



THE ENVIRONMENTAL AND LAND USE LAW SECTION REPORTER

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• Maribel N. Nicholson-Choice, Chair • Carol A. Forthman, Co-editor • Enola T. Brown, Co-editor •

Legislative Summary

by Eric Olsen and Angela Dempsey

The 2003 Legislative session was marked more by the legislation that did not pass, than by the legislation enacted. Due to disagreements between the House and Senate, the Legislature did not pass the state budget during the regular session. The Legislature also did not pass legislation regarding worker's compensation reform, medical malpractice reform, implementation of the constitutional amendment banning smoking, and implementation of the class size constitutional amendment. In the environmental area, the Legislature did pass several pieces of legislation, including amendments to the Everglades Forever Act, several water bills, and Global Risk Based

Corrective Action. However, the Legislature not pass legislation sought by the Department of Environmental Protection (DEP) regarding performance based permitting and legislation governing alternative water supplies, even though many bills were considered regarding the latter.

As of this writing, the Legislature is convening its first 2003 Special Session to consider budget and finance matters and several other bills including workers compensation. Additional special sessions may be convened to consider issues relating to medical malpractice, smoking in the workplace, and the class size amendment. The following is a brief summary of the significant environmen-

tal legislation that passed, and some that did not.

Everglades Restoration

CS/SB 626

Effective Date: Upon Becoming Law

CS/SB 626 was the most controversial environmental legislation enacted in the 2003 Legislative session. CS/SB 626 amends the 1994 Everglades Forever Act (EFA) to establish a long-term planning process intended to achieve state water quality standards in the Everglades Protection Area. The bill includes several legislative findings, including a determination that the Long-Term Plan developed by the SFWMD constitutes Best Available Phosphorus Reduction

continued, page 2

Florida Caselaw Update

by Gary K. Hunter, Jr. and D. Kent Safriet

For as-applied takings claims, plaintiff need not exhaust all administrative options if it is evident that pursuing further options would be futile. *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA Nov. 13, 2002)

Lost Tree Village Corp. (Lost Tree) filed an inverse condemnation action after its plans to develop the Lost Tree Islands on the Indian River, situated partially within the City of Vero Beach (City) and partially in the Town of Indian River Shores (Town), were

impeded by the City and the Town. Lost Tree intended to build a bridge from the City to the islands, but the City enacted an ordinance prohibiting the construction of bridges to undeveloped islands. At the same time, the City restricted the permissible density on the islands to one single-family house per every five acres. With respect to the Town, the Town adopted a new Comprehensive Plan which prohibited development on unbridged islands. Nonetheless, Lost Tree submitted an application to the City, seeking to build a bridge, and to

continued, page 6

INSIDE:

On Appeal	9
Southwest Florida Water Management District	12
St. Johns River Water Management District	13

LEGISLATIVE SUMMARY

from page 1

Technology (BAPRT). The bill also states the Legislature's intent that the Long-Term Plan be implemented consistent with the Congressionally authorized components of the Comprehensive Everglades Restoration Program (CERP).

The bill requires implementation of the first 13-year phase of the Long-Term Plan from 2003 to 2016. This initial phase includes several pre-2006 projects, as well as additional incremental phosphorus reduction measures to be reviewed and approved by the Department of Environmental Protection by December 31, 2008. Implementation of projects after the initial phase requires subsequent legislative approval. CS/SB 626 allows DEP's rule adopting a phosphorus criterion for the Everglades Protection Area to include moderating provisions authorizing discharges based upon BAPRT providing net improvement to impacted areas. Moderating provisions can also authorize discharges into unimpacted areas so long as BAPRT is implemented and DEP determines that environmental benefits clearly outweigh potential adverse impacts. Compliance with the phosphorus criterion is to be determined by a network of stations.

By December 31, 2003, the SFWMD must apply to DEP for a permit modification to incorporate proposed changes to the Everglades Construction Project as needed to implement the pre-2006 projects and other strategies in the Long-Term Plan. These changes must be designed to achieve compliance with water quality standards, including the phosphorus criterion and moderating provisions, to the maximum extent practicable. During implementation of the initial phase of the Long-Term Plan, DEP-issued permits must be based on BAPRT and include technology-based effluent limitations.

The legislation extends imposition of a \$25 per acre Everglades agricultural privilege tax through 2016 and authorizes the SFWMD to expand its use of the Okeechobee Basin tax to fund the initial phase of the Long-Term Plan. The legislation provides that payment of the Everglades agri-

cultural privilege tax constitutes compliance with the so-called "Polluters Pay" provision in Article II, Section 7(b), of the Florida Constitution.

The above issues concern water quality improvements in the Everglades, more than 90 percent of which already meet the 10 ppb standard. More than \$650 million has already been invested in the clean up, with an additional \$450 million guaranteed by the Senate legislation. Several changes were made to the bill to ensure compliance with the goal of the state-federal partnership, which is to restore water quantity by capturing nearly two billion gallons of water per day lost to sea and reestablish a more natural flow in the Everglades. On May 20, 2003, the Governor signed CS/SB 626.

SWIM and Water Supplies

CS/SB 2260

Effective Date: Upon Becoming a Law, Except as Otherwise Provided

CS/SB 2260 began as a bill primarily focusing on the Surface Water Improvement and Management (SWIM) program, but was amended in the end to include various provisions regarding water supplies and water management district governance. With respect to the SWIM program, CS/SB 2260 makes numerous changes including deleting state funding for this program, increasing the review and update requirements from 3 years to 5 years, and cross-referencing waters listed on the SWIM project list with those that appear on the total maximum daily loads (TMDL) and impaired waters lists. The Florida Fish and Wildlife Conservation Commission and the Department of Agriculture and Consumer Services are added to the list of parties who should receive copies of draft SWIM plans and are given 45 days to make comments on those plans. Additionally, the funding formulas and distributions for SWIM projects previously contained in Sections 373.459 and 373.451-373.457, F.S., are substantially revised or repealed.

With regard to water supplies, CS/SB 2260 provides that the withdrawal of groundwater in one water management district for use in another water management district, but within the same county, does not constitute

an inter-district transfer of groundwater subject to the additional procedural requirements of section 373.2295, F.S. The bill also deletes the funding limitations previously provided for the Florida Water Pollution Control Financing Corporation allowing for the continuation of this state revolving loan funding program.

Regarding water management district governance, CS/SB 2260 transfers the St. Johns River Water Management District's territory within Polk County to the Southwest Florida Water Management District effective July 1, 2003. The bill also provides that the basin boundaries within the Southwest Florida Water Management District may be amended by that district without legislative approval. The executive directors of the water management district are now given the authority to hire legal staff to run the day-to-day operations of the water management district. This right was previously possessed by the districts' governing boards, who will nevertheless maintain the authority to employ certain attorneys to represent the legal interest or position of the governing boards.

Interdistrict Transfers of Water

CS/CS/SB 554

Effective Date: Upon Becoming a Law

CS/CS/SB 554 modifies the inter-district groundwater transfer provisions of section 373.2295, F.S., by providing that the withdrawal and use of groundwater occurring across water management district boundaries, but within the same county, does not constitute an inter-district transfer of groundwater governed by the provisions of section 373.2295, F.S. Section 373.2295 creates special procedural requirements to be followed when groundwater is withdrawn in one water management district for use in another. This bill was sent to the Governor on May 20, 2003, which means the Signing Deadline is June 4, 2003.

Local Government Notification of Water Use Permits

CS/SB 1044

Effective Date: Upon Becoming a Law

CS/SB 1044 provides that when a water management district receives a consumptive use permit applica-

tion, it must send a notice of the receipt of that application to the affected local government and consider the comments the local government submits on that application. The bill also requires water management districts to place a condition on consumptive use permits stating that the permit holder must still comply with all applicable local zoning and other regulatory ordinances.

Agricultural Lands and Practices Act

CS/CS/SB 1660

Effective Date: July 1, 2003

CS/CS/SB 1660 supplements the Florida Right to Farm Act under section 823.14, F.S., which protects farming activities from nuisance suits. The bill expands upon the Florida Right to Farm Act's prohibition on duplication of regulation where best management practices are adopted as part of a state or regional regulatory program, to include best management practices adopted under a federal regulatory program. Counties may regulate farming activities located within a wellfield protection area, unless the federal, state, or regional best management practices or regulations being applied specifically address wellfield protection (consistent with the Right to Farm Act). The bill does not prevent counties from regulating the transportation and land application of sewage sludge.

CS/CS/SB 1660 does not authorize existing farm operations to change to a more intensive or extensive farm operation with regard to traffic, noise, odor, dust, or fumes, where the existing farm operation is located next to a home or business established on March 15, 1982 (consistent with the Right to Farm Act). In addition, counties in urbanized areas in South Florida, with a population over 1.5 million and not operating under a home rule charter, are not restricted from adopting ordinances or regulations needed to comply with Section 373.4592, F.S. (regarding Everglades Improvement and Management) or to carry out duties under a delegated program.

Department of Environmental Protection Internet Noticing

CS/SB 1374

Effective Date: Upon Becoming a Law

CS/SB 1374 continues the DEP

Internet noticing pilot program. CS/SB 1374 allows DEP to replace its Florida Administrative Weekly notices with an Internet website notification. Notices that are published on the website must state the date the notice was first published and will be published only on the same days as the Florida Administrative Weekly is published. This pilot effort to convert to electronic notice is repealed July 1, 2004, unless reenacted by the Florida Legislature.

Northwest Florida ERP Extension

CS/HB 623

Effective Date: Upon Becoming a Law

CS/HB 623 extends the effective date for the Environmental Resource Permit (ERP) program within the boundaries of the Northwest Florida Water Management District from July 1, 2003 until July 1, 2005. This means that the DEP may not implement an ERP program within the Northwest Florida Water Management District boundaries until July 1, 2005. The wetland resource permitting program authorized under chapter 62-312, F.A.C., and the stormwater regulation program authorized under chapter 62-25, F.A.C., will remain effective within the Northwest Florida Water Management District until that date.

Marine Turtle Penalties

SB 174

Effective Date: July 1, 2003

SB 174 makes various changes to the Marine Turtle Protection Act, including an increase in the penalties associated with the possession of turtle eggs and the disturbance of a turtle nest. The bill provides that if a person illegally possesses 11 or fewer marine turtle eggs, they have committed a first degree misdemeanor, provided that it is their first offense. If a person possesses more than 11 eggs or disturbs a turtle nest, they have committed a third degree felony. Any person or corporation that commits any act prohibited by this legislation involving any egg of any marine turtle species must pay a penalty of \$100 per egg in addition to any other penalties outlined in this legislation. The Florida Fish and Wildlife Conservation Commission may issue a permit to any person or corporation to allow them to possess a ma-

rine turtle, including their nest, eggs, or hatchlings, for scientific, educational, exhibition, or conservation purposes. The Florida Fish and Wildlife Conservation Commission is also given the authority to adopt rules to establish conditions and restrictions for marine turtle conservation. SB 174 was sent to the Governor on May 20, 2003, which means the Signing Deadline is June 4, 2003.

Fish and Wildlife Conservation Commission Revisions

CS/SB 2388

Effective Date: Upon Becoming a Law

CS/SB 2388 makes various and miscellaneous changes to the fees and other program responsibilities of the Fish and Wildlife Conservation Commission. The bill adds a new and more expansive definition of "saltwater fish" to Section 372.001, F.S., and the definition of "take" is amended to specifically include saltwater fish. The licensure and permitting language in Section 372.57, F.S., is revised to include the term "saltwater fish", and it also includes the act of possessing game, freshwater, or saltwater fish. The responsibilities and obligations of the Florida Fish and Wildlife Conservation Commission (Commission) are expanded to include the distribution of promotional items to increase public awareness regarding boating safety, as well as promotional materials regarding resource conservation. A notice requirement is imposed upon any court which adjudicates a violation under Chapter 372, F.S., to notify the Commission within 10 days of the final disposition of that matter.

The fee for non-residents of the state of Florida to participate in hunting activities within the state is increased to \$45, which is valid for a 10 day period. Likewise, the annual turkey hunting permit fee imposed upon non-residents of Florida is increased from \$5 to \$100. The alligator trapping license is changed to a 12 month license period, as opposed to expiring on June 30 of every year. The fee for the exhibition or possession of venomous or poisonous reptiles is increased from \$5 to \$100. The license to sell or exhibit wildlife, provided that more than 25 individual specimens are involved, is increased to \$250 per year, depending upon the

continued...

LEGISLATIVE SUMMARY

from page 3

class of wildlife exhibited. That fee is increased to \$150 per year if not more than 25 individual specimens are involved. Fees for owning and operating a private game preserve are increased from \$5 per year to \$50 per year. The fee to possess wildlife that is considered to pose a real or potential threat to human safety has been increased to \$140 per year.

Global Risk Based Corrective Action (RBCA)

CS/HB 1123

Effective Date: Upon Becoming a Law

This legislation extends Risk Based Corrective Action (RBCA) principles to all sites contaminated with discharges of pollutants or hazardous substances, including voluntary clean-ups and state managed clean-ups. It does not establish any independent basis for liability. The Florida Department of Environmental Protection is required to establish rules implementing this legislation by July 1, 2004. These rules must include clean-up target levels (CTLs) for soil contact, soil leachability and, where there are no current standards, CTLs for groundwater. In addition, the rules must create protocols for the use of natural attenuation, institutional and engineering controls and the issuance of "No Further Action" orders.

In the House, the vote on this bill, which creates Section 376.30701, F.S., was 113 to 4, in the Senate, it was 36 to 0. After some concern was expressed by the Legal Environmental Assistance Foundation (LEAF) about the applicability of alternative clean-up target levels (ACTLs) for water at a limited number of sites, the House Natural Resources Committee added some language to the bill clarifying the limited applicability of ACTLs. The language found in Section 376.30701(2)(g) 3, F.S. generally limits the use of ACTLs for water to appropriate sites.

Drycleaning Solvent Clean-up Liability Protection

CS/SB 956

Effective Date: Upon Becoming a Law

This bill extends the exemption

from liability for the cost of cleanup of sites eligible for the drycleaning solvent cleanup program pursuant to Section 376.3078(3), F.S., to "nearby real property owners." Previously, this liability protection was provided only to owners, operators and real property owners of eligible facilities. Additionally, the bill provides immunity from third party property damage claims to any real property owner or nearby real property owner who conducts voluntary site rehabilitation pursuant to Section 376.3078(11), F.S. To receive the liability protection, any voluntary clean-up must be conducted in accordance with state and federal laws and rules, under a DEP approved rehabilitation schedule and while allowing the DEP access to the Site.

This law was proposed to disallow double recovery for property damage after assessment and remediation, which the Second DCA recognized as possible under existing law in *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045 (2nd DCA, 2001). On April 25, the bill was passed by a 39 to 0 vote in the Senate and on May 2, it was passed by a 119 to 0 vote in the House. The bill applies retroactively to cases in which a lawsuit has not yet been filed.

Direct Support Organizations

HB 365

Effective Date: July 1, 2003

This legislation affects Section 215.981, Florida Statutes, that specifies financial audit requirements for state agency direct-support organizations and citizen support organizations. The bill excludes certain organizations from such requirements. DSOs and CSOs for an agency that have annual expenditures of less than \$300,000 are not required to have an independent audit. Additionally, DEP must establish accounting and financial management guidelines for those organizations under its jurisdiction. This bill was passed unanimously by both houses.

Citrus Air Emissions Management Practices

SB 1300

Effective Date: Upon Becoming a Law

This bill revises existing statutes regulating air pollutant emissions from the citrus juice processing in-

dustry, which consists of 28 citrus juice processing facilities that operate in Florida. It amends Section 403.08725, F.S. to provide that these facilities comply with this section by July 1, 2004, in lieu of obtaining air construction and operating permits. It redefines the terms "new sources" and "existing sources" and changes permitted emissions limits. It requires DEP to develop rules relating to management practices to prevent or minimize emissions of hazardous air pollutants and registration of facilities as required by Title V of the Clean Air Act. The bill requires that citrus processing facilities provide the department with specified information for evaluation and provides for the expiration of the program created under Section 403.08725, F.S. This bill passed unanimously in both chambers.

Administrative Procedures Act Changes

SB 1584

Effective Date: Upon Becoming a Law

This legislation revises various provisions of Chapter 120, Florida Statutes, including the definition of arbitrary and capricious, DEP and water management districts' ability to adopt rules by reference in implementing part IV of Chapter 373 (water resources), and burdens of proof and standards of review in rule challenges. SB 1584 states that the petitioner has the burden of proving by a preponderance of evidence that the existing rule is an invalid exercise of delegated legislative authority and that hearings held in rule challenges are de novo. According to Senate staff analysis these changes are intended to clarify the ruling in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So.2d 243 (Fla. 1st DCA 2002), which held that agency rules be subject to a "competent and substantial evidence" standard of review. The bill also provides for initial scheduling orders at DOAH to establish discovery schedules and otherwise move Section 120.569, F.S. cases towards final hearing. Lastly the bill provides for mandatory attorneys fees up to \$50,000 (previous limit was \$15,000), which in the case of private litigants, are to be split equally between the losing party and the losing party's attorney.

BILLS THAT DID NOT PASS:

Phosphate Mining – CS/CS/HB 1363 / CS/CS/SB1312 (similar) – For those who do not practice in this area, a little background is helpful. Florida provides approximately 75 percent of the nation’s phosphate supply and approximately 25 percent of the world’s supply. Phosphate companies own or have mineral rights to almost 450,000 acres in the state. Phosphate operations produce gypsum, a sandy mineral by-product of phosphate fertilizer manufacturing. Gypsum is stored in stacks, commonly referred to as “gyp stacks,” of 150 feet or taller. The gypsum goes on to the stack and mixes with wastewater and storm water. Because the water is acidic, it must be contained on the site or recycled into the plant as cooling water. These stacks must be monitored continuously to ensure that the water does not contaminate surface or ground water. There are currently 25 stacks in Florida. The vast majority of these stacks are located just south of Lakeland and are in various stages of their life-cycle: 10 are active, 12 are inactive, and 3 are closed.

Generally, this legislation attempted to change the cumulative impact review and mitigation provisions for environmental resource permit (ERP) applications. The legislation provided additional cumulative impact review criteria for phosphate mining projects and requires mining ERP applicants within the Peace River Watershed to conduct cumulative impact studies. The bill proposed to change provisions for use of funds from the Nonmandatory Lands Reclamation Trust Fund (NMLRTF) and financial responsibility requirements for mine reclamation and construction and operation of phosphogypsum stack systems. The bills would also have created criminal sanctions for violating the financial requirements. Lastly, the bill provided DEP liens over certain assets associated with fertilizer production facilities have priority over other liens. Both bills passed their respective houses on the last day of session. However, CS for CS for SB 1312 died in messages to the House and HB 1363 died in the Senate Natural Resources Committee.

Performance Based Permitting – SB 2634 / HB 1525. This bill proposed compliance incentives for certain environmental permitting activities, and provided more specific criteria for permit denials and suspensions. Under pressure from industry groups, the House Natural Resources Committee decided not to consider the bill any further. This will leave the criteria for future permit suspensions and revocations within the discretion of the judicial branch.

Bert Harris Act Amendments - CS/SB 1164 (similar HB 113). This bill was proposed to address the ruling in *Royal World Metropolitan, Inc., v. City of Miami Beach*, No. 99-17243-CA 23, (Fla. 11th Cir. Ct. July 25, 2002), *reh’g denied* Oct. 24, 2002, *currently on appeal*, which held that governments are protected by sovereign immunity in Bert Harris Act claims. In 1995, the Bert Harris Act was enacted by the Legislature to provide a new cause of action for private property owners whose property has been “inordinately burdened” by state and local government action that may not rise to the level of a “taking” under the State or Federal Constitution. Section 70.001(13), F.S., currently states that the Act does not affect sovereign immunity. This bill attempted to waive sovereign immunity. The Senate passed the bill by a 35 to 2 vote on April 23, but the bill died in the House.

Water Reservations - HB 1005 was one of the more controversial water supply bills of the 2003 session. HB 1005 originally would have restricted the water management districts’ ability to reserve water for protection of fish and wildlife and public health and safety. The bill would have also required an affirmative Legislative ratification of any proposed amendments to Chapter 62-40, F.A.C. HB 1005 passed through all of its assigned House committees and was amended in the end to provide for affirmative ratification of amendments to Chapter 62-40, F.A.C.; to contain the reuse provisions also contained in HB 1459, HB 1069, and SB 2316; and to provide for a priority listing, peer review and recovery strategy process for reservations of water similar to the process now used for minimum

flows and levels. HB 1005 died on the House calendar.

Land Use and Water Use Linkage - HB 1069/SB 2758. These bills were focused primarily on improving the linkage between land use planning and water supply planning. In the end, they contained provisions requiring local governments to plan for water supply projects in their comprehensive plans; allowing the water management districts to adopt preferred water sources by rule; encouraging metering and volume based charges for the use of reclaimed water; and allowing for additional sub-metering of potable water use. HB 1069 also contained the water conservation manual, mining variance, and reuse provisions contained in HB 1459 and SB 2316. HB 1069 died on the House calendar. SB 2758 died on the Senate calendar.

Water Conservation - HB 1459/SB 2316. These bills were the premier water conservation and water supply bills of the 2003 session. In the end, HB 1459 contained the following provisions:

- Requiring local governments to plan for future water supply projects in their comprehensive plans considering the regional water supply plans of the water management districts.
- Requiring the PSC to allow full recovery for the cost of alternative water supplies.
- Requiring development of a water conservation manual to be used by public water supply utilities to satisfy water use/consumptive use permitting requirements.
- Providing that the water management districts could require the use of uncommitted reclaimed water if economically, technically, and environmentally feasible, but could not redirect the use of committed reclaimed water.
- Amending the process for the water management districts to develop regional water supply plans.
- Allowing the water management districts to create revolving load funds for alternative water supplies.
- Allowing the water management districts to condition reuse funding assistance on metering and volume based charges for reclaimed water.

continued

LEGISLATIVE SUMMARY

from page 5

- Prohibiting the development of the Cone Ranch wellfield by Tampa Bay Water.
- Requiring a study by the DEP and water management districts on marketing water rights.
- Requiring a Peace River comprehensive study.
- Allowing the water management districts to establish preferred water sources by rule.
- Requiring the water management districts to develop landscape irrigation design standards.
- Encouraging sub-metering of potable water.
- Allowing DEP to grant variances from mine reclamation requirements for water supply development.
- Providing that the water management districts must give significant consideration to the data and conclusions of a utility's reuse feasibility

study prepared for DEP under section 403.064, Florida Statutes.

- Encouraging the use of reclaimed water at state facilities.
- Removing the sunset provisions for the water pollution control financing corporation.

HB 1459 passed the House, but with amendments relating to the sale of Florida Water Services and the payment of compensation for property rights related to the construction of the Tampa Bay Water regional reservoir. Those amendments, along with other unrelated disagreements between the House and Senate, caused HB 1469 to die in messages. There was a very last minute effort to put together a consensus bill under SB 2316, but that effort died when time ran out in the Senate.

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Angela Dempsey is a Senior Assistant General Counsel at the Florida Department of Environmental Protection. Ms. Dempsey specializes in civil litigation enforcing the Resource Conservation and Recovery Act and other waste and water statutes. She received her J.D., with honors, from the University of Florida College of Law in 1993 and her B.S. from San Diego State University in 1990. Ms. Dempsey previously practiced as an assistant state attorney in Orlando.

FLORIDA CASELAW UPDATE

from page 1

the Town, seeking preliminary plat approval for a 57 unit development. After both applications were rejected, Lost Tree brought an inverse condemnation action.

Lost Tree's eleven count complaint alleged both facial and as-applied takings claims. At trial, the Circuit Court reasoned Lost Creek had not exhausted the development application

process. Therefore, the Circuit Court dismissed the complaint as unripe.

On appeal, the Fourth DCA reversed. First, the Court held that the action of two government entities working in concert can be a compensable taking when the action of either entity alone would not be a taking. The Court stated that the Constitutions of both the United States and

Florida place emphasis on the act of taking property as opposed to the number of actors. If the acts of two government entities working together effect a taking, the landowner must be compensated.

Regarding the facial takings claim, the Court held that a facial takings claim may not need a ripeness analysis. However, a facial taking requires a complete deprivation of economically beneficial use. Applied to the Town, the Court stated this had not occurred because there was no prohibition on building a bridge from the Town to connect to the islands, which would allow development; only when applied to the specific scenario where the bridge must be built from the City did the regulation preclude development. Applied to the City, the Court held that because there was no prohibition on building within the City without a bridge, Lost Tree was not denied all economically beneficial use and a facial takings claim could not succeed.

With respect to the as-applied claims, the Court held that a taking

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claim was not ripe for some of the islands because Lost Tree had not pursued all available administrative remedies. For a portion of the islands, Lost Tree had not even submitted a proposed plan for development. However, the Court recognized a futility exception for circumstances where it is beyond mere speculation that the entities will reject amendments to the applications. For the area of the islands for which Lost Tree had submitted proposals, Lost Tree did not have to continue submitting proposals after it became clear that such proposals were futile. Therefore, for these islands, Lost Tree's takings claim was ripe. The Court reversed and remanded.

Due Process requirements dictate that administrative proceedings afford each party a full opportunity to present evidence. *Kupke v. Orange County*, 838 So.2d 598 (Fla. 5th DCA Feb. 7, 2003)

Kupke challenged the constitutionality of an administrative hearing after Kupke was cited by the Code Enforcement Board of Orange County (Board) for operating an unauthorized junkyard on his agricultural zoned land. At the hearing, Kupke was prevented from calling witnesses to show the complained-of materials were farm equipment protected against a nuisance action, by Section 823.14, F.S., while the County was allowed to present as many witnesses as it desired. The Board found the equipment was a nuisance and ordered Kupke to remove the equipment within 30 days or pay a \$250 per day fine.

The Circuit Court, acting in its appellate capacity, affirmed the Board's decision, finding the Board "provided procedural due process" and "observed the essential requirements of law." The 5th DCA granted certiorari.

The DCA reversed the prior rulings, finding the "denial of an opportunity to present evidence violated Kupke's due process rights." Persons tried by administrative bodies and subject to quasi-judicial proceedings must be afforded an opportunity to "present evidence, cross examine witnesses, and be informed of all facts upon which the commission acts." The Court quashed the order of the cir-

cuit court and remanded for an order quashing the decision of the Board and requiring the Board to allow Kupke an opportunity to attempt to show the equipment has an agricultural use as protected by Section 823.14, F.S.

Different sections of Land Development Code may supply guidance for discretion as to the zoning authority's decisions on Special Uses. *Cap's-on-the-Water, Inc. v. St. John's County*, 28 Fla. L. Weekly D537 (Fla. 5th DCA Feb. 21, 2003).

Cap's-on-the-Water (Cap's) facially challenged the constitutionality of section 2.03.01-A of the St. Johns County Land Development Code (Code), claiming it doesn't provide adequate standards to guide the Planning and Zoning Agency (PZA) in making decisions with respect to conditions on "Special Uses." The Circuit Court found the section constitutional because Part 12.01.01 of the Code constrained the definition of "Special Use," and when read in context of the entire document, limited the discretion of the PZA to place conditions on Special Uses.

The 5th DCA affirmed; Part 12.01.01 was an adequate constraint of the discretion granted under PZA's section 2.03.01-A. The Court relied upon *Life Concepts, Inc. v. Harden*, 562 So.2d 762 (Fla. 5th DCA 1990), which declared that the language "compatible with the neighborhood or area..." was not so vague as to be unconstitutional. Because Part 12.01.01 has similar language, stating that the Special Use should be controlled so it is "in relation to the neighborhood," it provided a sufficient constitutional standard to guide the PZA's discretion. The Court added that the conditions imposed should relate to the goal of compatibility between the special use and the surrounding area.

In dissent, Judge Peterson stated that the Part 12.01.01 definition of "Special Use" does not provide any guidance to the PZA in making decisions under Section 2.03.01-A. Further, the absence of limitations or uniform standards within Section 2.03.01-A allows the PZA to permit conditions on a "selective, *ad hoc*, arbitrary basis."

Section 163.3215(4), F.S., requires complaining party to file a verified complaint with the local government body as a condition precedent to a consistency challenge. *City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389 (Fla. 4th DCA Mar. 19, 2003).

On July 13, 2001, the City of Coconut Creek (Coconut Creek) filed a complaint against the City of Deerfield Beach (Deerfield Beach) challenging the consistency of a development order issued by Deerfield Beach with the Broward County Comprehensive Plan. Count I of the complaint sought to enjoin the issuance of site plan approval, while Counts II and III sought to enjoin the enforcement of the order based upon alleged violations of procedural and substantive due process in the approval process. The development order, issued June 18, 2001, allowed Deerfield Beach Energy Center (Energy Center) to build a power plant adjacent to land owned by Coconut Creek, although Coconut Creek alleged that neither the Comprehensive Plan nor the zoning code permits power plants on the Energy Center's land. The circuit court dismissed the consistency challenge of the complaint with prejudice due to Coconut Creek's failure to comply with the statutory presuit notice requirement.

On appeal, the 4th DCA affirmed, holding that section 163.3215(4), F.S., requires the complaining party to file a verified complaint with the local government body as a condition precedent to suit. Specifically, the court found that Coconut Creek was an "aggrieved or adversely affected party" under section 163.3215(1), F.S., and in order to comply with section 163.3215(4), F.S., Coconut Creek needed first to file a verified complaint with Deerfield Beach within 30 days of the issuance of the development order. This condition precedent was not met when Coconut Creek filed the complaint and, service of process upon the city within the 30 day time period did not satisfy the statutory requirement. The 4th DCA affirmed the dismissal of Count I with prejudice. Counts II and III were also properly dismissed since the proper method to challenge a local quasi-judicial decision is through a petition for writ of certiorari.

continued...

Revocation of conditional zoning is not a taking when the conditions are broken. *Agripost, Inc. v. Metropolitan Miami-Dade County*, 28 Fla. L. Weekly D794 (Fla. 3d DCA Mar. 26, 2003).

Agripost alleged an inverse condemnation action against Miami-Dade County (County) after the County revoked its conditional unusual use zoning approval due to waste particles and odors emitted by Agripost's waste processing plant. The plant began operating in the fall of 1989, and in October of 1990, the County informed Agripost that its plant was a nuisance because of the odors emitted, in violation of a condition of the zoning approval which allowed the County to revoke the unusual use if the plant emitted objectionable odors.

December of 1990, the County Commission rejected Agripost's proposal to modify the plant to correct the problems and directed staff to pursue enforcement through the Zoning Appeals Board (ZAB). The ZAB ruled that Agripost had violated conditions of its unusual use and revoked it. After unsuccessful federal litigation, Agripost filed suit in state court alleging inverse condemnation under the Florida Constitution and breach of contract for the County's refusal to allow Agripost to modify its facility. The trial court issued summary judgment in favor of the County.

On appeal, the Third DCA affirmed, holding that when zoning approval is conditional and revocable, and the conditions are broken, the revocation of the permit is not a compensable taking. When the County

created Agripost's unusual use property rights, it reserved the power to alter those rights. The County's exercise of such power was not a taking.

Alternatively, Agripost argued that its contract with the County entitled Agripost to an opportunity to cure the violation of the zoning condition, and when the County rejected the facility modification, the County breached the contract. The Court held there was no breach because Agripost's modification proposal was dependent upon charging the County a higher rate for waste than was called for under the existing contract. The Court reasoned that if Agripost merely requested time to modify the plant's problems at its own expense, a breach might have occurred. However, since the modification proposed to charge the County more to fund the modification, a breach did not occur.

Without estoppel, gaming boats are not a valid accessory use to a river-front restaurant. *Sun Cruz Casinos, L.L.C., v. City of Hollywood*, 2003 WL 1916856 (Fla. 4th DCA Apr. 23, 2003).

After Sun Cruz Casinos (Sun Cruz) began operating a third, unpermitted gaming boat from the dock of Martha's Restaurant (Martha's) in addition to two permitted gaming boats already in place at Martha's, the City of Hollywood (City) filed a complaint against Sun Cruz and Martha's. The City sought (1) a declaration that gaming boats are not a valid accessory use to a main permitted use and (2) an injunction to prevent Sun Cruz from operating gaming boats from Martha's dock within the city. Sun Cruz and Martha's counterclaimed, stating that the gaming boats are an accessory use and that Sun Cruz had a right to continue operating by es-

toppel. The Circuit Court found that the Sun Cruz gaming boats were not an accessory use to Martha's restaurant, but the City was estopped from preventing the continued operation of the first two gaming boats. The lower court did not find estoppel with respect to the third gaming boat and enjoined its continued operation from Martha's property.

The Fourth DCA affirmed. Utilizing the definition of "accessory use" from the City's zoning code, the Court held that gaming boats were not "customarily associated" with the main permitted use of operating a restaurant. Nonetheless, the Court held that estoppel allowed Sun Cruz to continue operating the first two gaming boats. The Court found that the occupational licenses for the two boats, combined with three years of extensive communications, negotiations, and agreements between the City and Sun Cruz constituted affirmative representations of material fact by the City. Therefore, when Sun Cruz and Martha's relied on the representations and enlarged Martha's parking area so as to accommodate a larger patronage, an estoppel was created for the first two boats. However, regarding the third boat, because the City made no representation of material fact as to this boat, estoppel did not extend and its operation was enjoined.

Gary K. Hunter, Jr. is a Shareholder with Hopping Green & Sams, P.A. in Tallahassee. He received his B.B.A. and J.D. from the University of Georgia. D. Kent Safriet is an associate of the firm and received his B.S. from Clemson University and J.D. from the University of South Carolina. Mr. Hunter and Mr. Safriet practice primarily in the areas of environmental and land use litigation and solid/hazardous waste regulation.

On the Move

John J. Fumero, General Counsel of the South Florida Water Management District, announced his resignation effective May 30th. Mr. Fumero, a Board Member of the Environmental and Land Use Law Section of The Florida Bar, is entering private practice to provide strategic environmental, water and governmental affairs counsel statewide for landowners, local governments and industry associations. As General Counsel, he was responsible for providing legal counsel to a nine member governor-appointed Board, and for management of a 50 person in-house law office.

On Appeal

by Susan L. Stephens and Lawrence E. Sellers, Jr.

Note: Status of cases is as of May 9, 2003. Readers are encouraged to advise the authors of pending appeals that should be included.

FLORIDA SUPREME COURT

Haire v. Department of Agriculture and Consumer Services, Case No. SC03-446; *Brooks Tropical, Inc. v. Department of Agriculture and Consumer Services*, Case No. SC03-552. Petition to review a Fourth DCA opinion reversing the temporary injunction granted by the trial court enjoining DACS inspectors from entering upon private property to search for citrus trees infected with citrus canker or in close proximity to infected trees without individually issued search warrants. The court held that the statute requiring removal of citrus trees within 1900 feet of a tree infected with citrus canker did not violate due process, but that the statute authorizing area-wide search warrants to locate affected trees was unconstitutional. Nonetheless, magistrates have the discretion to include multiple properties in affidavits and search warrants based upon his or her determination that probable cause to search each included property exists. 836 So. 2d 1040 (Fla. 4th DCA 2003). Status: Review granted April 14 in Case No. 03-446 and April 23 in Case No. 03-552.

Pepper's Steel & Alloys, Inc. v. U.S.A., Case No. SC02-971. The United States sued Pepper's and others for contamination at a scrap metal recovery site. Pepper's sought coverage from its insurer and successfully sued the insurer for enforcement of a \$2 million settlement offer by the insurer. Peppers unsuccessfully sought attorney's fees. The case was appealed to the 11th Circuit Court of Appeals, and the 11th Circuit certified the following question to the Florida Supreme Court: "Under Section 627.428 of the Florida Statutes, is an insured entitled to an award of attorneys' fees incurred in enforcing a settlement agreement against an insurer?" 289 F.3d 741 (11th Cir. 4/25/02). Status: Oral argument held December 11, 2002.

Paulucci v. General Dynamics Corp., Case No. SC01-2346. Petition to review a Fifth DCA opinion holding that the trial court was without jurisdiction to entertain a motion to enforce a settlement agreement between private parties to address pollution on Paulucci's property, allegedly caused by General Dynamics and others, even though the trial court had previously issued the final judgment incorporating the settlement agreement. 797 So. 2d 18 (Fla. 5th DCA 2001). Status: On March 20, the Court reversed in part and remanded, holding that the trial court had the authority to enforce the settlement agreement, but that any action for damages under the agreement must be instituted as a separate action. 28 Fla. L. Weekly S235.

Miami-Dade County v. Omnipoint Holdings, Case No. SC02-815. Petition to review a Third DCA opinion upholding a lower court decision allowing Omnipoint to build a communications tower in a local community despite the refusal of the zoning board to grant a zoning exception. The Third DCA declared that the entire zoning code was "legally deficient because it lacks objective criteria for the County's zoning boards to use in their decision-making process" and was overly vague. 811 So. 2d 767 (Fla. 3d DCA 2002). Status: Oral argument scheduled for June 2.

FIRST DCA

D'Asaro et al., v. Department of Environmental Protection et. al., Case No. 1D03-1184. Appeal of a circuit court order dismissing without prejudice the plaintiffs' complaint for failure to state causes of action for trespass, nuisance, negligence, and the alleged civil theft of "public employees' services" as to any of the defendants with regard to the operation of a rock crusher by Anderson Columbia Co. pursuant to a permit issued by DEP. The order also dismissed with prejudice two conspiracy counts in the complaints and held that no claims could be brought individually against David Struhs or Bobby Cooley for acts or omissions taken in the

course of their employment with the State. Status: Notice of appeal filed March 24. The court issued an order to show cause why the appeal should not be dismissed and Appellants have requested additional time to respond.

Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates Co. and DEP, 1D03-1717. Appeal of a DEP final order dismissing ECOSWF's petition challenging DEP's decision to issue an ERP to IMC to authorize mining and reclamation activities on property known as the Ona Mine, on the ground that ECOSWF alleged standing only as a citizen pursuant to section 403.412, without alleging that a substantial number of its members would be substantially affected by issuance of the permit. The order noted that section 403.412, as amended in 2002, only allows citizens to intervene in an ongoing administrative proceeding and does not allow a citizen to initiate an administrative action without showing that his or her substantial interests would be affected. Status: Notice of appeal filed April 25.

Sierra Club, Inc., et. al., v. DEP, Case No. 1D03-1302. Appeal of a Second Circuit final order dismissing the Plaintiffs' complaint challenging Chapter 2002-261, Laws of Florida, in particular, Section 9, which modifies section 403.412, Florida Statutes, to specify that a citizen can only intervene in ongoing administrative proceedings and may not, merely by alleging citizenship, initiate or petition for proceedings under Chapter 120, Florida Statutes. The Plaintiffs sought injunctive relief and a declaratory judgment that Chapter 2002-261 violates the single subject requirements of Article III, Section 6, Florida Constitution. The trial court held that the Plaintiffs failed to show any "bona fide need" for a declaration on the constitutionality of Chapter 2002-261 and that the Plaintiffs had failed to demonstrate the injury in fact necessary to seek declaratory or injunctive relief. The trial court also held that Chapter 2002-261 does not violate the single-subject requirement. Case No. 02-CA-1963 (March 4, 2003). Status:

continued...

ON APPEAL

from page 9

Notice of appeal filed April 1.

Environmental Confederation of Southwest Florida, Inc. v. Charlotte County and DEP, 1D03-784. Appeal of a DEP final order dismissing ECOSWF's petition challenging DEP's decision to issue a Class I underground injection permit to Charlotte County, on the ground that ECOSWF alleged standing only as a citizen pursuant to section 403.412, without alleging that a substantial number of its members would be substantially affected by issuance of the permit. The order noted that section 403.412, as amended in 2002, only allows citizens to intervene in an ongoing administrative proceeding and does not allow a citizen to initiate an administrative action without showing that his or her substantial interests would be affected. Status: Notice of appeal filed February 27.

Jacqueline Lane v. DEP, Case No.

1D02-2043, and *Apalachicola Bay and River Keeper, Inc. et al. v. DEP*, Case No. 1D02-2319. Appeal of a DOAH final order upholding DEP's rule establishing the criteria for determining whether a state water body is "impaired", thereby requiring development of a Total Maximum Discharge Limit (TMDL). Status: All briefs have been filed.

Wilkinson v. Florida Fish & Wildlife Conservation Commission, Case No. 1D02-1841. Appeal of a summary judgment in favor of the FWCC on a boater's action for declaratory judgment challenging the FWCC's administrative rule establishing a manatee protection zone in Leon County. Status: All briefs have been filed. Oral argument scheduled for March 8 was cancelled and has not been rescheduled.

Charlotte County v. IMC Phosphates Co. and Department of Envi-

ronmental Protection, Case No. 1D02-4874. Appeal of a DEP final order (issued by a substitute agency head) granting an ERP permit authorizing phosphate mining and reclamation in a tract known as the Manson Jenkins property that includes the West Fork of Horse Creek. DOAH Case Nos. 01-0180, 1081 and 1082; DEP OGC Nos. 01-0364, 01-0371 and 01-0372. Status: Notice of appeal filed December 3, 2002; order lifting stay on mining activities issued April 25. Motion for oral argument pending.

FOURTH DCA

Department of Agriculture v. Haire, et al., Case Nos. 4D02-2584 and 4D02-3315. Appeal of a lower court decision issuing a temporary injunction preventing DACS inspectors from entering private property without a search warrant to find and destroy all citrus trees within 1,900 feet of a tree in-

2003 Environmental and Land Use Law Annual Update August 21-23 Amelia Island Plantation

- Legislative Update
- Agency Updates
- Federal Law Update (CERCLA, RCRA, CAA)
- Ethics
- Administrative Law Update
- Wetlands Update
- Local Government Regulation of Rights of Way
- CWA Update
- Utility Franchises
- Schools and Development
- Takings Law Update
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ected with citrus canker. Status: On January 15, the court reversed the temporary injunction and quashed the trial court's orders restricting the application for warrants. The court held that the statute requiring removal of citrus trees within 1900 feet of a tree infected with citrus canker did not violate due process, but that the statute authorizing area-wide search warrants to locate affected trees was unconstitutional, although magistrates had the discretion to include multiple properties in affidavits and search warrants. Rehearing was denied on February 17. 836 So. 2d 1040. On April 14, the Florida Supreme Court granted review. *See related cases under Florida Supreme Court, Case Nos. SC03-446 and SC03-552.*

FIFTH DCA

Ellen Whitmire, et al., v. St. Johns County and the Department of Community Affairs, Case No. 5D02-2631. Appeal of a final order of the DCA upholding amendments to the comprehensive plan of St. Johns County that created a new future land use element category known as "New Town Development" and changed the future land use map designations of nearly 13,000 acres of land from Rural/Silviculture to primarily New Town, with some "Conservation." The amendments also authorize "pipelining" to satisfy transportation concurrency requirements. DCA Final Order No. DCA02-GM-189. Status: Notice of appeal filed August 22, 2002; all briefs have been filed.

U.S. SUPREME COURT

Power Engineering v. United States, Case No. 02-1086. Appeal of a Tenth Circuit opinion that, in an RCRA hazardous waste case, if a state enforcement action did not address a particular issue, EPA may initiate a separate enforcement action. 303 F. 3d 1232. Status: Review denied May 5.

South Florida Water Management District v. Miccosukee Tribe of Indians, Case No. 00-15703. Petition to review an Eleventh Circuit opinion that pumping water from one water body to another requires an NPDES per-

mit when this action serves to add phosphorus to the receiving water. 280 F. 3d 1364 (11th Cir. 2002). Status: Petition filed October 21, 2002.

Alaska Department of Environmental Conservation v. EPA, Case No. 02-658. Petition to review a Ninth Circuit decision holding that EPA has the authority to overturn an air construction permit issued by the Alaska DEC on the basis that the permit did not require implementation of Best Available Control Technology. 298 F.3d 814 (9th Cir. 2002). Status: Petition granted February 24.

SIXTH CIRCUIT

Rapanos v. United States, Case No. 02-1377. Appeal of a district court ruling holding that John Rapanos could not be convicted under the Clean Water Act for filling isolated wetlands on his property, when that property was located twenty miles from the nearest navigable waterway. The lower court held that the isolated wetlands were not "directly adjacent" to the navigable waterway as intended by the Supreme Court in the SWANCC decision. *U.S. v. Rapanos*, 190 F.Supp.2d 1011 (E.D.Mich. Feb 21, 2002) (NO. 93-CR-20023-01). Status: All briefs have been filed; oral argument has been requested.

NINTH CIRCUIT

Environmental Defense Center v. EPA, Case No. 00-70014. Challenge to EPA's rules promulgated under the Clean Water Act for stormwater discharges from municipal storm sewer systems, the so-called Phase II stormwater rules. Status: On January 14, the court upheld the majority of the rules, but held that that the provisions allowing for the use of general permits by filing a Notice of Intent violated the Clean Water Act because they did not require EPA to review the content of the NOIs and did not provide for public participation because the NOIs were not published. 319 F.3d 398. Rehearing denied April 24.

ELEVENTH CIRCUIT

Tennessee Valley Authority v. EPA, Case No. 00-12310. Challenge to an

EPA administrative compliance order holding that TVA violated the Clean Air Act because various upgrades over the years were major modifications requiring a New Source Review permit, not routine maintenance. Status: EPA's motion to dismiss denied January 8, 2002. Oral argument held May 21, 2002. Court-sponsored mediation effort in August 2002 unsuccessful. This case has now been closed.

D.C. CIRCUIT

Environmental Defense Fund v. EPA, Case No. 98-1363. Challenge to EPA's revocation of the one-hour ozone standard for 2,901 counties on June 5, 1998, on the ground that EPA must first formally redesignate the counties as being in attainment with the standard. Status: In abeyance pending settlement discussions; status report filed April 21; settlement ongoing; next status report due May 22.

American Iron & Steel v. EPA, Case No. 00-1435. Petition to review EPA's final air pollution monitoring rule and performance standard published August 10, 2000, for requiring use of continuous opacity monitors. Status: Oral argument held February 25. In settlement; status report due April 7 and every 60 days thereafter.

American Farm Bureau Federation v. Whitman, Case No. 00-1320; *The TMDL Coalition v. EPA*, Case No. 00-1468; and consolidated cases. Petitions to review EPA's TMDL rule. Status: On May 8, on motion by EPA, the court ordered the case held in abeyance; motions to govern further proceedings due August 18.

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Southwest Florida Water Management District

by Karen A. Lloyd, Senior Attorney and Michael Molligan

Governing Board Names Moore Executive Director

The Governing Board of the Southwest Florida Water Management District at its March, 2003 meeting selected David Moore as its new executive director. Moore, who is currently deputy executive director, will assume his new role after being approved by the Governor. The position requires confirmation by the Florida Senate.

"This executive director position is going to be pivotal in protecting the water resources of the 16-county District," said Governing Board Chair Ronnie Duncan. "We were fortunate to have an excellent pool of candidates. The fact that our two finalists were internal candidates is a salute to District staff. I know Dave will continue the exemplary work of the staff in addressing water resource issues."

Gene Heath, interim executive director, was the second finalist.

Moore, 46, is a professional geologist who currently resides in Odessa. Moore joined the District in 1984 as a project hydrologist. He began his tenure as the District's deputy execu-

tive director in 1992. His experience with the District includes all levels of management. Prior to joining the District, he was an exploration geologist for Exxon. Moore holds a bachelor of science degree in geology from the College of Charleston, a master of science degree in geology from the University of South Florida, and a graduate certificate in public administration from the University of South Florida.

"I appreciate the confidence the Governing Board has shown in me. We face many water resource challenges as we try to meet the growing demand for water while protecting the environment. I'm looking forward to working with the Governing Board and our top-notch staff to find solutions to those challenges," Moore said.

Some of Moore's accomplishments at the District include:

- * Spearheaded development of the Southern Water Use Caution Area management strategy including directing the establishment of minimum levels and flows

- * Led the development of the District's Tampa Bay Regional Re-

claimed Water Plan

- * Executive liaison with the Basin Boards

- * Developed the Basin Boards' budget development process and project tracking system

- * Worked with the Governor's office and others to improve the state's pilot less-than-fee land acquisition program

- * District liaison to Tampa Bay Water on the development of the Resource Development Plan that led to construction of the Seawater Desalination Plant, the Integrated Surface Water Project and aggressive demand management

As part of the selection process the Governing Board screened the applicants and pared down a list of eleven applicants to two finalists. The entire Board interviewed the finalists during public meetings and selected the new executive director.

Heath, who was the assistant executive director, has been serving as interim executive director since Jan. 17 when E. D. "Sonny" Vergara stepped down from the top District post. Vergara announced his resignation Dec. 16.

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St. Johns River Water Management District

by Jennifer Springfield and Veronika Thiebach, Assistant General Counsels.

The administrative case of *Marion County v. Margaret C. Dickson Revocable Trust No. 1 and the St. Johns River Water Management District*, DOAH Case No. 02-3372, was voluntarily dismissed by the County following a settlement between the parties. The Dickson Trust applied for a consumptive use permit that would have authorized the withdrawal of groundwater from the Floridan Aquifer in an amount slightly above the District's permitting thresholds at a site adjacent to Silver Springs, as well as the authority to transport the wa-

ter to bottling facilities within the District's boundaries. District staff approved the application. In its challenge to the issuance of the permit, the County argued that the permit should have been denied because the proposed withdrawal was inconsistent with the County's comprehensive plan and zoning code and thus, inconsistent with the public interest, and further, that the Trust should have been required to obtain all necessary County permits before the District issued the consumptive use permit. Under the terms of the

settlement, the Dickson Trust agreed to purchase up to 100,000 gallons per day from the local private, nonprofit utility, thus obviating the need for a consumptive use permit. However, the settlement agreement also contemplated that the Dickson Trust could modify its application to request a secondary consumptive use permit. The Trust has submitted that modified application and it will be presented to the District's Governing Board on May 13, 2003, with a staff recommendation for approval.

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