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Local Government

John J. Copelan* Barbara Monahan†

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Local Government: 1993 Survey of Florida Law

John J. Copelan, Jr.*
Barbara S. Monahan**

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I. INTRODUCTION

While Hurricane Andrew occupied much of South Florida's attention during the survey period, with the exception of case law affecting elections held in the aftermath of such a natural disaster, the litigation it generated has yet to hit the appellate courts. Because of Florida's burgeoning and unfettered growth over the past several decades, local government regulation for the protection of the health, safety, and welfare of its residents intensified. This article discusses decisions of the Florida courts, as well as a decision of the United States Supreme Court, during the survey period of

* County Attorney for Broward County, Florida, since 1989; a former Deputy City Attorney for Miami, Florida; B.A., *magna cum laude*, Mercer University, 1973; J.D., Mercer University, 1976; M.A., Florida Atlantic University, 1976. Mr. Copelan is a member of the Adjunct Faculty of St. Thomas University Law School.

** Assistant County Attorney for Broward County, Florida, since 1990; B.A., Florida Atlantic University, 1987; J.D., Nova University Center for the Study of Law, 1990. Ms. Monahan practices in the area of Land Use and Environmental Law and is the coordinator for the County's Preventive Law Program.

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July 1992 through July 1993. These decisions relate to increased regulation which impacts local governments in the area of election law, police powers, eminent domain, and sovereign immunity.

II. ELECTION LAW

In the aftermath of Hurricane Andrew, elections for state and local offices had not yet been held. Because of the impossibility of operating many of the polling places due to the destruction and devastation caused by Andrew, the Dade County Attorney's Office sought an emergency injunction from the state circuit court in order to postpone the election, as well as to enjoin the state from announcing results of statewide races until Dade's elections were held.[1] On expedited appeal, the Florida Supreme Court affirmed the postponement of the election, but reversed enjoining the announcement of the results from the rest of the state.[2]

III. POLICE POWERS

The ability of local governments to regulate through its police powers is frequently defined as that power of government, inherent in sovereignty, to provide for the public order, peace, health, safety, welfare, and morals.[3] The police power enables a local government to regulate anything that it deems reasonably necessary and appropriate in the best interest of the public to secure not only the public order and peace, but for the prosperity, comfort, and quiet convenience of the general public.[4]

A local government's power to regulate through its police powers is also derived from the Florida Constitution.[5] Non-charter counties have all the powers of self-government as provided by general or special state law.[6] Non-charter counties may also enact ordinances that are not inconsistent with general or special law, but if such an ordinance conflicts with a municipal ordinance, the ordinance is not effective within the municipality

1. Dade County v. State, Nos. 92-19086, 92-19087, 92-19088 (Fla. 11th Cir. Ct. Aug. 31, 1992).

2. State v. Dade County, 17 Fla. L. Weekly S578 (Fla. Aug. 31, 1992).

3. 6A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.04 (3d ed. 1988).

4. 10 FLA. JUR. 2D *Constitutional Law* § 191 (1979).

5. FLA. CONST. art. VIII.

6. *Id.* § 1(f).

to the extent that the ordinances conflict.[7] On the other hand, charter counties have all the powers of local self-government not inconsistent with general or special law approved by the vote of the electors or enacted by their governing body.[8] A charter county can designate in its charter which shall prevail in the event of conflict between county and municipal ordinances.[9]

Under the Florida Constitution, a municipality may be established by charter, and is thereby granted the authority to "exercise any power for municipal purposes except as otherwise provided by law."[10] Although the powers residing in local governments are extensive, the courts are the final arbiters of what is the proper subject of the police powers, and whether the exercise of such power is within constitutional limits.[11]

A. *Public Health, Safety, and Welfare*

Some important cases in the area of local government law arose out of the enactment of ordinances regulating adult oriented uses of land and inhibiting religious practice. Undoubtedly, one of the most interesting cases of the survey period arose out of the enactment of four ordinances by the City of Hialeah. The City of Hialeah attempted to prohibit, among other things, the unnecessary killing of animals in a public or private ritual or ceremony, unless the primary purpose was for consumption.[12] The United States Supreme Court held that the ordinances were void because they were contrary to the principles of the Free Exercise Clause of the United States Constitution.[13]

Although the city claimed that the purpose of the ordinances was to protect the public health and prevent cruelty to animals, the Court found that

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7. *Id.*
8. *Id.* § 1(g).
9. *Id.*
10. FLA. CONST. art. VIII, § 2(a), (b).
11. 10 FLA. JUR. 2D *Constitutional Law* § 201 (1979).
12. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2223 (1993). The following ordinances were enacted: (1) Ordinance 87-40 incorporates the Florida animal cruelty laws and punishes anyone who kills an animal unnecessarily or cruelly; (2) Ordinance 87-52 defines sacrifice and prohibits the possession or slaughter or sacrifice of an animal if killed in a ritual and where there is no intent to use the animal for food (the ordinance goes on to exempt licensed food establishments); (3) Ordinance 87-71 prohibits the sacrifice of animals; and, (4) Ordinance 87-52 defines the term "slaughter" and prohibits slaughtering animals outside areas zoned for slaughterhouses, but then exempts small numbers of hogs and/or cattle if exempt by state law. *Id.* at 2224.
13. *Id.* at 2231.

the ordinances were underinclusive to meet those ends in that they failed to prohibit nonreligious conduct that endangered those same interests.[14] The Court determined that the city's only interest was to regulate conduct motivated by religious belief and that:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.[15]

The Court found that the ordinances were not narrowly tailored to accomplish their purpose and held that all four of the ordinances were overbroad or underinclusive because they were all aimed at limiting the religious practices of the Santeria religion.[16] In so holding, the Court stated that the ordinances seek "not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation."[17] The Court went on to state that if the city's intent was to address the improper disposal of animals, the city should have enacted an ordinance regulating the disposal of organic garbage; however, the ordinances were aimed at the sacrifice itself as the "harm to be prevented."[18]

Any restrictions or regulations proffered by a local government must be narrowly tailored to meet the required ends.[19] When and if those regulations infringe on constitutional rights, the courts may determine the regulations to be of no force and effect.

In the area of regulation of adult-oriented uses, the courts have been more deferential to local governments and the ability to regulate those uses through their police powers in order to protect the health, safety, and welfare of their residents.[20]

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14. *Id.* at 2232. The Court pointed out that the ordinances did not prohibit the killing of fish, the extermination of mice and rats, nor the euthanasia of stray or abandoned animals and was, therefore, underinclusive. *Id.*

15. *Lukumi*, 113 S. Ct. at 2233 (citing McDaniel v. Paty, 435 U.S. 628 (1978)).

16. *Id.* Santeria means "the way of the saints." The Santeria faith teaches that each individual has a destiny that is handed down from God. In order to fulfill that destiny, one needs the aid of the Orishas, which are spirits. The followers of Santeria believe the Orishas, although powerful, are not immortal, and therefore require sacrifices for survival. *Id.*

17. *Id.* at 2229.

18. *Id.* at 2220.

19. *See Lukumi*, 113 S. Ct. at 2233.

20. Many local governments began enacting ordinances regulating the distance between adult-oriented establishments and licensing (i.e. time, place, and manner) of adult-oriented

During the survey period, ordinances regulating adult-oriented establishments have withstood numerous challenges. For instance, in *T.J.R. Holding Co. v. Alachua County*,[21] the owner of Cafe Risque sought to enjoin enforcement of an Alachua County ordinance that banned nudity and sexual conduct where alcoholic beverages were served. The challenge to the ordinance was based on the allegation that the ordinance affected the use of land and should have been enacted in accordance with section 125.66(6) of the Florida Statutes.[22] The First District Court of Appeal determined that the ordinance was "intended to regulate . . . specifically described conduct within establishments serving alcoholic beverages" and did not affect the "owner's 'use of the land' on which the establishment was located," and therefore did not require the enactment to be in accordance with section 125.66(6).[23]

In *T-Marc, Inc. v. Pinellas County*,[24] the United States District Court for the Middle District of Florida upheld the validity of an ordinance that: (1) relied on the studies conducted by other cities;[25] (2) required patrons and entertainers to maintain a three foot distance from each other;[26] (3) implemented a one year amortization period;[27] and, (4) established licensing and recordkeeping requirements.[28] However, the court issued an injunction enjoining the enforcement of a provision requiring the disclosure of anything beyond the names, aliases, and dates of birth of employees of such an establishment.[29]

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uses in 1976, when the United States Supreme Court found that such ordinances were not violative of the Constitution of the United States so long as the ordinances were content-neutral and not aimed at suppressing any First Amendment rights. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); *see also* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *But see* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (ordinance will not be upheld if unbridled discretion is given to licensing authority and there is no limit on the time within which the local government must issue the license).

21. 617 So. 2d 798 (Fla. 1st Dist. Ct. App. 1993).

22. *Id.* at 799. The ordinance was enacted as a general ordinance under Florida Statutes, section 125.66(1) and (2), with one public hearing. Florida Statutes, section 125.66(6), requires that any ordinance which affects the "use of land" must be adopted at two public hearings to be held approximately two weeks apart after 5:00 p.m. *Id.* at 800 n.1.

23. *Id.*

24. 804 F. Supp. 1500 (M.D. Fla. 1992).

25. *Id.* at 1503.

26. *Id.* at 1506.

27. *Id.* at 1504.

28. *Id.* at 1505.

29. *T-Marc*, 804 F. Supp. at 1505.

The court also stated conclusively that a city does not have to actually experience the detrimental effects it is attempting to avoid before regulating establishments which have nude entertainment, but "may rely on the secondary effects suffered by other cities."[30]

Due to the proliferation of adult-oriented establishments, local governments all across the United States will continue to enact ordinances regulating these establishments in order to attempt to diminish the secondary effects[31] that consistently flow from such uses.[32]

Recently, local governments have been regulating in the area of health warnings. In *Hillsborough County v. Florida Restaurant Ass'n*,[33] the Second District Court of Appeal upheld the county's enactment of an ordinance requiring vendors of alcoholic beverages to post health warning signs that included warnings about birth defects, addiction and intoxication, not drinking before driving or operating machinery, and not mixing alcohol with other drugs.[34] A complaint for declaratory and injunctive relief was filed by the Florida Restaurant Association, a statewide association with 154 members in Hillsborough County, on behalf of thirty-seven members that serve alcoholic beverages on the premises of their public food establishments.[35] On summary judgment, the trial court entered a permanent injunction finding the ordinance unconstitutional.[36]

On appeal, the court addressed the issues raised by the county, such as standing, preemption (both express and implied), and inconsistency with general law. In determining that the Association had standing to challenge the ordinance, the court granted relief based on the three-prong test for standing enunciated in *Florida Home Builders Ass'n v. Department of Labor & Employment Security*.[37] This test requires: (1) a substantial number of the association's members, although not necessarily a majority, to be substantially affected by the challenged rule; (2) the subject matter of the rule to be within the association's general scope of interest and activity; and,

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30. *Id.* at 1504.

31. Whereas clauses prefacing these ordinances cite the secondary effects as crime, drugs, prostitution, and the spread of communicable diseases.

32. *See, e.g.*, *Barnes*, 111 S. Ct. at 2456; *FW/PBS*, 493 U.S. at 215; *Playtime Theaters*, 475 U.S. at 41; Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

33. 603 So. 2d 587 (Fla. 2d Dist. Ct. App. 1992).

34. *Id.* at 592.

35. *Id.* at 589.

36. *Id.* at 588.

37. *Id.* at 588-89 (citing Florida Home Builders Ass'n v. Department of Labor & Employment Sec., 412 So. 2d 351 (Fla. 1982)).

(3) the relief requested to be the type appropriate for a trade association to receive on behalf of its members.[38]

On the issue of express preemption, the court found that the state regulating scheme[39] was not so pervasive that the county could not enact such an ordinance under its police powers and that there was no express preemption relating to consumer warning signs.[40] Likewise, as to implied preemption, the court found that the state's interest in the conduct, management, and operation of the manufacturing, packaging, distribution, and sale of alcoholic beverages was not so pervasive as to preclude consumer warning signs.[41] In determining there was no implied preemption, the court indicated that no danger of conflict existed between the action of the junior and senior legislative bodies and that the legislative scheme of the Florida statutes did not completely occupy the field.[42]

The last argument asserted by the Association to be rejected by the court was that the county, pursuant to its charter, enacted an ordinance inconsistent with general law.[43] The court applied the rationale in *State ex rel. Dade County v. Brautigam*, where it was held that an ordinance is inconsistent with general law if it is "contradictory in the sense of legislative provisions which cannot coexist."[44] The court found, after applying this rationale, that Hillsborough County's warnings were a proper exercise of the county's broad residual power of self-government granted to it by article VIII, section 1(g) of the Florida Constitution.[45] Thus, it appears that regulations enacted pursuant to a local government's police powers will be upheld if a local government can show that it has a substantial interest in protecting its residents' health, safety, and welfare.

B. *Land Use Regulation*

The courts have faced many different issues in the domain of land use

38. *Hillsborough County*, 603 So. 2d at 589 n.1.

39. *See* FLA. STAT. § 381.061(9) (1989). Subsequently, this section of the statute was repealed and the provisions transferred to section 381.0072. *Hillsborough County*, 603 So. 2d at 590.

40. *Hillsborough County*, 603 So. 2d at 589.

41. *Id.* at 591.

42. *Id.* (citing Tribune Co. v. Cannella, 458 So. 2d 1075, 1077 (Fla. 1984), *appeal dismissed sub nom.* Desperte v. Tribune Co., 471 U.S. 1096 (1985)).

43. *Id.* at 592.

44. *Id.* at 591 (quoting State *ex rel.* Dade County v. Brautigam, 224 So. 2d 688, 692 (Fla. 1969)).

45. *Hillsborough County*, 603 So. 2d at 592.

regulation. These issues relate to granting variances, adopting comprehensive plans, interpreting zoning regulations, and determining whether land use issues should be resolved through quasi-judicial or legislative proceedings.

In *Herrera v. City of Miami*,[46] the court concluded that the trial court erred in affirming the granting of a variance where there were no findings that, without the variance, it would be virtually impossible to use the land as it had been presently zoned.[47] The property developer sought a variance from the City of Miami in order to construct a 100-unit federally sponsored project for the elderly. The appellants, owners of single-family residential properties located across the street, argued that the project would create overflow parking with "unsightly clutter and congestion."[48] The city zoning ordinances provided for the granting of a variance under certain conditions.[49] While the city staff and Zoning Board opposed the granting of the variance, the City Commission, in a three-to-two vote, rejected the staff's recommendation and reversed the denial of the variance.[50] The circuit court, sitting in its appellate capacity, reviewed the record and found "there was competent and substantial evidence to support the City Commission's finding . . . ."[51]

In reversing the circuit court's decision, the appellate court, with one judge dissenting, offered three reasons why the variance was inappropriate:

> (1) the petitioner for the variance [was] the developer; the landowner made no claim or demonstration of hardship; (2) the only argument of hardship was that the specific 100-unit federally sponsored project for the elderly might not qualify for financing without the variance; and (3) there was no showing whatever that the project could not be reduced in size to satisfy zoning conditions or that the land could not yield a reasonable return if used as authorized by present zoning restrictions for another project.[52]

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46. 600 So. 2d 561 (Fla. 3d Dist. Ct. App. 1992).

47. *Id.* at 562-63.

48. *Id.* at 562.

49. Section 1901 of the City of Miami Zoning ordinance provides:

> A variance is relaxation of the terms of the ordinance where such action not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of actions of the applicant, a literal enforcement of this ordinance would result in unnecessary and undue hardship on the property.

Id. at 563 n.1 (quoting MIAMI, FLA., CODE § 1901 (1992)).

50. *Herrera*, 600 So. 2d at 562.

51. *Id.*

52. *Id.* at 563.

Under existing land use case law, a variance seeker must demonstrate an exceptional and unique hardship to the individual landowner not shared by other property owners in the area,[53] and a variance is not justified unless no reasonable use can be made of the land without the variance.[54] Applying these principles, the court quashed the order granting the variance because the factual findings made by the circuit court for the record did not satisfy the legal requirements for a variance.[55]

In another case, *Joynt v. Orange County*,[56] the court concluded that the circuit court and the county's Code Enforcement Board applied the wrong law in finding that the Joynts, doing business as "Don's Auto Recycling Company," violated the Orange County Zoning Code[57] because access to their property was by "ingress and egress through a residentially zoned area . . . ."[58] The record of the code enforcement hearing showed that there was access to the property by an easement that the Joynts used for their vehicles, but that their customers, who brought scrap metal to the yard for recycling, were using the residential streets.[59] The Fifth District Court of Appeal held that the circuit court erred in applying the code in this instance because the zoning code did not prohibit the use of residential streets, it only required industrial zoning to have access to a major street through nonresidential districts, and the facts indicated that access to a major street was available.[60]

On a different note, several cases pertaining to comprehensive land use planning were decided in 1992. In *B & H Travel Corp. v. Department of Community Affairs*,[61] the court held that the Department of Community Affairs acted within its discretion in finding the Town of Redington Beach's comprehensive plan in compliance, notwithstanding the Town's Local Planning Board's failure to recommend the plan's adoption to the City

53. Nance v. Town of Indialantic, 419 So. 2d 1041, 1041 (Fla. 1982).

54. Bernard v. Town Council of Palm Beach, 569 So. 2d 853, 855 (Fla. 4th Dist. Ct. App. 1990).

55. *Herrera*, 600 So. 2d at 563.

56. 603 So. 2d 568 (Fla. 5th Dist. Ct. App. 1992).

57. Section 38-1004 of the Orange County Zoning Code provides: "Each I-4 general industrial district shall be located on a major street as designated on the major street plan of the county, or shall have access to a major street by a public street without passing through or alongside any residential district . . . ." *Id.* at 569 (quoting ORANGE COUNTY, FLA., CODE § 38-1004 (1992)).

58. *Id.* at 569-70.

59. *Id.*

60. *Id.* at 570.

61. 602 So. 2d 1362 (Fla. 1st Dist. Ct. App.), *review denied*, 613 So. 2d 1 (Fla. 1992).

Commission.[62] Citing Florida Statutes, section 163.3184(9)(a),[63] the court found that the plan "shall be determined to be in compliance if the . . . determination of compliance is fairly debatable."[64] The standard applied by the court is a "deferential one that requires affirmance of the local government's action if reasonable persons could differ as to its propriety."[65]

The court rejected the appellant's argument that "the planning board's failure to formally recommend the proposed plan to the Commissioners renders the plan finally adopted by that body inconsistent with Rule 9J-5.005(8)(b) & (c) [of the Florida Administrative Code] . . . because a plan must be 'consistent with' Rule 9J-5 in order to be in compliance with the [Growth Management] Act . . . ."[66] The court found that there was a "de facto recommendation of the plan" because, in fact, the planning board and the public had an active role in the adoption process and "local government bodies 'often proceed in an informal, free-form manner.'"[67]

One of the more important issues facing local governments in the area of land use is whether the site specific modifications to comprehensive plans,[68] rezonings,[69] and proposed site plans,[70] are quasi-judicial or legislative in nature. If such plans are quasi-judicial in nature, any determination of the governing body would have to be through hearings that afford all parties the opportunity to present evidence, take sworn testimony,

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62. *Id.* at 1363.

63. Once the state land planning agency issues a notice of intent to find the comprehensive plan in compliance, then any affected person has 21 days from the date of publication to file a formal protest. FLA. STAT. § 163.3184(9)(a) (1991).

64. *B & H Travel*, 602 So. 2d at 1365.

65. *Id.* (quoting Environmental Coalition of Fla., Inc. v. Broward County, 586 So. 2d 1212, 1215 n.4 (Fla. 1st Dist. Ct. App. 1991)).

66. *Id.* at 1366; *see* FLA. STAT. § 163.3184 (1991); FLA. ADMIN. CODE ANN. r. 9J-5.005 (1992).

67. *B & H Travel*, 602 So. 2d at 1366 (quoting Leon County v. Parker, 566 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1990)).

68. *See* City of Melbourne v. Puma, 616 So. 2d 190 (Fla. 5th Dist. Ct. App.), *juris accepted*, 624 So. 2d 264 (Fla. 1993) (holding that site specific amendments to a comprehensive plan are quasi-judicial).

69. *See* Snyder v. Board of County Comm'rs, 595 So. 2d 65, 74-75 (Fla. 5th Dist. Ct. App. 1991), *juris. accepted*, 605 So. 2d 1262 (Fla. 1992) (holding that site specific rezonings are a quasi-judicial function).

70. *See* Park of Commerce v. City of Delray Beach, 606 So. 2d 633, 634 (Fla. 4th Dist. Ct. App. 1992) (holding that proposed site plans for development of owner's property are not legislative in nature).

and cross-examine witnesses. If the plans are legislative, then no formalized evidentiary proceedings would be necessary.

Until 1991, when the Fifth District Court of Appeal issued its opinion in *Snyder v. Board of County Commissioners*,[71] most local governments in Florida made legislative determinations on whether to approve or reject site specific modifications to comprehensive plans, rezonings, and site plans. The *Snyder* decision, thus far, has led to disparate opinions among the district courts of appeal within the state.[72] Therefore, the Florida Supreme Court's ruling in the next survey period will be significant.[73]

C. *Environmental Law*

In some instances, the actions of one governmental body are challenged by another governmental body, especially when a location within its jurisdiction may be jeopardized. The Department of Environmental Regulation faced a number of challenges to its decisions affecting local governments. Two of those decisions, one affecting Dade County and another affecting Monroe County, are examined in this survey.

In one case, Metropolitan Dade County intervened in an administrative action in order to challenge the findings of a hearing officer of the Florida Department of Environmental Regulation ("DER").[74] In this instance, the hearing officer granted a dredge and fill permit to a developer in North Dade to expand an existing marina from 99 slips to 346 slips.[75]

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71. 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991). The appellate court also adopted a higher standard of review that has never been a requirement in previous zoning cases. This higher standard forces a local government to substantiate its zoning determination by clear and convincing evidence. Therefore, supreme court approval of this higher standard could severely impact how a local government conducts its day-to-day activities. Moreover, if *Snyder* is read in conjunction with Jennings v. Dade County, 589 So. 2d 1337, 1341 (Fla. 3d Dist. Ct. App. 1991), which prohibits *ex parte* communications in quasi-judicial proceedings, applicants and residents will have limited access to their elected officials. In addition, those same applicants and residents will bear the burden of conducting costly quasi-judicial proceedings.

72. *See* Lee County v. Sunbelt Equities, 619 So. 2d 996, 1007 (Fla. 2d Dist. Ct. App. 1993) (holding site specific rezoning is quasi-judicial, requiring a local government to show by substantial competent evidence that the zoning was enacted in furtherance of some legitimate public purpose); Board of County Comm'rs v. Monticello Drug Co., 619 So. 2d 361, 365 (Fla. 1st Dist. Ct. App. 1993) (rezoning is a legislative action which should be reviewed under the traditional "fairly debatable" standard of review).

73. *Snyder* was argued before the Florida Supreme Court in March of 1993.

74. Metropolitan Dade County v. Coscan Fla., Inc., 609 So. 2d 644 (Fla. 3d Dist. Ct. App. 1992).

75. *Id.* at 644-45.

In *Coscan*, DER and Coscan entered into a settlement stipulation requiring phased construction with specific conditions to protect water quality and the manatees.[76] The county opposed the granting of the permit, stating that the terms of the stipulated settlement agreement would not protect the already degraded water quality and the granting of the permit violated section 403.918 of the Florida Statutes,[77] which requires that (1) there be reasonable assurances that the water quality standards will not be violated, and (2) the project is not contrary to the public interest.[78]

First, the applicant was required to show that the activities would not materially aggravate an existing problem. Second, the project could not be contrary to the public interest.[79] In this instance, the court agreed with the county that because the settlement agreement stated the developer's proposed system had only a "sufficient possibility of operating successfully," the agreement was clearly not reasonable assurance as required by the statute which "contemplates . . . a substantial likelihood that the project be successfully implemented."[80]

The court also agreed with the county's argument that the hearing officer failed to fully consider the significant impact the additional boat traffic from the expanded marina would have on manatees, since the project would bring boats into the marina across a manatee migratory area.[81] In its analysis, the court found the hearing officer erred by applying the weaker federal standard rather than the more stringent state standard, which affords greater protection to endangered species in determining whether the project would adversely affect manatees.[82]

In reversing and remanding the case, the court placed the burden on the applicant to "show entitlement to the permit" and suggested that the hearing

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76. *Id.* at 645.

77. *Id.* at 646.

78. *Id.*

79. *Coscan*, 609 So. 2d at 646.

80. *Id.* at 648.

81. *Id.* at 649. The court, recognizing that the manatee is an endangered species, cited Florida Statutes, section 403.918(2)(a)(2) (requiring consideration be given as to "[w]hether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats . . . ."). *Id.*

82. *Id.* at 650. The hearing officer relied on a "U.S. Fish and Wildlife Service report [which determined] that the project *will not jeopardize the continued existence* of the manatee" as "persuasive evidence that any *incremental impact* of the project on the manatee is acceptable." *Coscan*, 609 So. 2d at 650 (emphasis added).

officer consider more stringent conditions to avoid further adverse impact to an already declining area.[83]

In a different scenario, Monroe County challenged DER's denial of a permit to trim mangroves at the Key West International Airport in order to comply with Federal Aviation Administration regulations requiring "clear zones" adjacent to airport runways.[84] The county filed an action for declaratory and injunctive relief, alleging that its actions were exempt under the Florida statute as a "governmental function."[85] After the court granted the county's motion for temporary relief, DER entered into a stipulation with the county allowing it to trim the mangroves to the same extent as they had been trimmed previously.[86] Subsequently, DER filed an answer and counterclaim, stating that the trimming by the county was "far in excess" of what was agreed upon and "what was required to protect the public safety," and further alleging that the wetlands had been filled without a permit as the county did not remove the mangrove cuttings in the wetlands.[87]

The lower court granted summary judgment in favor of the county, finding the county was exempt from obtaining a dredge and fill permit as required by the statute.[88] On appeal, the court agreed that the county is exempt from DER's jurisdiction when performing a governmental function;[89] however, the court correctly found summary judgment improper since questions of fact had not been addressed by the lower court, specifically, whether the trimming was, in fact, accomplished in compliance with federal regulations or whether it was excessive; and whether the cuttings were placed on dry land as the county alleged or onto protected wetlands.[90]

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83. *Id.* at 650-51. The court suggested that limiting the marina expansion to sailboats might be a suitable alternative. *Id.* at 651.

84. State of Florida Dep't of Envtl. Regulation v. Monroe County, 610 So. 2d 697 (Fla. 3d Dist. Ct. App. 1992).

85. *Id.* at 698. Section 403.932(1) of the Florida Statutes permits the "alteration of mangrove trees by . . . a federal, state, county, or municipal agency . . . , when such alteration is done as a governmental function of such agency." FLA. STAT. § 403.932(1) (1991).

86. *Monroe*, 610 So. 2d at 698.

87. *Id.* DER asserted that the filling of wetlands without a permit was a violation of Florida Statutes, section 403.913(1). This section provides: "[N]o person shall dredge or fill . . . without a permit . . . unless exempted by [state] statute." *Id.*

88. *Id.*

89. *Id.*

90. *Monroe*, 610 So. 2d at 698-99.

IV. POWERS OF EMINENT DOMAIN

The power of eminent domain is "the power of a sovereign to take private property, or to authorize its taking, for a public use or purpose without the owner's consent, on the payment of just compensation."[91] The power to take private property without compensation is limited by article I, section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The state, its agencies, and political subdivisions may exercise its power of eminent domain through powers derived from the Florida Constitution.[92]

The power of eminent domain is clearly distinguishable from a local government's police power. Under the power of eminent domain, after payment of compensation, the physical possession and use of property is taken from a private owner for the use and benefit of the public or a public agency.[93] Under the police powers, the government may destroy or regulate the use of private property in the interest of the public welfare without compensation.[94]

In 1990, in the case of *Joint Ventures, Inc. vs. Department of Transportation*,[95] the Florida Supreme Court held that Florida Statutes, section 337.241, which prohibited the construction of any improvements on future rights-of-way once a surveyed map of reservation was recorded, was simply a means of preventing increases in the cost of property earmarked for condemnation under the state's eminent domain powers.[96] Consequently, the court invalidated the maps of reservation.[97]

Since *Joint Ventures*, there has been much confusion among the district courts of appeal as to whether property owners with property inside the boundaries of the invalidated maps of reservation are entitled to per se declarations of taking and jury trials to determine just compensation.[98]

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91. 21 FLA. JUR. 2D *Eminent Domain* § 1 (1979).
92. FLA. CONST. art. X, § 6(a).
93. 10 FLA. JUR. 2D *Constitutional Law* § 269 (1979).
94. *Id.*
95. 563 So. 2d 622 (Fla. 1990).
96. *Id.* at 626.
97. *Id.*
98. Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d Dist. Ct. App. 1992) (certified question to the Florida Supreme Court as to "[w]hether all landowners with property inside the boundaries of invalidated maps of reservation under subsections 337.241(2) and (3) . . . are legally entitled to receive per se declarations of taking and jury trials to determine just compensation"), *review granted*, 621 So. 2d 433 (Fla. 1993); Department of Transp. v. DiGerlando, 609 So. 2d 165 (Fla. 2d Dist. Ct. App. 1992), *review granted*, 624 So. 2d 265 (Fla. 1993); Department of Transp. v.

More important for local governments, based on the holding in *Joint Ventures* invalidating the maps of reservation, is the Fourth District Court of Appeal's invalidation of Palm Beach County's thoroughfare map,[99] which was created pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act ("Growth Management Act").[100] The court found trafficways maps indistinguishable from the maps of reservation in *Joint Ventures.*[101]

Palm Beach countered that trafficways maps are merely utilized as long-range planning tools and, historically, the ability of a community to plan for orderly development through the implementation of such regulations is within its police powers. Palm Beach asserted that, unlike *Joint Ventures*, the trafficways map does not involve a situation in which a property owner is prevented from selling or developing property.

The Fourth District Court of Appeal erred by applying the analysis used in *Joint Ventures,* since, in that case, once the property was surveyed and a map of reservation was recorded, the statute imposed a moratorium which, in effect, prevented a property owner from initiating any new construction or renovating an existing structure. However, a trafficways map is part of the planning process required not only as an element of the Growth Management Act, but as a common sense approach to efficient and systematic development. Because the preparation of a trafficways element[102] is a requirement of the Growth Management Act, and not an issue

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Miccosukee Village Shopping Ctr., 621 So. 2d 516 (Fla. 1st Dist. Ct. App. 1993); Department of Transp. v. Weisenfeld, 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993).

99. Palm Beach County v. Wright, 612 So. 2d 709, 710 (Fla. 4th Dist. Ct. App. 1993).

100. *See* FLA. STAT. § 163.3161 (1991).

101. *Wright*, 612 So. 2d at 710. The court, recognizing that the "decision passes on a question of great public importance," certified the question to the Florida Supreme Court whether a county thoroughfare map designating corridors for future roadways, and "WHICH FORBIDS LAND USE ACTIVITY THAT WOULD IMPEDE FUTURE CONSTRUCTION OF A ROADWAY, ADOPTED INCIDENT TO A COMPREHENSIVE COUNTY LAND USE PLAN ENACTED UNDER THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT, FACIALLY UNCONSTITUTIONAL UNDER *JOINT VENTURES* . . . ." *Id.*

102. The Traffic Circulation Element is a required element set forth in the Florida Administrative Code:

> [T]o establish the desired and projected transportation system in the jurisdiction and particularly to plan for future motorized and non-motorized traffic circulation systems . . . and . . . depicted on the proposed traffic circulation map or map series within the element.

FLA. ADMIN. CODE ANN. r. 9J-5.007 (1992).

of eminent domain, many local governments are concerned with the outcome of this case.

In a recent Broward County case, *Test v. Broward County*,[103] because the county did not condemn adjacent industrial or commercial properties, the plaintiffs challenged the county's condemnation of their residential property in connection with expansion of the airport. The county presented evidence that while the property was not needed for immediate expansion, the county wanted to limit residential use of the property because of the noise problem.[104] In affirming the trial court's order approving the condemnation, the Fourth District Court of Appeal held that the decision should not be disturbed on appeal if the "taking is supported by good faith considerations of cost, safety, environmental protection, and long-term planning."[105]

The court also determined that, pursuant to Florida Statutes, section 333.02,[106] certain types of activities would not be compatible with airport operations and would adversely affect residents within the vicinity of the airport. Since an incompatible use in a residential area is a raised noise level as defined by statute,[107] the court determined the condemnation was a valid public purpose that met the incompatible use test.[108]

V. SOVEREIGN IMMUNITY

The doctrine of sovereign immunity arises out of the concept that "the king can do no wrong," a concept which has never been completely accepted by the courts.[109] The doctrine of governmental immunity, which holds that a local government is not liable for some or all of its tortious acts is, more often than not, deemed to be contrary to the fundamental theory of

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103. 616 So. 2d 111 (Fla. 4th Dist. Ct. App. 1993).

104. *Id.* at 113.

105. *Id.* (citing School Bd. of Broward County v. Viele, 459 So. 2d 354 (Fla. 4th Dist. Ct. App. 1984), *review denied*, 467 So. 2d 1000 (Fla. 1985)).

106. Section 333.02 provides that local governments can expend public funds to acquire land or property interests in the immediate vicinity of the airport when it is in the best interest of the public health, safety, and general welfare of its residents. FLA. STAT. § 333.02 (1991).

107. *See id.* Noise level defined in the statute exceeding "part 150" is incompatible as a residential use. *Id.* § 333.03(2)(c).

108. *Test*, 616 So. 2d at 114.

109. CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS 1042-43 (1980).

tort law that liability follows negligence, and that every person is entitled to a legal remedy for injuries incurred.[110] In keeping with the spirit of the ideology of the constitution, that each person has a right to redress, the Florida Legislature enacted the Tort Claims Act,[111] which waives sovereign immunity in tort actions on behalf of the state and its agencies or subdivisions.[112] The Tort Claims Act permits a private individual to impose liability on the state, and its agencies and subdivisions, for tort claims, both negligent and intentional, if committed within the scope of the employee's office or employment, but only to the extent permitted under the act.[113] The following cases represent the distinct ways in which the appellate courts have applied the doctrine of sovereign immunity during the survey period.

In *Birge v. City of Eagle Lake*,[114] the Second District Court of Appeal was asked whether damages could be assessed by the plaintiffs against the City of Eagle Lake. The facts indicated that sewage had backed up into the plaintiffs' home when lightning struck the transformer that powered the city's sewage pumping station.[115] The plaintiffs alleged the city had a duty to install a warning system at the pumping station in the event of a power failure.[116] The court, basing its decision on *Trianon Park Condominium Ass'n v. City of Hialeah*,[117] held the city was not liable for failing

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110. *Id.*

111. FLA. STAT. § 768.28 (1991) (effective July 1, 1974).

112. *Id.* Section 768.28 reads, in pertinent part:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act . . . .
>
> (2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch . . . and the independent establishments of the state; counties and municipalities . . . .

Id.

113. *Id.* § 768.28(1).

114. 614 So. 2d 550 (Fla. 2d Dist. Ct. App.), *review denied*, 623 So. 2d 493 (Fla. 1993).

115. *Id.* at 551.

116. *Id.*

117. 468 So. 2d 912 (Fla. 1985). In this case, the district court certified the following question to the Florida Supreme Court, which answered in the negative:

> Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity.

Id. at 914. In a lengthy opinion, the Florida Supreme Court clarified in what functions or activities a local government engages and placed the activities in four categories: "(I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and

to install the warning system because it is a judgmental, planning-level function for which no duty exists and which is, therefore, not actionable.[118]

In another case, *Nanz v. Southwest Florida Water Management District*,[119] the court took a different view of the provision of services to a resident by a local government. Southwest Florida Water Management District ("SWFWMD") issued permits to Hillsborough County for the construction and maintenance of a drainage system. Plaintiffs sued SWFWMD and Hillsborough County.[120] The court dismissed SWFWMD, holding that it was immune from suit based on the Florida Statutes.[121] However, the court held the county liable because, although the county had no duty to provide such a service, once it assumed such a responsibility, it had a duty to act with reasonable care.[122]

The case of *Hill v. City of North Miami Beach*[123] addresses the issue of sovereign immunity in another context. In *Hill*, the plaintiff went to a recreational facility owned by the city to play ping-pong with other people also visiting the park. When one of the games was over, the plaintiff asked another visitor at the park, Dailey, who lost the game, if he could have the paddle so that he could challenge the winner. Dailey, seemingly without provocation, attacked the plaintiff and broke his jaw.[124]

The plaintiff sued the city, claiming the city owed a duty to invitees to keep the park safe from known dangerous conditions. The city's records indicated that Dailey, a known troublemaker, previously attacked a park employee and had to be ejected by the police.[125] The city stated it had no duty to protect the plaintiff; however, the court determined the opposite was true—the city did owe a duty to the plaintiff because, as a landowner, it has

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the protection of public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens." *Id.* at 919. The court went on to distinguish when and which activities the waiver of sovereign immunity was intended to address. *Id.*

118. *Birge*, 614 So. 2d at 551.

119. 617 So. 2d 735 (Fla. 2d Dist. Ct. App. 1993).

120. *Id.*

121. *Id.* at 736; *see also* FLA. STAT. § 373.443 (1991). Section 373.443 provides, in pertinent part: "No action shall be brought against the state or district . . . for the recovery of damages caused by partial or total failure of any stormwater management system . . . by virtue of . . . approval of the permit for construction or alteration . . . ." *Id.*

122. *Nanz*, 617 So. 2d at 736.

123. 613 So. 2d 1356 (Fla. 3d Dist. Ct. App. 1993).

124. *Id.* at 1357.

125. *Id.*

a duty to protect an invitee from criminal attack that is reasonably foreseeable.[126]

In a personal injury case, *Frawley v. City of Lake Worth*,[127] the plaintiff was injured when he was extricated from an overturned truck by a paramedic, and a police officer from another jurisdiction, who was on administrative assignment in the city in which the accident occurred. The lower court granted summary judgment in favor of the Village of Palm Springs, where the police officer was employed, based on the Good Samaritan Act which the Village asserted entitled it to immunity.[128]

Because the police officer was acting in his individual capacity and not within the scope of his employment, the Village alleged it should not be held liable. The court agreed with the Village and determined the police officer did not have a duty to stop and render assistance and when he did so, "he was acting in his individual capacity and not within the scope of his employment . . . ."[129]

VI. CONCLUSION—A LOOK TO THE FUTURE

The foregoing is just a sampling of case law that affected local government operations during this past year. Although there were no dramatic decisions during the survey period, the coming year should bring a final determination of the *Snyder* and *Palm Beach v. Wright* cases which, depending on the outcome, will undoubtedly impact day-to-day activities in the area of local government land use regulation.

126. *Id.* at 1357-58.

127. 603 So. 2d 1327 (Fla. 4th Dist. Ct. App. 1993).

128. *Id.* at 1327-28 (citing section 768.13(2)(a) of the Florida Statutes, which states that a person who "gratuitously and in good faith renders emergency care or treatment at the scene of an emergency" shall not be held liable. FLA. STAT. § 768.13(2)(a) (1991)).

129. *Frawley*, 603 So. 2d at 1329.