands such as Palazzolo's, "protected coastal wetlands."[13] Second, in 1978, Palazzolo became SGI's sole shareholder.[14]

In 1983, and again in 1985, Palazzolo applied for permits to fill in part, or all, of the salt marsh land.[15] He was denied both times.[16] The Council stated that he failed to meet the requirements for a special exception.[17] Finally, in 1985, Palazzolo filed an inverse condemnation claim in Rhode Island state court, claiming that the permit denials deprived his property of all economically viable use. Palazzolo argued that the government's actions resulted in a total regulatory taking, pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[18]

The trial judge rejected Palazzolo's argument.[19] The appellate court affirmed the trial court on three grounds. First, Palazzolo's takings claim was not ripe for adjudication.[20] He still could find some form of lesser development that the Council might approve.[21] Second, Palazzolo's claims were time-barred.[22] The Council's

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7. *Id.* at 2455. As background to the case, the Court discusses the intriguing history of Westerly, Rhode Island. Incorporated in 1669, the town has developed into a charming beach resort, with mild temperatures in the summer. Thousands of visitors come to Westerly every summer to vacation. *Id.* at 2454-55.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See id.*

12. *Id.* at 2456.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *Id.*

18. *Id.*

19. *See id.* at 2457.

20. *Id.*

21. *Id.*

22. *Id.*

regulation of coastal land was in effect when he took over as sole shareholder of SGI.[23] Third, Palazzolo's claim that the regulations deprived his land of economically beneficial use was incorrect.[24] He could still build a house worth $200,000 on the portion of his property that was not subject to flooding.[25] Additionally, the court held that the *Penn Central*[26] test did not apply to Palazzolo's claim.[27] The regulation predated his ownership of the property.[28] Therefore, Palazzolo had "no reasonable investment-backed expectations that were affected by this regulation."[29]

The United States Supreme Court granted certiorari on Palazzolo's case. First, the Court addressed the ripeness issue. The claim would not be ripe until the Council had reached a final decision regarding the applications for permits to fill the land.[30] Once it becomes clear that the Council cannot permit any development, a takings claim is likely to have ripened.[31] Based on the State's oral arguments and briefs, the Court concluded that the Council was not going to allow any fill for ordinary land use on the wetlands.[32] The landowner should not have to endure countless rounds of repetitive land use review processes, or futile applications with other agencies, just to show that his claim was ripe.[33]

The Court then considered whether Palazzolo's claim should be time-barred. The Court disagreed with the Rhode Island Supreme Court, and rejected the State's argument that Palazzolo, a post-enactment purchaser, could not challenge the regulations under the Takings Clause.[34] The Takings Clause occasionally allows a landowner to argue that a state's regulation is so unreasonable, that compensation should be awarded.[35] If the Court were to agree with the State's argument, "the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no mater how extreme or unreasonable."[36] By enacting legislation after the purchase of a property, the State would be

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23. *Id.*
24. *Id.*
25. *See id.*
26. *Penn Central* test derives from Penn Cent. Co. v. New York City, 438 U.S. 104 (1978).
27. *Palazzolo*, 121 S. Ct. at 2457.
28. *Id.*
29. *Id.* (quoting *Penn Central, supra* note 26).
30. *Id.* at 2459 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).
31. *Id.*
32. *See id.*
33. *See id.* at 2460.
34. *See id.* at 2464.
35. *Id.* at 2462.
36. *Id.*

allowed to put an expiration date on the Takings Clause.[37] Future generations have a right to challenge unreasonable limitations on land use.[38]

Nor did the Court accept the State's argument that putting the landowner on notice should bar the claim.[39] If landowners were barred from bringing claims simply because the state put them on notice, the landowners would be stripped of their ability to transfer interest which they had prior to the regulation.[40] The Court echoed their holding in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); prior owners of property must be allowed to transfer full property rights in conveying the lot.[41] Even if the landowners are on notice, post possession legislation should not time bar claims under the Takings Clause.[42]

Finally, the Court addressed the issue of whether or not the State's regulation deprived Palazzolo of all economic beneficial use of his property. Here, the Court agreed with the Rhode Island Supreme Court.[43] Palazzolo still could build a home on his property valued at least $200,000.[44] A regulation which permits this type of construction does not leave the property "economically idle."[45] The case was remanded for further proceedings.[46]

Aviall Services, Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001).

In *Aviall*, the Fifth Circuit upheld the District Court for the Northern District of Texas's decision to grant summary judgment against Aviall Services, Inc. ("Aviall").[47]

In 1981, Aviall bought an aircraft engine maintenance business from Cooper Industries, Inc. ("Cooper").[48] Having discovered that Cooper had contaminated several facilities with petroleum and hazardous substances, Aviall began a decade-long environmental cleanup, spending millions of dollars.[49] Aviall, however, did not

37. *Id.* at 2463.
38. *Id.*
39. *See id.*
40. *Id.*
41. *Id.*
42. *See generally id.*
43. *See id.* at 2465.
44. *Id.* at 2464.
45. *Id.* at 2465 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).
46. *Id.*
47. *See* Aviall Services, Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001).
48. *Id.* at 136.
49. *Id.*

contact Cooper to discuss the clean up efforts until 1995.[50] Two years later, Aviall filed suit against Cooper, basing part of its claim on CERCLA's § 107(a) "cost recovery provision."[51] Aviall later amended its complaint, dropping the § 107 claim and added a claim for contribution under § 113(f)(1) of CERCLA.[52] The District Court granted Cooper's motion for summary judgment, holding that Aviall could not assert the contribution claim unless it was subject to an action which involved a § 107(a), or § 106 claim.[53]

After briefly reviewing the structure and history of CERCLA,[54] the Court discussed the merits of the case. The Circuit Court applied a plain meaning interpretation of CERCLA's contribution section to support the District Court's holding.[55] A common definition of contribution requires that a tortfeasor face judgment before it can seek contribution from other parties.[56] In spite of this definition, Aviall, who conceded that it did not have a § 106 or § 107(a) claim against Cooper, argued that the statutory language supported its current claim.[57]

Aviall argued that the use of "may" in the statute signified a non-exclusive means for contribution; it "may choose one of several ways" to seek contribution.[58] The court held that Aviall's interpretation of the word may was inconsistent with statutory construction.[59] The word "may" can convey exclusivity as in "shall" or "must."[60] Therefore, Aviall did not have broad options as to when it could bring its contribution claim.

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50. *Id.*

51. *See id.* (noting that the CERCLA's "cost recovery" program allows innocent parties to recover environmental response costs from liable parties).

52. *See id.* (noting that Aviall also brought a state contribution claim under Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. § 361.344(a) (West 1992 & Supp. 2001)).

53. *Id.*

54. *See id.* at 137. In its review of CERCLA, the court gives four definitions for "potentially responsible parties" ("PRP's"), and notes that § 107(a) (the cost recovery provision) and § 113(f)(1) (contribution provision) are two ways for parties to recover environmental response costs. The court also distinguishes a contribution claim, which involves actions between PRP's, with cost recovery claims, which are initiated by a non-responsible party against a PRP.

55. *See id.* at 138. 42 U.S.C. § 9613(f), the contribution section of CERCLA, reads: "Any person may seek contribution from any other person who is liable or potentially liable under § 107(a), during or following any civil action under [§ 106] or under § 107(a)."

56. *See id.* (citing BLACK'S LAW DICTIONARY 329 (6th ed. 1990)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 139 (quoting WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993)).

Relying on the savings clause of § 113(f)(1),[61] Aviall argued that congressional intent was to allow a contribution claim, even if a party was not a defendant in a § 106 or § 107(a) action.[62] The court rejected this argument. The interpretation of a statute as a whole should not render a part of the statute inoperative.[63] A specific provision of a statute governs a general provision.[64] Congress did not intend for the savings clause to render the first sentence of § 113(f)(1) superfluous.[65] Instead, the provision was intended to preserve state law-based claims.[66]

Legislative history and a majority of case law also supported the court's decision. A 1986 amendment to CERCLA codified an express contribution provision in § 113(f)(1).[67]

Both House and Senate reports supported the Court's decision that a party, seeking contribution, must have faced, or potentially face, liability under § 106 or § 107(a).[68] While no federal circuit has directly weighed in on the question of contribution under CERCLA, several district courts support the Fifth Circuit Court's decision.[69]

Finally, the court considered Aviall's policy argument that upholding the district court's ruling would discourage voluntary cleanups because parties could not seek contribution unless they were defendants.[70] Although the court did not disregard this argument,[71] it held that its interpretation was consistent with the policy goals of CERCLA.[72] The court doubted that Congress intended to go beyond the traditional common law definition of

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61. *See id.* The savings clause of § 113(f)(1) reads: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]."

62. *Id.*

63. *Id.* at 140 (citing Resolution Trust Corp. v. Miramon, 22 F.3d 1357 (5th Cir. 1994)).

64. *Id.* (citing Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992)).

65. *Id.*

66. *Id.*

67. *See id.* at 141.

68. *See id.* The House report stated specifically: "This section clarifies and confirms the right of a person *held jointly and severally liable under* CERCLA to seek contribution from other potentially liable parties." H.R. REP. NO. 00-253(I)(1985), *reprinted in* U.S.C.C.A.N. 2835, 1985 WL 25943 at 26 (Leg. Hist.). The Senate report states: "parties found liable under section 106 or 107 have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid." S. REP. NO. 99-11 at 43 (1985).

69. *See id.* at 141-43. *See also* Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983 (C.D. Ill. 1998); Deby, Inc. v. Cooper Indus., 2000 U.S. Dist. LEXIS 2677; U.S. v. Compaction Sys. Corp., 88 F. Supp. 2d 339 (D.N.J. 1999) (each with a holding that supports the holding in the case at bar). *But see* Johnson County Airport Comm'n v. Parsonitt Co., Inc., 916 F. Supp. 1090 (D. Kan. 1996); Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684 (N.D. Ind. 1997); Mathis v. Velsicol Chem. Corp., 786 F. Supp. 971 (N.D. Ga. 1991).

70. *Id.* at 144.

71. *Id.* The Court agreed that the text trumped policy preferences.

72. *Id.*

contribution, which requires pending or past judgment.[73] Furthermore, parties are not daunted from voluntary cleanup.[74] They can rely on state environmental laws to recover costs from liable parties.[75] Aviall, who has state law claims against Cooper, was such a party.[76]

Save Our Heritage, Inc. v. F.A.A., 269 F.3d 49 (1st Cir. 2001).

In *Save Our Heritage, Inc.*, the First Circuit Court of Appeal denied preservationist organizations, towns, and stewards of several historic sites a petition for review of the Federal Aviation Administration's (FAA) decision to authorize a commuter airline between Boston and New York.[77]

Hanscom Field ("Hanscom"), a general aviation airport, 15 miles northwest of Boston, has been a major aviation facility since 1940.[78] To lessen the congestion of Boston's Logan International Airport, the Massachusetts Port Authority and the FAA recently expanded commercial passenger service to Hanscom.[79] The increased traffic has concerned certain Massachusetts community groups.[80]

In 1999, the FAA allowed Shuttle America Airlines ("Shuttle America") to begin operating flights from Hanscom.[81] In May 2000, Shuttle America sought to add New York's LaGuardia Airport ("LaGuardia") to its list of destinations from Hanscom.[82] To be prudent, the FAA conducted an environmental analysis, which showed that there would not be any potential adverse effect on the historic properties.[83] The petitioners Save Our Heritage and the Hanscom-area towns sent the FAA detailed criticisms to the contrary.[84] In October 2000, the FAA issued the amendment, and

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *See* Save Our Heritage, Inc. v. F.A.A., 269 F.3d 49 (1st Cir. 2001).
78. *Id.* at 53.
79. *Id.*
80. *Id.* The groups fear that increased noise, air pollution, and surface traffic from additional flights will harm the natural and historic resources near Hanscom. Among the sites of concern are: Minute Man National Historic Park, Walden Pond, and the homes of authors Ralph Waldo Emerson and Louisa May Alcott. *Id.*
81. *Id.*
82. *Id.* at 54.
83. *Id.* The FAA did not conduct an environmental study when it allowed Shuttle America to start flying from Hanscom in 1999. Nor did the FAA feel that the study was necessary in its decision to allow Shuttle America to fly from Hanscom to LaGuardia. *Id.*
84. *Id.*

Shuttle America began trips to LaGuardia.[85] The petitioners petitioned the First Circuit to review the FAA's decision.[86]

First, the court held that the plaintiffs had standing to challenge the FAA's order. The court utilized a three prong test to determine the standing issue: (1) the petitioner has to be someone who has suffered or is threatened by injury in fact to a cognizable interest; (2) the injury is casually connected to the defendant's action; and (3) the court can present a remedy for the injury.[87] The court was not persuaded by any of the FAA's three objections.[88] At least one of the plaintiffs in the groups had standing, which was sufficient to proceed with the entire case.[89] Even if the plaintiffs' claim would not trigger agency obligations, there was enough of a connection to the defendant's action to show minimal impact.[90] Finally, the plaintiffs did not have to negate every possibility that the number of flights would be the same, even if the court held in their favor.[91]

Next, the court addressed the FAA's contention that the petitioners were making untimely claims on prior orders.[92] The FAA argued that since the petitioners were disputing 1999 claims, which allowed Shuttle America to use the bigger planes needed to fly to New York, 49 U.S.C. § 46110(a) imposed a 60 day time limit on direct review.[93] The FAA argued that the petitioners did not file for review in 1999, and their claims should be barred.[94] Although the court agreed that the earlier orders were responsible for much of the impact, it held that the petitioners could claim that an additional impact would arise from the new LaGuardia flights.[95]

After discussing the standing and time issues, the court addressed the merits of the case. The Court faced two issues. First, did the FAA make a substantial error by concluding that the additional flights would have a di minimis environmental impact

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85. *Id.*

86. *Id.* The petitioners claimed that the FAA decision violated the National Environmental Policy Act of 1969 ("NEPA"), the National Historic Preservation Act of 1966 ("NHPA"), and the Department of Transportation Act of 1966. *Id.* at 54-55.

87. *Id.* at 55 (citing Cotter v. Mass. Ass'n of Minority Law Enforcement Officers, 219 F.3d 31,33 (1st Cir. 2000), *cert. denied*, 531 U.S. 1072, 121 (2001)).

88. *See id.* The FAA made three objections to the petitioners' standing: (1) none of the members of the organizations had shown they were among the injured; (2) there was no actual adverse effect on any petitioner because, the small number of flights would not have a significant environmental impact; and, (3) even if the order was overturned, the same number of flights could be flown between Boston and New York. *Id.*

89. *Id.*

90. *Id.* at 55-56.

91. *Id.* at 56.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

near Hanscom.[96] The FAA studied noise, fuel emissions, and surface traffic that could affect Hanscom.[97] Hanscom handled just under 100,000 flights in 1999.[98] The LaGuardia flights would add, at most, 10 additional flights per day.[99] Realistically, there would be a 2.5 percent increase in Hanscom flights per year, a trivial number.[100] The surface traffic impact was also minimal.[101] At worst, the peak traffic would increase on Route 2A, a main thorough way through the Hanscom area, by 2.65 percent.[102] Finally, the FAA correctly concluded that the fuel emissions with LaGuardia flights would be "below de minimus levels."[103] The FAA did not err by deciding that the additional flights would a have a small environmental impact near Hanscom.

The court noted that the petitioners could overcome the FAA's findings with an organized rebuttal.[104] The petitioners, however, made no direct attack on the aircraft noise or air pollution conclusions.[105] The court chided this reaction stating, "[G]auzy generalizations and pin-prick criticisms, in the face of specific findings and a plausible result, are not even a start at a serious assault."[106]

The court then discussed the second issue, whether the FAA made a procedural error by not consulting with governmental agencies concerned with historic preservation.[107] The court did not explicitly say that the FAA made an error.[108] A project is not environmentally controversial simply because vocal opponents exist.[109] The court concluded that even if the FAA had made an error by not making a more formal assessment, it was harmless.[110] The FAA did not refuse to study environmentally problematic consequences.[111] Contrarily, considering the small number of flights, it conducted a thorough examination of the effect on

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96. *Id.* at 57.
97. *Id.* at 58-59.
98. *Id.* at 58.
99. *Id.*
100. *Id.*
101. *Id.* at 59.
102. *Id.*
103. *See id.* at 59.
104. *Id.* at 60.
105. *Id.*
106. *Id.*
107. *Id.* at 57.
108. *See id.* at 61-62.
109. *Id.* at 61 (citing Found. For N. Am. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982)).
110. *Id.*
111. *Id.* at 62.

Hanscom.[112] The court echoed its displeasure with the petitioners' lack of evidence to the contrary.[113] The FAA's decision was upheld.

III. FLORIDA DECISIONS

Pinecrest Lakes, Inc. v. Karen Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001).

In *Pinecrest*, the Fourth District Court of Appeal faced an unprecedented issue of Florida law.[114] It concluded that a trial court has the authority to order the complete demolition of several multi-story buildings which are inconsistent with a county's comprehensive land use plan.[115]

Pinecrest Lakes, Inc. ("Pinecrest") had been developing a five hundred acre parcel of land in Martin County for over twenty years.[116] The development culminated in Phase Ten, the phase in dispute.[117] Each phase had to coordinate with the county's Comprehensive Plan as residential real estate; single-family homes on individual lots, with a maximum density of two units per acre ("UPA").[118] Phase Ten's final plan included 136 units, in two-story buildings, with a density of 6.5 UPA.[119] The county's growth management staff recommended that the County Commission approve Phase Ten.[120] Before permitting nineteen of the two-story buildings, the Commission heard protests from the area's residents, including Karen Shidel, a resident who opposed Phase Ten since its introduction in 1986.[121]

Shidel, along with Charles Brooks and other homeowners, filed a civil action in the Martin County Circuit Court, pursuant to *Florida Statutes* section 163.3215(1) (1995).[122] They alleged that the development order was inconsistent with the county's

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112. *See id.*
113. *See id.* at 63.
114. *See* Pinecrest Lakes, Inc. v. Karen Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001).
115. *See id.* at 193.
116. *Id.*
117. *Id.*
118. *Id.* The Comprehensive Plan reads: "[w]here single family structures comprise the dominant structure type within these areas, new development of undeveloped abutting lands shall be required to include compatible structure types of land immediately adjacent to existing single family development." *Id.*
119. *See id.* at 194.
120. *Id.*
121. *Id.*
122. FLA. STAT. § 163.3215(1) (1995) reads: "Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order...which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part." *Id.* n.5.

Comprehensive Plan.[123] The trial court, looking only at the record before the County Commission, ruled that the development order was consistent with the Comprehensive Plan.[124]

Knowing that the case was going to be appealed, and that if victorious the homeowners would seek demolition as a remedy,[125] the developer started building five of the units.[126] In 1997, the Fourth DCA reversed the trial court's decision, ruling that the development order did not comply with the county's Comprehensive Plan.[127] The DCA remanded the case for a trial de novo, and appropriate relief.[128]

On remand, the trial judge[129] first considered the consistency issue.[130] The Comprehensive Plan established a hierarchy of land uses.[131] New structures, added immediately adjacent to an existing structure, have to be "comparable and compatible" to the ones already built.[132] The new, two story apartment buildings from Phase Ten were not "comparable and compatible" to the already existing, single family homes of Phase One.[133] Nor were the buildings of comparable density.[134] The development order was inconsistent with the Comprehensive Plan.[135]

Having determined the consistency issue, the trial judge then considered an appropriate remedy.[136] Meanwhile, the developer continued with construction.[137] As a possible remedy, Shidel could seek injunctive relief.[138] The judge found that the developer, having continued construction while the appeal was pending, acted in bad faith, and at his own peril.[139] As a consequence, the land in dispute was to be restored to its status prior to construction,

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123. *See Pinecrest*, 795 So. 2d at 194.
124. *See id.*
125. When construction began, Shidel and Brooks sent the developer a letter informing him that if they won, they would seek demolition as a remedy. *Id.* at 195.
126. *Id.*
127. *See id.*
128. *Id.*
129. On remand, the case was assigned to a new judge. *See id.* n.7.
130. *Pinecrest*, 795 So. 2d at 195.
131. *Id.*
132. *Id.* at 196.
133. *Id.*
134. *Id.*
135. *Id.*
136. *See id.*
137. *Id.* The County conducted final inspection on two of the buildings, issued certificates of occupancy (CO), and allowed the residents to move into the buildings. *Id.*
138. *Id.* The judge found no evidence that Brooks and the Homeowner's Association were damaged by the diminution in value. The Homeowner's Association was not a person under FLA. STAT. § 163.3215(2), and could not seek relief. *Id.*
139. *Id.*

notwithstanding the completed buildings.[140] Following this judgment, the developer filed an appeal and moved for a stay pending review.[141] The trial court granted the stay,[142] and the DCA heard the appeal.

Similar to the trial judge, the DCA addressed the consistency issue first. The court upheld the trial judge's decision, rejecting the developer's argument that the trial court committed a reversible error by not deferring to the County Commission's interpretation of it's own Comprehensive Plan.[143] Section 163.3215(1) was silent regarding deference to the County Commission.[144] If the legislature intended for the courts to defer to the county commissions, there would be language to that effect in the statute.[145] A strict interpretation of the statute reads that all development must conform to the comprehensive plans.[146] Consistency with the comprehensive plan is not discretionary.[147] Pursuant to section 163.3215, citizen enforcement is the best method to ensure that development decisions will be consistent with comprehensive plans.[148] Therefore, the developer's argument that the court should have deferred to the county commission was inconsistent with the structure of section 163.3215.[149]

The Comprehensive Plan's tiering policy was enacted to handle how development should be added to the existing single-family residential communities.[150] The policy required a transition zone

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140. *Id.* At this point, five of the eight-unit buildings had been built, and fifteen of the sixteen units had been occupied. The remaining buildings were between 50 and 66 percent finished. *Id.*

141. *Id.*

142. *Id.* The court granted the stay only towards the demolition order. The lessees could continue in possession of the buildings under lease. The developer was prohibited from renewing any existing leases. *Id.* at 196-97.

143. *See id.* at 197. Intermingled with its analysis of the consistency issue, is a thorough examination of the history of land development statutes in Florida. *Id.* at 198. The court notes that since the first growth management statute, the Local Government Comprehensive Planning Act of 1975, two trends have developed in the field. *Id.* at 198-99. First, property owners' and citizen groups' standing to challenge land development decisions of local governments has become more liberal. *Id.* at 199-200. The Growth Management Act of 1985, which created FLA. STAT. § 163.3215, is largely responsible for this. *Id. See* Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), which the Pinecrest court calls "the most significant land use decision by the supreme court in the past decade." *Id.* at 200. Second, counties, which initially had virtually exclusive interpretation of their comprehensive plans, have succumbed to the courts' stricter scrutiny of local government development orders. *Id.* at 201-02.

144. *Id.* at 202.

145. *Id.*

146. *See id.*

147. *Id.*

148. *Id.* at 202.

149. *Id.*

150. *Id.* at 203.

where Phase Ten and Phase One intersected.[151] In this zone, the Phase Ten development was to consist of buildings of "comparable density and compatible dwelling unit types."[152] The two story buildings, with a 6.6 UPA, were neither comparable nor compatible with the single-family dwellings of Phase One.[153] The trial court was correct in ruling that the Development Order was inconsistent with the Comprehensive Plan.[154]

The DCA then discussed the trial court's decision to demolish five of the multi-family residential buildings.[155] Pinecrest argued against the "enormity and extremity of the injunctive remedy imposed by the trial court," calling it the most radical remedy ever given by a Florida court regarding an inconsistency with the Comprehensive Plan.[156] As an alternative remedy, Pinecrest suggested that it could compensate Shidel for her $26,000 diminution in property.[157] Demolition of the buildings would result in a loss of $3.3 million dollars to the developer.[158]

Furthermore, Pinecrest argued that the trial court failed to consider the traditional elements for injunctive relief.[159] Injunctions are usually denied if the party seeking relief cannot demonstrate "a particular harm for which there is no adequate remedy at law."[160] The court returned to a plain reading of the statute, noting that the legislature has the authority to set forth a remedy of its choice.[161] A plain reading of section 163.321 showed that the legislature suggested injunctive relief as a means of supporting public interest.[162] In the case at bar, the public interest was to demolish the existing buildings that did not conform to the Comprehensive Plan.[163]

To enforce the injunctive relief, warranted by the statute, the party seeking the relief has to meet two elements.[164] The party must be (1) aggrieved or affected by (2) an approved project that is

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151. *Id.*
152. *Id.*
153. *Id.* The Phase One units had a .94 UPA. *Id.*
154. *See id.* at 204.
155. *See id.*
156. *Id.*
157. *See id.* at 207.
158. *Id.* at 204, 207.
159. *Id.* at 204
160. *Id.*
161. *See id.* at 204-05.
162. *See id.* at 205-06.
163. *See id.*
164. *See id.* at 206.

inconsistent with the Comprehensive Plan.[165] Shidel met both of these elements, and the remedy of demolition was appropriate.

The court was eager to point out its disapproval of the developer's suggestion that it could compensate Shidel for the diminution in her property. If the court allowed the developer to compensate an aggrieved party for the diminution in value of her property, other developers would be able to circumvent the statute with "pay offs."[166] Rarely would the diminution of value in a neighbor's property be more than the cost of a large development project.[167] Relying on *Welton v. 40 Oak Street Building, Corp.*,[168] the court held that financial relief to appellants is not the only factor in weighing equities.[169] The trial court had the power to order the remedy of demolition.

Dusseau v. Metropolitan Dade County Board of County Comm'rs, 794 So. 2d 1270 (Fla. 2001).

In *Dusseau*, the Supreme Court of Florida remanded a decision granting a special zoning exception.[170] The court asked the circuit court to apply the three-pronged *Vaillant* test on remand.[171]

University Baptist Church sought to build a new church in an area zoned for single-family one-acre estates.[172] Churches are permitted a special exception to the zoning requirements.[173] Charles Dusseau, and other residents in the area where the church was to be built, only approved of a "simple church."[174]

Before arriving in the supreme court, the project endured a long procedural history. The project was initially approved by local agencies.[175] Notwithstanding the approval, the Zoning Appeals

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165. *Id.*
166. *See id.* at 207-08.
167. *Id.*
168. 70 F.2d 377 (7th Cir. 1934).
169. *Id.* at 208.
170. *See* Dusseau v. Metropolitan Dade County Board of County Comm'rs, 794 So. 2d 1270 (Fla. 2001).
171. *See id.*
172. *Id.* at 1272. The Church wanted to build on 19.7 acres in Miami-Dade County, which they owned.
173. *See id.*
174. *Id.*
175. *Id.* Eleven local agencies initially approved the project: the Zoning and Planning Department, the Department of Environmental Resource Management, the Public Works Department, the Water and Sewer Authority, the Fire Department, the Metro-Dade Transit Agency, the School Board, the Solid Waste Department, the Parks Department, the Public Safety Department, and the Aviation Department.

Board denied the application.[176] After testimony from both sides and a hearing, the County Commission approved the project with a 9 to 2 vote.[177] Then, in a 2 to 1 vote, the circuit court reversed the commission's decision.[178] Finally, the Third District Court of Appeal quashed the circuit court's decision, granting the petition.[179]

The Florida Supreme Court first discussed the applicable law for reviewing a decision regarding the application for a special exception. In *Florida Power & Light Co. v. City of Dania*,[180] the court added that once an agency has ruled on the application for special exception, the parties may seek review under a two-tiered certiorari system.[181] Under the first tier, a party may seek review in a circuit court.[182] The circuit court then applies the three-prong *Vaillant* test: (1) was procedural due process accorded; (2) have the essential requirements of the law been observed; (3) were the administrative findings and judgment supported by "competent substantial evidence."[183] Under the second tier, the parties can seek review of the circuit court decision at the district court of appeal ("DCA") level.[184] Since the circuit court's decision is usually conclusive, the review at the DCA level is limited.[185] A key difference between the two levels of review is that the "competent substantial evidence" prong is absent from the district court standard.[186]

Having discussed the applicable law, the court turned to the merits of the case. The court found that the circuit court erred in its review of the Commission's decision.[187] Instead of reviewing the Commission's decision to grant the exception, the circuit court

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176. *Id.*

177. *Id.*

178. *Id.* The circuit court held that there was "no competent substantial evidence" that the church qualified for a special exception. Contrarily, there was "competent substantial evidence" that the church did not meet the code criteria for a special exception. Dusseau v. Board of County Comm'rs, No. 97-115 AP, slip op. at 8 (Fla. 11th Cir. Ct. May 22, 1998).

179. *Id.* at 1273. The Third DCA held that the circuit court concentrated primarily on the neighbors' attorney, and expert witness testimony. The circuit court "departed from the essential requirements of law" by reweighing, and completely ignoring, evidence which supported the Commission's ruling. Metropolitan Dade County v. Dusseau, 725 So. 2d 1169 (Fla. 3d DCA 1998).

180. 761 So. 2d 1089 (Fla. 2000).

181. *See Dusseau*, 794 So. 2d at 1273 (citing Florida Power & Light, 761 So. 2d at 1092).

182. *See id.* at 1273-74.

183. *See id.* at 1274. The Vaillant test derives from City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982).

184. *See id.*

185. *See id.*

186. *See id.* "The district court may not review the record to determine whether the agency decision is supported by competent substantial evidence." Florida Power & Light, 761 So. 2d at 1092-93.

187. *See Dusseau*, 794 So. 2d at 1275.

reweighed the evidence, and made a determination that there was no "competent substantial evidence" that the church met the criteria for a special exception.[188] Ultimately, the circuit court usurped the agency's fact-finding authority.[189]

While it completely disagreed with the circuit court's decision, the Florida Supreme Court partially disagreed with the DCA's decision.[190] The DCA correctly ruled that, by reweighing evidence and completely ignoring the Commission's decision, the circuit court erred.[191] The DCA, however, also erred by holding that the Commission's decision was supported by "competent substantial evidence."[192] The district court, which is allowed a limited review of the circuit court under the two tiered certiorari system, see, supra, did not have the authority to review this aspect of the Commission's decision.[193] Consequently, the district court usurped the circuit court's jurisdiction.[194]

The court remanded the case to the circuit court, to apply the three-pronged *Vaillant* test, and determine if the Commission's decision was correct.[195]

Central Florida Investments, Inc. v. Orange County Code Enforcement Bd., 790 So. 2d 593 (Fla. 5th DCA 2001).

In *Central Florida Investments*, the Fifth District Court of Appeals affirmed an order dismissing a suit by Central Florida Investments, Inc., Westgate Lakes, Inc., and Westgate Lake Owners' Association, Inc. ("Central Florida"), against Orange County Code Enforcement Board ("County").[196] Central Florida failed to exhaust all administrative remedies before bringing suit against the County.[197]

Central Florida owns a condominium resort on Big Sand Lake in Orange County.[198] In July of 1993, Central Florida sought

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188. *Id.*
189. *Id.*
190. *See id.*
191. *Id.* (citing *Dusseau*, 725 So. 2d at 1171).
192. *Id.*
193. *Id.* at 1275-76.
194. *Id.*
195. *Id.* at 1276.
196. *See* Central Florida Investments, Inc. v. Orange County Code Enforcement Bd., 790 So. 2d 593 (Fla. 5th DCA 2001).
197. *See id.*
198. *Id.* at 595.

permission to rent out a ski boat, and six jet skis on the lake.[199] Although its neighbors approved of the plan, the County issued a notice that Central Florida was violating the Orange County Code by using motorized watercrafts on the lake.[200] Central Florida filed for a writ of certiorari to obtain an amendment to the development plan.[201] The court granted the petition, and issued a temporary injunction, allowing Central Florida to rent out the watercraft.[202] Despite its success, Central Florida withdrew its application for the amendment, and ceased renting out the watercraft.[203] Central Florida then filed an amended complaint against the County.[204] The County successfully moved to dismiss the suit, alleging that Central Florida failed to exhaust administrative remedies.[205] Central Florida appealed.[206]

The court rejected all three of Central Florida's arguments as to why they did not need to exhaust administrative remedies in the case at bar. First, Central Florida argued that it did not have to exhaust its remedies because there was no pending administrative proceeding; the County had already decided that Central Florida had no riparian rights on the lake.[207] The court could not find a statement by the County to support this assertion.[208] The County claimed that Central Florida's predecessor agreed to restrict motorized watercraft on the lake in exchange for zoning to allow timeshare units.[209] Central Florida argued that the agreement never existed.[210] The court felt that this dispute was all the more reason for Central Florida to exhaust all administrative remedies before pursuing a cause of action.[211]

Central Florida's second argument was that the lawsuit involved constitutional claims, which could not be determined by the County.[212] The court acknowledged that riparian rights exist in

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199. *Id.*
200. *Id.* In January 1993, the Zoning Development Review committee recommended approval of an amendment to the development plan, which would allow the watercraft on the lake.
201. *Id.* Central Florida also filed a lawsuit, claiming it should be able to use motorized watercraft on the lake.
202. *Id.*
203. *Id.*
204. *Id.* at 596.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 597.
210. *Id.*
211. *Id.*
212. *Id.*

Florida as a constitutional right.[213] A county, however, can regulate constitutional rights.[214] The court also acknowledged that landowners can make a general attack on the validity of an ordinance without exhausting administrative remedies.[215] When the landowner, however, alleges that the ordinance is unconstitutional "only as applied to particular property," the landowner must apply for a variance or exception before the party can seek judicial review.[216] Since Central Florida was challenging action specific to its property, without an application for a variance or special exception, it was required to exhaust all administrative remedies.[217]

Finally, Central Florida argued that further administrative action on its part would be futile; ultimately, its request would be denied.[218] Central Florida was specifically concerned with unfavorable comments made by the former County Chairman.[219] The court pointed out that there was a new chairman, and, regardless, the County chairperson does not speak for the entire county.[220] Central Florida still had an opportunity, if it exhausted all administrative remedies, to get the amendment it was seeking.[221]

IV. NOTABLE BILLS PASSED DURING FLORIDA'S 2001 LEGISLATIVE SESSION

The descriptions below are excerpts from the Environmental & Land Use Law Section of The Florida Bar summary of the 2001 legislative session, prepared by Eric T. Olsen of Hopping, Green, Sams and Smith, P.A., and Angela Dempsey, a Senior Assistant General Counsel at the Florida Department of Environmental Protection.[222] The reader is encouraged to research the Senate or House Committee summary reports compiled by legislative staff and listed at the Florida Legislature's web site.[223] Summaries for many of these bills are also available at either the Department of

213. *Id.* (citing Feller v. Eau Gallie Yacht Basin, Inc., 397 So. 2d 1155 (Fla. 5th DCA 1981)).
214. *Id.* (citing Intracoastal N. Condo. Ass'n, Inc. v. Palm Beach County, 698 So. 2d 384 (Fla. 4th DCA), rev. denied, 703 So. 2d 476 (Fla. 1997)).
215. *Id.*
216. *Id.* (citing Lee County v. Morales, 557 So. 2d 652 (Fla. 2d DCA), rev. denied, 564 So. 2d 1086 (Fla. 1990)).
217. *Id.*
218. *Id.*
219. *Id.* at 598.
220. *Id.*
221. *Id.*
222. www.eluls.org
223. www.leg.state.fl.us

Community Affairs' site,[224] or the Department of Environmental Protection's web site.[225]

CS/HB 9 Solid Waste Management Facilities/Recycling Chapter *2001-224, Florida Statutes*

An individual who applies for a permit to build, or substantially remodel, a solid waste management facility, must notify the local government, which has jurisdiction over the facility, of the filing of the application on or before the day the application for permit is filed. The individual must also publish the notice in a newspaper of general circulation.

The bill amends section 403.71851, Florida Statutes, replacing lead-containing materials grants with electronic recycling grants. Pursuant to the bill, funds from the Solid Waste Management Trust Fund can be used as grants to Florida businesses that recycle electronic equipment. The bill also provides certain grants to counties to develop methods to collect and transport electronics for recycling. The methods must be comprehensive in nature.

Finally, the bill requires the DEP to review the waste reduction and recycling goals from part IV of Chapter 403, F.S. The DEP must make recommendations to the Governor, Senate President, and House Speaker by October 31, 2001.

HB 945 Palm Beach County Solid Waste Authorization

This bill codifies all prior special acts that relate to the Solid Waste Authority of Palm Beach County into a single act. The bill repeals prior acts, pursuant to section 189.429, F.S. HB 945 reenacts the majority of the Authority's current provisions, which include provisions for permitting, assessments and enforcement. Finally, the bill adds provisions for severability and liberal construction.

HB 1635 Environmental Litigation Reform Act *Chapter 2001-258, Florida Statutes*

This act was designed to simplify the DEP's various administrative fine authority provisions. By creating an administrative penalty schedule for cases with a penalty of $10,000 or less, the act establishes a more predictable and efficient process for the resolution of less serious environmental disputes.

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224. www.dca.state.fl.us
225. www.dep.state.fl.us

In the absence of resolution, the less serious environmental cases are sent to the administrative process instead of civil court. The administrative law judge (ALJ) has the discretion to adjust the penalty. Single violations range from $500-$5000 each. The ALJ can increase the penalty, provided it does not exceed $10,000. The ALJ may also decrease the penalty by 50%. If the violation was the result of circumstances beyond the reasonable control of the respondent, the ALJ can reduce the penalty by more than 50%.

The act allows other protections to violators. The hearing must be heard no later than 180 days of being sent to the Division of Administrative Hearings (DOAH). The parties can agree to a later date. If corrective actions are not pursued in the Notice of Violation (NOV), they are waived. The ALJ issues the final order, not the DEP. If DEP issued the NOV for an improper purpose, attorney's fees, not exceeding $15,000, can be awarded.

The act allows the respondent to "opt out" of the administrative process by filing a written notice within twenty days of service. DEP can still pursue the case in civil court. The DEP has to submit a report to the legislature within two years. The report shall contain the number of NOV's issued, penalties assessed, penalties collected, and the efficiencies gained from the act.

HB 1221 Water Management District Legislation Chapter 2001-256, *Florida Statutes*

This bill pertains to changes in the internal budgeting and land acquisition procedures for water management districts (districts). The bill also gives districts the authority to secure patents, copyrights, and trademarks in light of scientific breakthroughs which are anticipated as part of the Everglades research and development. The districts are given an option to convey their mineral interest in the properties that they sell. Districts may also withhold title information to prospective sellers. Assuming a district has contracted to assist in the purchase of certain properties, it is authorized to disclose appraisal and offer information with third parties.

The bill allows districts to lease cell towers, and similar structures, on district property. Regarding the district's budget, the bill revises notices and scheduling information. Sections 373.507 and 373.589, which deal with district audits, are repealed.

The bill allows any investor-owned utility, regulated by the Public Service Commission, to obtain all of its costs for the construction of alternative water supply facilities. HB 1221 adjusts the composition of the Manasota Basin Board, allots $100 million to South Miami for a drinking water facility.

CS/SB 1524 Comprehensive Everglades Restoration Chapter 2001-172, *Florida Statutes*

This bill creates an expedited permitting program for project components of the Comprehensive Everglades Restoration Plan (CERP). CERP works to protect and preserve water resources of the central and southern Florida ecosystem.

CS/SB 1524 creates section 373.1502, F.S., which provides special permits for CERP project components. The bill makes sure that permit applications provide reasonable assurances that the project component will result in the objectives set forth in the application, and any impacts to the wetlands or threatened or endangered species will be avoided.

Finally, construction can begin only after submission of a permit application and completion of DEP's review of the project. Permits must include conditions to ensure appropriate water quality monitoring during construction and operation. Permits may allow multiple project components.

CS/SB 1662 Environmental Protection Disposal Fee Chapter 2001-193, *Florida Statutes*

Private and governmental utilities, in certain counties, that dispose of wastewater residual sludge by land application in the Lake Okeechobee basin are authorized to impose a line item on local sewer rates. The line item will cover the cost of wastewater residual treatment methodology. The counties selected for this bill are Monroe, Miami-Dade, Broward, Palm Beach, Martin, St. Lucie, Indian River, Okeechobee, Highlands, Hendry and Glades.

If the county disposes of the residual sludge by land spreading, it may impose a line item fee called an "environmental protection disposal fee." This fee pertains to local sewer rates, if they meet disposal requirements.

The bill also contains specifications on how to use fee proceeds. It requires the Florida Public Service Commission, or the county receiving compensation from the fee, to conduct an audit at least every three years.

CS/HB 41 Water and Wastewater Regulation Chapter 2001-145, *Florida Statutes*

This bill deals with the process used in rates at the county level for regulation of investor-owned water and wastewater systems. The bill also addresses the recovery of rate case expense by all water and wastewater utilities.

Section 120.569 and 120.57, F.S., provisions are no longer explicitly made applicable to county regulatory proceedings. Pursuant to section 367.171(8), the Office of Public Counsel can provide legal representation in proceedings before counties. Upon conclusion of the period over which rate case expenses were apportioned, rates of water and wastewater companies shall be reduced. The reduction shall be in the amount of rate case expense included in rates.

HB 1863 Onsite Sewage Treatment Systems Chapter 2001-234, *Florida Statutes*

The Department of Health has regulatory authority over maintenance entities for performance-based treatment systems and aerobic treatment systems. Maintenance groups are required to employ licensed professionals who are responsible for maintenance and repair of systems under contract. This bill also discusses specific permitting requirements and fees for these systems. As an example, operating permits for commercial wastewater systems are valid for a year; operating permits for an aerobic treatment unit are valid for two years. Minimum qualifying criteria for the systems is created by rule. It must include matters such as training, access to spare parts, and service response time.

CS/SB 1030 Water Resources Chapter 2001-270, *Florida Statutes*

This bill changes several definitions for water supply and wastewater operations. The new definitions have regulatory consequences on operating and maintaining water and wastewater facilities. Local government agencies, which qualify for water pollution control financial aid, now include entities providing wastewater sewage and storm water services to airports, research parks, industrial parks, and ports.

Primary and secondary drinking water regulations apply to non-transient and transient noncommunity water systems. If a system uses groundwater for their water supply, variances and waivers will be authorized, from disinfection and certified operator requirements, for transient noncommunity water systems.

The DEP may require data showing that water delivered to the customer's tap meets applicable drinking water standards. This may cause retrofitting requirements for older systems which use copper pipes.

To conform to legislation, DEP must amend its public water supply and water well contractor licensing rules. DEP must adopt a rule for renewal of the licenses, including continuing education requirements. New license and fee requirements are imposed on

water distribution system operators. There is a new classification scheme for water and wastewater treatment systems. Classification by size, complexity and level of treatment is expanded to include water distribution systems.

Finally, this bill repeals sections 403.1822, 403.1823, 403.1826, and 403.1829, F.S.

CS/HB 589 Local Government Utilities Assistance Act Chapter 2001-229, *Florida Statutes*

This bill establishes a pilot program in the DEP to help local governments acquire privately owned water and wastewater utilities which have public health or economic problems. Regarding the Pasco County program, the DEP has to report to the legislature by January 1, 2004. The bill gives $500,000 to DEP for a uniform fiscal impact analysis model that aids local governments in evaluating the cost of infrastructure to support development.

Local governments, covered by the Pasco County pilot program, have to show the following in order to receive funds: 1) it has provided service consistently inadequate to meet public health or water quality standards; 2) it is unable to alleviate a public health or water quality threat through its own resources, without increasing its rates beyond community standards; 3) it desires to sell; and 4) presents a public health or water quality threat that would be more effectively addressed through public management or ownership.

CS/CS/SB 1204 FFWCC Technical Amendments *Chapter 2001-272*

Among the provisions in this bill that relate to the Florida Fish and Wildlife Conservation Commission (FFWCC), are the following: 1) designates the Railroad Retirement Board as an agency to make certain disability determinations; 2) changes the permit standards for marine aquaculture producers who are engaged in culturing shellfish; 3) provides for a legislator appointee to Atlantic States Marine Fisheries Commission and the Gulf States Marine Fisheries Commission; 4) transfers responsibilities for artificial reef permits to the DEP; 5) provides that FFWCC must approve posting and maintaining of regulatory markers in navigable waters; and 6) encourages the release and feeding of quail on lands managed by state agencies.

CS/SB 1468 Land Acquisition Chapter 2001-275, *Florida Statutes*

This bill makes minor changes to the Florida Forever criteria. The bill's legislative intent is to pay back $75 million to everglades restoration in fiscal year 2002-2003. The bill rewrote the acquisition criteria for Florida Forever, placing emphasis on water quality and quantity based acquisitions. An emphasis was also placed on recreation-based parcels.

The time period for evaluating whether lands should be surplused or disposed of by the Trustees is extended from every three years to every five years. Surplused lands are offered state and local governments for thirty days at appraised value, unless the Trustees determine a different sales price. If a parcel of land was donated to the state without payment of money, that land may be surplused based on one appraisal, unless the land is more than $1 million.

CS/CS/SB 1376 Financial Protection for Mining Operations Chapter 2001-134, *Florida Statutes*

This bill provides a funding source for DEP to respond to imminent hazard abatement activities, which are the result of a mining facility's financial troubles. The money from the Nonmandatory Land Reclamation Trust Fund, $50 million, must be repaid in a $75,000 per year stack fee. This fee, covering a five-year period, will also be applied to any new stacks constructed. DEP must provide notice to phosphogypsum stack owners regarding payment of the fee on August 1 of each year. The fee is payable by August 31 of each year.

This bill also authorizes the DEP to take necessary closure steps by court order, or through an agreement with the mine owner. The DEP can authorize a lien on the mine's real property and assets. The lien will be equal to the amount of money spent from Nonmandatory Land Reclamation Trust Fund.