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Jeanne B. Curtin

RECENT DEVELOPMENTS IN LAND USE AND ENVIRONMENTAL LAW

JEANNE B. CURTIN*

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INTRODUCTION

This section highlights significant recent developments in federal and state environmental and land use case law. In addition to the sources cited in this section, the reader is encouraged to consult the official website of the Florida Legislature at <www.leg.state.fl.us>, and the website of the Environmental and Land Use Section of the Florida Bar <www.eluls.org>. Other useful sources the reader may wish to consult include the website of the Florida Department of Environmental Protection <www.dep.state.fl.us>, the Environmental Protection Agency's website <www.epa.gov>, and Enviro-Net <www.enviro-net.com> for recent news stories.

I. FEDERAL CASES

Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et. al., 121 S. Ct. 903 (February 27, 2001)

On February 27, 2001, the United States Supreme Court, in a unanimous decision, held that: (1) section 109(b)(1) of the Clean Air Act (CAA) does not allow the Environmental Protection Agency (EPA) to consider costs when setting primary ambient air quality standards; (2) the scope of discretion allowed by section 109(b)(1) was not a violation of the nondelegation doctrine; (3) EPA's implementation policy for the revised ozone National Ambient Air Quality Standards (NAAQS) was final agency action and was ripe

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*J.D., The Florida State University College of Law (expected 2001).

for judicial review; and (4) EPA's interpretation of sections 7501-7515 of the CAA was unreasonable and, therefore, unlawful.[1]

Section 109(b)(1) of the CAA instructs EPA "to set primary ambient air quality standards 'the attainment and maintenance of which ... are requisite to protect the public health' with 'an adequate margin of safety.'"[2] The Court found that this language clearly made no reference to cost considerations and noted that the CAA had expressly authorized cost considerations in other sections, making any finding of cost considerations in ambiguous sections of the CAA improper.[3] The Court went on to point out that the States are the *implementers* of the CAA and, therefore, "the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan."[4]

The Court disagreed with the Court of Appeals for the District of Columbia Circuit's finding that the EPA's interpretation of section 109(b)(1) of the CAA violated the nondelegation doctrine.[5] The Court of Appeals held that section 109(b)(1), which directs the EPA to set ambient air quality standards that are requisite to protect the public health, provided no "intelligible principles" to guide EPA.[6] The Court concluded that the term "requisite" did, in fact, provide guidance to EPA as "[r]equisite ... 'mean[s] sufficient, but not more than necessary.'"[7] The Court also pointed out that it has never required statutory schemes to provide a "determinate criterion" that instructs an agency as to "how much [of the regulated harm] is too much."[8]

Next, the Court found that EPA's implementation policy for the revised ozone NAAQS was final agency action and was ripe for judicial review.[9] On the day that the final ozone NAAQS was promulgated, EPA issued an explanation of implementation procedures as a supplement to a White House memorandum that was published in the *Federal Register* which set forth implementation

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1. *See* Whitman, Administrator of Envtl. Prot. Agency, et. al. v. Am. Trucking Ass'ns, Inc., et. al., 121 S. Ct. 903 (February 27, 2001).

2. *Id.* at 908 (citing 42 U.S.C. § 7409(b)(1)).

3. *See id.* at 908–911.

4. *Id.* at 911 (quoting Union Elec. Co v. EPA, 427 U.S. 246, 266 (1976)).

5. *See id.* at 912.

6. *See id.* (quoting Am. Trucking Ass'ns, Inc. v. Envtl. Prot. Agency, 175 F.3d 1027 at 1034 (1999).

7. *Id.* (citing Tr. of Oral Arg. in No. 99-1257, pg. 7).

8. *Id.* at 913 (quoting *Am. Trucking*, 175 F.3d at 1034).

9. *See id.* at 914–917.

procedures that EPA was to follow.[10] Moreover, "[s]ince that interpretation issued, the EPA has refused in subsequent rulemakings to reconsider it, explaining to disappointed commenters that its earlier decision was conclusive."[11] Thus, while EPA had not followed procedural requirements finalizing its interpretation, the agency's actions indicated that its interpretation was final.[12]

Finally, the Court concluded that while it was required to defer to a *reasonable* agency interpretation of an ambiguous statute pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[13] EPA's interpretation was not reasonable because it effectively nullified certain provisions of the CAA.[14] This issue concerned the relationship between Subpart 1,[15] which sets forth general requirements for nonattainment areas (areas whose ozone levels exceed the maximum permitted level), and Subpart 2,[16] which was added by the CAA Amendments of 1990 and addresses ozone.[17] Arguably, both Subpart 1 and Subpart 2 could apply to the new ozone standard.[18] Subpart 1 grants EPA regulatory discretion in determining requirements and deadlines for nonattainment areas, whereas Subpart 2 sets forth specific classifications and a schedule for nonattainment areas as a matter of law.[19] EPA argued that "Subpart 2 was simply Congress's 'approach to the implementation of the [old] 1-hour standard, and so there was no reason that 'the new standard could not simultaneously be implemented under . . . [s]ubpart 1.'"[20] The Court responded that "[t]o use a few apparent gaps in Subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative is to go over the edge of reasonable interpretation."[21] Additionally, the Court was astonished by EPA's interpretation because Subpart 2 was written to govern implementation through 2010.[22] EPA must now

10. *See id.*
11. *Id.* at 915.
12. *See id.*
13. 467 U.S. 837 (1984).
14. *See* Whitman, 121 S.Ct. 903 at 915 (2001).
15. 42 U.S.C. §§ 7501-7509a.
16. 42 U.S.C. §§ 7511-7511f.
17. *See* Whitman, 121 S. Ct. 903 at 917–19.
18. *See id.*
19. *See id.* at 918.
20. *Id.* (quoting 62 Fed. Reg. 38856, 3885 (1997)).
21. *Id.*
22. *See id.* at 919.

develop a reasonable interpretation of the nonattainment implementation provisions as they apply to revised ozone NAAQS.[23]

"The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for proceedings consistent with this opinion."[24]

Central Green Co. v. U.S., 121 S. Ct. 1005 (Feb. 21, 2001)

The United States Supreme Court held that in cases involving immunity pursuant to the Flood Control Act of 1928, "courts should consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project."[25] At issue was whether the words "flood or flood waters" refer to all waters that run "through a federal facility that was designed and is operated, at least in part, for flood control purposes."[26] The Court remanded the case for a determination of whether section 702(c), which grants the United States immunity from damage caused by floods or flood waters, applies in an action against the United States for damages allegedly caused by flooding from a federally owned canal.[27]

In 1928, incident to the authorization of a flood control project, "Congress enacted an immunity provision which stated that 'no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."[28] In 1986, petitioner brought suit against the United States and the Madera Irrigation District for damages from the flooding of petitioner's orchards which was allegedly caused by the negligent design, construction, and maintenance of the Madera Canal, which runs through petitioner's property.[29] The District Court dismissed the complaint because the canal was a part of Central Valley Project (Project), one of the purposes of which is flood control.[30] Although the United States Court of Appeals for the Ninth Circuit agreed with petitioner that the Canal served no flood control purpose, it nonetheless affirmed, reasoning that immunity attached *solely*

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23. *See id.*
24. *Id.*
25. *See* Cent. Green Co v. U.S., 121 S. Ct. 1005 at 1012 (Feb. 21, 2001).
26. *Id.* at 1007.
27. *See id.* at 1012 (citing 33 U.S.C. § 702(c)).
28. *Id.* at 1007.
29. *See id.*
30. *See Id.*

because the Canal is a branch of the Project.[31] In its holding, the Ninth Circuit "recognized that the government would probably not have enjoyed immunity in at least three other Circuits where the courts require a nexus between flood control activities and the harm done to the plaintiff."[32]

The Court relied on *United States v. Gerlach Live Stock Co.*,[33] referring to Justice Jackson's description of the Central Valley Project:

> [T]o characterize every drop of water that flows through that immense project as "flood water" simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the statute. The text of the statute does not include the words "flood control project." Rather, it states that immunity attaches to "any damage from or by floods or flood waters ...."[34]

The Court stated, "[a]ccordingly, the text of the statute directs us to determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release."[35]

The Court also disagreed with the Government's reliance on dicta from *United States v. James*, which stated that "[i]t is thus clear from [section] 702(c)'s plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control."[36] The Court distinguished *James* from the Ninth Circuit's broad reading of section 702(c), "under which immunity attaches simply because the Madera Canal is part of the ... Central Valley Project, and flood control is one of the purposes served by that project."[37]

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31. *See id.* (emphasis supplied).
32. *Id* (quoting Cent. Green Co. v. United States, 177 F.3d 834, 839 (1999).
33. 339 U.S. 725 (1950).
34. *Id.* at 1010.
35. *Id.* at 1010-11.
36. *Id.* at 1008 (quoting United States v. James, 478 U.S. 597, 605 (1986)).
37. *Id.* at 1009.

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S. Ct. 675 (2001)

On January 9, 2001, the U.S. Supreme Court reversed the United States Court of Appeals for the Seventh Circuit, holding that certain isolated wetlands do not come within the jurisdiction of the Army Corps of Engineers.[38] In a five-to-four opinion, the Court held that the provisions of section 404(a) of the Clean Water Act do not confer federal authority over an abandoned sand and gravel pit which provides habitat for migratory birds.[39]

The Solid Waste Agency of Northern Cook County (SWANCC)[40]decided to purchase an old sand and gravel mining pit for use as a disposal site for solid waste.[41] The abandoned excavation trenches on the property had evolved into permanent and seasonal ponds[42] which "'are used as habitat by migratory bird [sic] which cross state lines.'"[43] SWANCC applied for and was granted various required permits from Cook County and the State of Illinois.[44] Because the development required "the filling of some of the permanent and seasonal ponds, SWANCC"[45] also contacted the Corps "to determine if a federal landfill permit was required under § 404(a) of the [Clean Water Act]."[46] While "[t]he Corps initially concluded that it had no jurisdiction over the site . . . it later reconsidered and ultimately asserted jurisdiction over the balefill site."[47] The Corps determined that the ponds were "waters of the United States,"[48] which therefore came within the Corps' jurisdiction pursuant to the Migratory Bird Rule,[49] and the Corps refused to issue a permit.[50]

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38. *See* Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S. Ct. 675 (2001).

39. *See id.* at 678.

40. *See id.* ("SWANCC is a consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste.").

41. *See id.*

42. *See id.*

43. *Id.* at 679 (citing U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document).

44. *See id.*

45. *Id.* at 678.

46. *See id.* ("Section 404(a) of the Clean Water Act ... 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into 'navigable waters.'"). *Id.* at 677

47. *Id.*

48. *Id.* at 679. *See also supra*, note 43.

49. *See id.* at 678 ("In 1986, in an attempt to 'clarify' the reach of its jurisdiction, the Corps stated that § 404(a) extends to intrastate waters: a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b. Which are or would be used as habitat by other migratory birds which cross state lines; or c. Which are or would be used as habitat for

SWANCC filed suit in the Northern District of Illinois challenging the Corps' jurisdiction and its denial of the permit.[51] "The District Court granted summary judgment to respondents on the jurisdictional issue, and petitioner abandoned its challenge to the Corps' permit decision."[52] On appeal, the Seventh Circuit was presented with two issues: 1) whether "respondents had exceeded their statutory authority in interpreting the CWA [Clean Water Act] to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds[;] and, [2] in the alternative, [whether] Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction."[53] The Court of Appeals determined "that Congress has the authority to regulate such waters based upon the 'cumulative impact doctrine,'"[54] because "[t]he aggregate effect of the 'destruction of the natural habitat of migratory birds' on interstate commerce ... was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds."[55] Second, "[t]he court held that the CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents' 'Migratory Bird Rule' was a reasonable interpretation of the Act."[56]

The Supreme Court reversed, holding that the Corps' interpretation was not supported by the CWA.[57] The Court concluded that the text of the statute would not permit a finding "that the jurisdiction of the Corps extends to ponds that are not adjacent to open water."[58] The Court also rejected the Corps' argument that because Congress failed to pass legislation that expressly "overturned the Corps' 1977 regulations and the extension of jurisdiction,"[59] it had demonstrated Congressional acceptance of

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endangered species; or d. Used to irrigate crops sold in interstate commerce. 51 Fed. Reg. 41217. This ... promulgation has been dubbed the 'Migratory Bird Rule.'").

50. *See id.* at 679.

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.* (citing Solid Waste Agency of Northern Cook County v. U.S. Army of Engineers, 191 F. 3d 845, 850 (7th Cir. 1999) ("[T]he cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce.").

55. *Id.*

56. *Id.*

57. *See id.* at 680.

58. *Id.*

59. *Id.* at 681.

the Corps' broad definition of "'navigable waters.'"[60] The Court was reluctant to equate a piece of failed legislation with congressional acquiescence to an administrative interpretation.[61] Finally, the Court declined to extend *Chevron*[62] deference to the Corps' interpretation of the CWA.[63] The Court found that application of the Corps' regulations raised "significant constitutional questions . . . and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here."[64] The Court was also concerned that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[65]

Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210 (9th Cir. 2000), *reh'g granted*, 230 F.3d 1215 (9th Cir. 2001).

At issue was the scope of tribal jurisdiction over fee-patented private property owned by a nonmember of the tribe within reservation boundaries. The Ninth Circuit reversed the District Court and held that Congress had not expressly authorized tribal jurisdiction over non-member conduct on privately held land.[66] Bugenig purchased forty acres within the Reservation and wanted to harvest timber on less than three acres of her property.[67] The Tribal Council refused Bugenig's request for a permit to haul the timber and filed suit against her in the Hoopa Valley Trial Court after Bugenig had begun harvesting trees.[68] The Tribal Court determined that the Tribe did have jurisdiction over Bugenig's land and her activities, and the Northwest Regional Tribal Supreme Court

60. *See id.*

61. *See id.* (citing, in a footnote, Bob Jones Univ. v. United States, 461 U.S. 574, 595, 600-601 (1983)) ("Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.").

62. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (The Court held that if the statute is clear, then that is the end of the Court's inquiry. If the statute is ambiguous or silent, then the Court should defer to any permissible or reasonable interpretation made by the agency.)

63. *See id.* at 683.

64. *Id.* at 684.

65. *Id.*

66. *See* Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210 (2000).

67. *See id.* at 1214.

68. *See id.*

affirmed.[69] Bugenig filed suit in federal court which found that Congress had expressly authorized the Tribe's jurisdiction.[70]

The Ninth Circuit rejected the District Court's finding that "through passage of the [Hoopa-Yurok] Settlement Act [of 1988], which 'ratified and confirmed' tribal governing documents that assert tribal jurisdiction over nonmembers, Congress conferred upon the Tribe the authority to regulate Bugenig's land."[71] The court noted:

> The fact that nothing in the Settlement Act explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe.... The legislative history contains no indication that Congress considered giving or intended to give the Tribe authority to exercise jurisdiction over fee-patented land owned by non-Indians such as Bugenig.[72]

Because both sides had reasonable arguments as to "whether the Settlement Act confers upon the Tribe the jurisdiction to regulate the activities of nonmembers,"[73] the court adopted a "'clear statement rule,'" which requires that any congressional delegation of authority to tribes to regulate nonmembers be express.[74] The court noted that such grants of authority are rare and that the Supreme Court had only addressed the issue and found express congressional delegation in two instances.[75] "Supreme Court precedent establishes the existence of a presumption against tribal jurisdiction over nonmembers: exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without *express* congressional delegation.'"[76] The court determined that regulating Bugenig's logging activities, "even when justified by reference to some tribal interest, simply does not

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69. *See id.*
70. *See id.*
71. *Id.* at 1215.
72. *Id.*
73. *Id.* at 1216.
74. *See id.* at 1219.
75. *See id.* at 1217.
76. *Id.* at 1218 (quoting Montana v. United States, 450 U.S. 544 (1981) (emphasis supplied)).

implicate 'tribal self-government' or 'internal [tribal] relations' ...."[77] The instances when a tribe can regulate the activities of a nonmember "on nonmember-owned land are 'limited' indeed. "[78]

Palm Beach Isles Associates v. United States, 231 F. 3d 1354 (Fed. Cir. 2000), *reh'g denied*, 231 F. 3d 1365 (Fed. Cir. 2000)

On November 6, 2000, the United States Court of Appeals for the Federal Circuit determined that in a categorical regulatory takings case, the property owners' reasonable investment-backed expectations were not a part of the takings analysis.[79] In its original opinion, the court equated the categorical regulatory taking with a physical taking, and noted that, "[i]n a physical taking context, the question is not why the owner acquired the property taken, but only did she own it at the time of the taking."[80] On petition for rehearing, the government argued that the court, in its original opinion, had "failed to follow its own controlling precedent when it stated that, if a taking is 'categorical,'[81] that determination removes from the analytical equation the question of investment-backed expectations."[82] The government noted that in *Good v. United States*, the court stated that "'reasonable investment-backed expectations are an element of every regulatory takings case.'"[83] The court distinguished *Good* in that the case did not involve a categorical taking.[84] The court also noted, "[e]ver since *Penn Central*[85] it has been understood that having reasonable investment-backed expectations is, generally speaking, a part of a successful claim of regulatory taking, claims that typically *involve something less than a total wipeout* ...."[86]

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77. *Id.* at 1220.

78. *Id.* at 1223.

79. *See* Palm Beach Isles Associates v. United States, 231 F.3d 1354 (2000).

80. *Id.*

81. *See id.* at 1357 ("A 'categorical' taking is, by accepted convention, one in which all economically viable use, i.e., all economic value, has been taken by the regulatory imposition.").

82. *Id.*

83. *Id.* (quoting *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

84. *See id.* at 1360 (In *Good*, the court concluded that "the ... restrictions on development ... do not deprive plaintiff's property of all economic value. The property retains value both for development, or for the sale of transferable development rights.").

85. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

86. *Id.* at 1360 (emphasis supplied).

In *Lucas v. South Carolina Coastal Council*,[87] the Supreme Court "discussed at length the rationale behind the justification for the rule that a total deprivation of beneficial use by regulatory imposition was akin to a physical taking."[88] The circuit court noted:

> The Court's opening discussion in its *Lucas* opinion cited and referred to the leading takings law cases. Had the court intended to make analysis of a categorical regulatory taking different from the categorical physical taking, for example regarding the question of investment-backed expectations, surely somewhere in the opinion there would be a hint of it. There is not.[89]

The court acknowledged that "most land use restrictions do not deny the owner of the regulated property all economically viable uses of it."[90] Thus, "[i]n the relatively few cases where they do, we have no doubt that both law and sound constitutional policy entitle the owner to just compensation without regard to the nature of the owner's initial investment-backed expectations."[91] The court pointed out that the government still has defenses available under the nuisance category.[92]

II. FLORIDA CASES

Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000)

At issue was the appropriate standard of review to be applied by district courts on "second-tier" certiorari review.[93] Florida Power & Light (FP&L) wanted to build an electrical substation in the City of Dania and so applied for a special zoning exception with the City Commission.[94] The Commission rejected FP&L's application and FP&L filed a petition for a writ of certiorari in the circuit court.[95] The circuit court quashed the Commission's decision and found that once an applicant met its initial burden of proving that its application met

87. 505 U.S. 1003 (1992).
88. *Id.* at 1362.
89. *Id.*
90. *Id.* at 1364.
91. *Id.*
92. *See id.*
93. *See* Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000).
94. *See id.* at 1090.
95. *Id.*

the statutory criteria for the granting of a special exception, "the burden shifts to the City Commission to demonstrate by competent substantial evidence that the special exception requested did not meet such standards."[96] Specifically, the circuit court found that FP&L met its burden, and that the Commission did not offer competent substantial evidence to refute FP&L's claims.[97] The City petitioned for certiorari in the district court, which quashed the circuit court's order.[98] The district court found that "[b]ecause the circuit court appears to have substituted its evaluation of the evidence for that of the City ... the circuit court departed from the essential requirements of law."[99]

The Supreme Court of Florida granted certiorari because *City of Dania v. Florida Power & Light*,[100] was in conflict with *Education Dev. Ctr. v. City of West Palm Beach Zoning Bd. of Appeals*.[101] In *Education Dev. Ctr.*, the Supreme Court held "that a district court on 'second-tier' certiorari review cannot re-assess the record for competent substantial evidence ...."[102] Once a local agency has ruled on an application for a special exception, a party may seek "first-tier" certiorari review in circuit court as a matter of right.[103] "The court must review the record and determine inter alia whether the agency decision is supported by competent substantial evidence."[104] This is a standard of review, as opposed to a standard of proof.[105] A party may then seek "second-tier" certiorari review from the district court.[106] In *City of Deerfield Beach v. Valliant*,[107] the Court clarified the two standards of certiorari:

> We hold that where full review of administrative action is given in the circuit court as a matter of right, one appealing the circuit court's judgment is not entitled to a second full review in the district court.

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96. *Id.*
97. *See id.*
98. *See id.*
99. *Id.* at 1091 (quoting *City of Dania v. Florida Power & Light Co.*, 718 So.2d 813 at 814-817 (Fla. 4th DCA 1998).
100. 718 So. 2d 813 (Fla. 4th DCA 1998).
101. 541 So. 2d 106 (Fla. 1989).
102. Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 at 1091 (Fla. 2000) (quoting *Education Dev. Ctr.*, 541 So.2d 106 (Fla. 1989)).
103. *See id.* at 1092.
104. *Id.*
105. *See id.*
106. *See id.*
107. 419 So. 2d 624 (Fla. 1982).

> Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine: [1] whether procedural due process is accorded; [2] whether the essential requirements of the law have been observed; and [3] whether the administrative findings and judgment are supported by competent evidence. The district court, upon review of the circuit court's judgment, then determines whether the circuit court [1] afforded procedural due process, and [2] applied the correct law.[108]

The Supreme Court held that the district court was correct in determining that the circuit court erred when it engaged in a de novo review of the Commission's evidence.[109] However, the Supreme Court went on to conclude that the district court's statement that " '[t]he record as a whole contains substantial competent evidence to support a denial of the special exception' . . . was improper," because "[t]he 'competent substantial evidence component' has been eliminated" from second-tier review.[110] Thus, the district court had usurped the jurisdiction of the circuit court.[111] The Supreme Court returned the case to the circuit court to be determined pursuant to the three-prong analysis the Court set forth in *Valliant*.[112]

Tampa Elec. Co. v. Garcia, 767 So. 2d 428 (Fla. 2000)

The Supreme Court of Florida held that the Public Service Commission (PSC) exceeded its authority when it granted a determination of need for a proposed power plant that was committed to selling just 30-megawatts of the proposed 514-megawatt capacity to a Florida retail utility and the proposed plant was to be owned and operated by a subsidiary of a North Carolina utility.[113] The Court determined that the PSC derives its power solely from the legislature and that section 403.519, Florida Statutes (1997), which authorizes the PSC to determine the need for a utility

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108. *Id.*
109. *See id.* at 1093.
110. *Id.*
111. *See id.*
112. *See id.* at 1094.
113. *See* Tampa Elec. Co. v. Garcia, 767 So. 2d 428 (Fla. 2000).

pursuant to the Florida Electrical Power Plant Siting Act, does not grant such authority.[114]

In 1998, the Utilities Commission of the City of New Smyrna Beach (New Smyrna), and Duke Energy New Smyrna Beach Power Company (Duke), jointly filed a petition with the PSC for determination of need for a natural gas fired plant with 514 megawatts of capacity to be built in New Smyrna Beach and owned and operated by Duke.[115] Out of the 514 megawatts of capacity, 30 were committed to be sold to New Smyrna, and the remaining uncommitted 484 megawatts were to be sold to utilities that sell to retail customers, most of whom would be located in Florida.[116] Tampa Electric Company, Florida Power Corporation, and Florida Power & Light Company were among seven interveners.[117] In December 1998, in a three-to-two vote, the PSC denied a motion to dismiss and granted the petition.[118]

On appeal, appellants argued that section 403.519, Florida Statutes (1997), does not authorize the PSC to grant a determination of need to any entity that is not a Florida retail utility that is regulated by the PSC.[119] Further, it was urged that any petition had to be "based upon a specified demonstrated need of Florida retail utilities for serving Florida power customers," and that this defect was not cured by Duke joining with New Smyrna, which was a proper applicant.[120]

Duke and New Smyrna argued that because Duke is a regulated utility, that a need determination for the proposed plant did come within the scope of section 403.519, Florida Statutes (1997).[121] New Smyrna also argued that the dormant Commerce Clause would be violated if Duke were prohibited from applying for a need determination, and that any Florida requirement that Duke first secure a contract with a retail utility to construct the plant was preempted by Federal legislation.[122]

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114. *See id.* at 434.
115. *See id.* at 430.
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.* at 431.
120. *Id.*
121. *See id.* at 432.
122. *See id.* at 433 ("[P]rohibiting Duke from applying directly for a need determination would violate the dormant Commerce Clause of the United States Constitution because such action would unconstitutionally discriminate against out-of-state commerce and burden interstate commerce.").

The Court concluded that the PSC exceeded its authority when it granted the determination of need.[123] The Court stated, "[a] determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for *all* of the electrical power to be generated at a proposed plant."[124] The Court discussed the historical evolution of the PSC's role in regulating the generation and sale of power in Florida and found that the applicable statutory scheme "was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates," and "that the Legislature must enact express statutory criteria if it intends such authority for the PSC."[125] The Court also agreed with appellants that New Smyrna's thirty-megawatt commitment and joining with Duke did not make the application proper. Finally, the Court dismissed New Smyrna's constitutional arguments and found that Congress has expressly left power-plant siting and need determination to the states.[126]

Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000)

The First District Court of Appeal ruled that the Southwest Florida Water Management District (District) does not have the power to grant exemptions from environmental resource permitting requirements based solely on prior governmental approval.[127] The court affirmed a final order of the Division of Administrative Hearings (DOAH) which declared portions of rule 40D-4.051, Florida Administrative Code, to be invalid exercises of legislative authority.[128] The disputed portions of the rule created "exemptions from the environmental permitting requirements that otherwise apply to land developments within the District."[129]

South Shores Partners, Ltd., applied to the District for a development permit and proposed to excavate a portion of a 720-acre tract of land to connect an existing canal system on the property

123. *See id.* at 434.
124. *Id.* (emphasis supplied).
125. *Id.* at 435.
126. *See id.* at 436.
127. *See* Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).
128. *See id.* at 596.
129. *Id.*

with Tampa Bay.[130] South Shores asserted that it needed only a standard general permit to proceed with the project because, pursuant to sections (3), (5), and (6) of rule 40D-4.051, it was exempted from environmental resource permitting requirements.[131] The Save the Manatee Club, "fear[ing] that this waterway would cause an increase in power boat traffic into the Bay and that the boat traffic would endanger the manatee and its habitat,"[132] filed a petition with DOAH and "argued that the grandfather provisions in the rule were invalid because the enabling statute, section 373.414(9), Florida Statutes, does not authorize exemptions from the permitting requirements based solely on prior governmental approval."[133] On December 19, 1999, the Administrative Law Judge entered a final order declaring the rule 40D-4.051 sections at issue "invalid because they do not implement or interpret any specific power granted by the applicable enabling statute."[134] The District appealed.[135]

The court initially noted that "[a]n affected party may challenge an administrative rule on the ground that it is 'an invalid exercise of delegated legislative authority,'" pursuant to section 120.52(8), Florida Statutes.[136] In 1999, the Florida Legislature revised section 120.52(8).[137] The section "now provides that 'an agency may adopt only rules that implement or interpret the *specific powers and duties granted by the enabling statute*.'"[138] Section 373.414(9), Florida Statutes, which grants the District authority to issue environmental resource permits expressly limits the District's ability to grant exemptions from the permitting requirements.[139] The District may establish exemptions and general permits, if they do not allow significant adverse impacts to occur.[140]

The court concluded that the disputed sections of rule 40D-4.051 did not "implement or interpret any specific power or duty granted in the applicable enabling statute" and were, therefore, an invalid exercise of delegated legislative authority.[141] The court stated, "the rule allows exemptions from the environmental resource permitting

130. *See id.*
131. *See id.*
132. *Id.*
133. *Id.* at 597.
134. *Id.*
135. *See id.*
136. *Id.*
137. *See id.* at 598.
138. *Id.* at 599 (emphasis supplied).
139. *See id.* at 600.
140. *See id.*
141. *Id.*

requirements based entirely on prior approval.... Because section 373.414(9) does not provide specific authority for an exemption based on prior approval, the exemptions in the rule are invalid."[142]

Martin County v. Department of Community Affairs, 771 So. 2d 1268 (Fla. 4th DCA 2000)

The Fourth District Court of Appeal ruled that the City of Stuart's inclusion of a Future Annexation Map in revisions to its comprehensive plan was an amendment to the comprehensive plan and, therefore, had to be supported by adequate data and analysis.[143] In 1997, approximately 1,200 acres were annexed from Martin County (County) into the City of Stuart (City).[144] Pursuant to Florida law, however, the annexed land remained subject to the County's comprehensive plan and attendant zoning regulations until the City amended its comprehensive plan to include the annexed land.[145] The City eventually "amended its comprehensive plan, assigning a land use designation to each of the newly-annexed parcels, creating a new land use category, and revising the text of virtually all of the elements of its plan, including the intergovernmental coordination element."[146] Martin County challenged the amendments on numerous grounds:

> In short, the County contended that the amendments were not "in compliance" as defined in section 163.3184(1)(b), Florida Statutes, that the amendments failed to discourage urban sprawl ... [and] were not consistent with the County's comprehensive plan, that the intergovernmental coordination element was inadequate to meet the requirements of chapter 163, that the amendments were not based on adequate data and analysis, and that the City failed to demonstrate a need for the annexed parcels.[147]

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142. *Id.*
143. *See* Martin County v. Department of Community Affairs, 771 So. 2d 1268 (Fla. 4th DCA 2000).
144. *See id.* at 1268.
145. *See id.*
146. *Id.* at 1269.
147. *Id.*

The Department of Community Affairs "initially indicated an intent to find some of the amendments not 'in compliance,'"[148] but eventually agreed with the City and upheld the amendments in its final order, incorporating the majority of the administrative law judge's findings in that final order.[149]

On appeal, the district court affirmed "all issues, except the challenge to the Future Annexation Area Map."[150] Section 163.3177(8), Florida Statutes, states, "[a]ll elements of the comprehensive plan . . . shall be based upon data appropriate to the element involved."[151] The court found that the ordinance adopting the map *itself* characterized the map as part of the City's comprehensive plan and, therefore, the Department of Community Affairs had improperly characterized the map as data and analysis, which did not itself require supporting data and analysis.[152]

Nutt v. Orange County, 769 So. 2d 453 (Fla. 5th DCA 2000)

The Fifth District Court of Appeal affirmed the circuit court's determination that a landowner may not "receive compensation in the form of severance damages because of the uncertainty of future governmental action."[153] Orange County took 2.545 acres from Nutt's property.[154] A portion of the land was to be used for current improvements to an intersection and the remaining portion of the tract was to be used for future improvements.[155] Nutt argued that the mere possibility of future improvements diminished the value of the remaining 509 acres of his property by over $3,000,000.[156] While conceding that the future improvement might not impact his plans for the property, Nutt claimed that such uncertainty deserved compensation because a prospective purchaser would not pay a premium for the land.[157] The court noted that "[e]veryone is at the mercy of future governmental planning,"[158] and held that the proper

148. *Id.*
149. *See id.*
150. *Id.*
151. *Id.* (citing FLA. STAT. § 163.3177(8) (1999)).
152. *See id.* (emphasis supplied).
153. *See* Nutt v. Orange County, 769 So. 2d 453 (Fla. 5th DCA 2000).
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *Id.*

time for compensation was when the County's actions did, in fact, improperly impact Nutt's development.[159]

159. *Id.* at 454.