CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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Lot Maintenance Liens as a Code Enforcement Tool

by Randell H. Rowe, III

The big stick provided to all city and county code enforcement officials is found in Section 162.09(3) of the Florida Statutes. When all else fails, utilization of this statute's lien foreclosure provision often leads to the desired compliance results when a recalcitrant violator is suddenly faced with the possibility of losing his or her property at a foreclosure sale.

Chapter 162, of course, provides local code enforcement boards with the authority to impose administrative fines "to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist."[1] Pursuant to Section 162.09(3), a recorded certified copy of a code enforcement board's order imposing a fine constitutes a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.[2] After three months from the filing of any such lien which remains unpaid, the local governing body may foreclose on the lien.[3]

One limitation, however, is that a code enforcement lien cannot be foreclosed on homestead property.[4] Another roadblock frequently encountered is the discovery that a potential foreclosure property is heavily encumbered by preexisting mortgages, liens, or judgments superior in time and/or dignity to a code enforcement lien. In such a situation it usually is not advisable to file and follow through with a code enforcement lien foreclosure action because of the possibility that the county or city may ultimately end up owning the

See "Lot Maintenance" page 13

Taking Charge of Litigation

by Joseph G. Jarret, Esquire

It is the perennial dichotomy facing public sector attorneys: Bodies politic demanding that outside legal assistance be minimally relied upon while resisting efforts by in-house counsel to hire additional attorneys to handle mounting case loads. Take the aforementioned scenario and add to it the pressures from outside counsel for increasingly higher hourly rates (most outside firms argue that they are already making great sacrifices by providing a "government rate") and your litigation budget continues to spin out of control.

Most public risk managers will tell you that litigation costs should be viewed as nothing more than another exposure that must be managed, while contemporaneously conceding that traditional loss and cost control methodologies of risk transfer and risk avoidance generally do not apply to litigation. Further, most trial attorneys will tell you that the caprices of judges and juries make it almost impossible to accurately anticipate the amount of monies that will ultimately be exhausted on a given lawsuit.

One thing is fairly certain, however: The earlier you resolve a case, the less costly it will prove to be. Consequently, by creating and implementing a strategy designed to both

continued on page 4

INSIDE:

Chair's Report

A·G·E·N·D·A

by Kaye Collie

I am honored to be serving as Chair of our Section this year and look forward to working with all of you.

On behalf of myself and other Section members, I want to congratulate our immediate Past-Chair, Craig Coller, for a job well done! Craig's able leadership guided us through a number of trying issues that arose during his tenure. First, the Board of Governors of the Florida Bar had been considering changes to the financial relationship between the individual Sections and the Florida Bar. The proposed changes were met with a great deal of resistance from the majority of Sections. After several meetings between Bar staff, Council of Sections members and representatives of the various Sections, a compromise, of sorts, was reached. While the details are somewhat complicated, suffice it to say that the changes approved by the Board of Governors at its June 2005 meeting will have minimal effect at this time on our Section's finances.

Second, an issue arose this spring over a request by the Government Lawyers Section to obtain approval for its certification program. While our Section's Executive Council was not opposed to the request for certification, there was concern that the proposed name designation of "Administrative and Government Lawyers" would create confusion with our Section's certification program. Thanks to Craig's efforts and those of our Executive Council and other Section members, along with Certification Committee member Audrey Vance, Past Chairs Ken Buchman, Sandy MacLennan, Joni Coffey and Chip Rice, we were able to convince the Board of Legal Specialization and Education Committee for the Florida Bar that a more appropriate name would be "Administrative, State and Federal Government Practice" so as not to confuse the program with our "City, County and Local Government Law Practice" certification program.

Finally, the Executive Council voted to submit a brief on behalf of our Section in response to the Florida Bar's Proposed Amendments to the Rules Regulating the Florida Bar expressing concerns about the Proposed Amendments to Rule 4-1.11. A detailed explanation of the Section's position on the Proposed Amendments was set forth in the February 2005 Agenda. Oral argument on the Proposed Amendments was held on June 8, 2005, before the Florida Supreme Court. My sincere thanks and appreciation to Marion Radson for all his hard work in writing the brief, for his able oral argument on behalf of the Section, and to Liz Hernandez, Herb Thiele, and Cari Roth for organizing "the troops" at the oral argument.

Under Craig's guidance, we had another successful Certification Review Seminar and held the 28th Annual Local Government Law in Florida Seminar on May 5 – 7, 2005, at the Gaylord Palms Hotel in Kissimmee. Mary Helen Campbell, as Chair-Elect, will be responsible for next year's seminar at our annual meeting, which will be held May 12-13, 2006, at the Hyatt Bonita Springs.

Congratulations to Bob Ginsburg for being this year's recipient of the Ralph A. Marsicano Award and to Susan Churuti for winning the Paul S. Buchman Award. Both awards were presented at the 28th Annual Local Government Law in Florida Seminar. Thanks also to Chip Rice for continuing to chair the Mariscano Selection Committee.

Special thanks to Liz Hernandez and Joe Jarret for serving as editors of our newsletter, "The Agenda", the past few years. Joe Jarret has graciously agreed to take over sole responsibility as editor as Liz serves in her new capacity as Secretary/Treasurer of the Section. Jewel Cole continues as Chair of our Bar Journal Committee. Ken Tinkler is in charge of our Law Student/Intern Award Program.

We welcome Hans Ottinot as our newest member of the Executive Council. Hans is the City Attorney for the City of Sunny Isles Beach.

Our Section will continue to sponsor the Public Employee Labor Relations Seminar (Michael Grogan as Program Chair), the Public Finance Seminar (Sandy MacLennan as Program Chair), Land Use Law (Karl Sanders as Program Chair), and Certification Review Course (Herb Thiele as Program Chair).

I encourage you to visit the Section's website (www.locgov.org), which is under the direction of Grant Alley. The website provides information pertaining to our Section and its members, information on employment opportunities, as well as occasional summaries of cases related to local government law.

Still under development is an online update to the local government desk book on various topics related to local government practice. This project is being coordinated by Marion Radson, Liz Hernandez, and other Section member volunteers. I encourage your participation in helping to edit the desk book topics as they become available.

With the help of Pam Dubov, we hope to continue our partnership with Stetson Law School for the publication of the Local Government Law Symposium. The Symposium contains articles and digests on topics relevant to local government lawyers. A copy is provided to all City, County, and Local Government Law Section members as a benefit of membership.

No chair report would be complete without sincere thanks to Carol Kirkland, our Section coordinator, without whom our Section would cease to operate.

The activities of our Section occur as a result of the dedicated work of our members. Our programs can only be improved with your ideas, participation, and encouragement. I welcome your involvement in our Section activities and look forward to a successful year.

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manage the suit and achieve early case resolution, you can go a long way in assisting your entity in controlling the runaway costs inherent in so many cases.

Such a strategy or litigation plan is essential in an era of soaring attorney's fees, protracted, contentious litigation, expert witness fees and deposition costs as well as the practice by many jurisdictions around the State of raising filing fees in response to budget deficits and shortfalls and the Article V dilemma.

Litigation Management Program:

Clearly, you cannot overlook the utility and value of having in place a litigation management program that:

- Emphasizes alternative dispute resolution such as mediation and arbitration;
- Requires outside counsel to aggressively handle files;
- Utilizes pre-suit agreements or contacts that contain clauses requiring binding arbitration, this, depending of course on the type of case at Bar.

Once the above and related attempts have failed, and you determine that a file cannot be handled in-house due to a conflict of interest, or the unique characteristics of the matter at Bar, it is time to select outside counsel.

Selecting Outside Counsel:

I will preface the following comments by acknowledging that some entities have little or no choice in such matters due to preexisting contracts or, the dictates of the elected politic. If you do have some flexibility in this regard, however, it is helpful to create a comprehensive selection process that includes:

- Interviewing prospective attorneys;
- Educating oneself as to the attorney's reputation in the legal community.

This can best be accomplished by talking with your peers, or those in the know in the courthouse;

- Becoming knowledgeable of the attorney's litigation track record;
- Ensuring that the attorney has the requisite expertise in the particular body of law at issue and has the ability to site to specific cases and their outcomes; On this note, beware of the attorney who boasts he or she "does a little of this and a little of that."
- Discussing in detail the attorney's approach toward litigation. On one end of the continuum is the attorney who strives to achieve quick, lucrative settlements without regard to the entity's exposure. At the opposite end is the attorney who will employ dilatory tactics and, colloquially speaking, "milk the case for all its worth," thereby insuring that a hefty attorney's fee is in the offing.
- Insuring you are aware of who is doing what at each phase of the case and never hesitate to object to work being improperly assigned. For instance, high-priced trial lawyers should not be doing work that a less costly junior partner/associate or paralegal can competently do. Taking this one step further, why pay for the services of paralegal to do the work of legal secretary? Beware of double billing, which is the practice of sending two or three lawyers to do the work of one.

The above scenario often arises when a firm dispatches inexperienced lawyers to tag along experienced trial counsel, "for the experience." You should not pay a firm to train its staff on your budget.

- Insure the attorney has a clearly defined theory of the case and works toward achieving clearly defined goals as compared to blindly fighting back.

In summary, direct questions about an attorney's expertise, experience, technical competence and delegation of duties should receive direct answers. Anything less is suspect.

The Litigation Budget

Due to the complexity of certain law suits, most law firms increase their hourly rate every time one of their lawyers enters the courtroom. It is therefore essential that you establish a realistic litigation budget, and take great pains to ensure outside counsel sticks to the budget. Some organizations, in an effort to reduce and control its litigation budget, pit law firms against each other by putting their litigation work out to bid. The firms are given a synopsis of the facts of the case and are requested to submit a proposal that outlines a trial strategy, and most importantly, a detailed budget. The organization closely monitors the progress of the work by requiring weekly billing updates to ensure the law firm is on track with their proposed budget. The bills are then compared with the estimates originally proposed by the law firm. If the law firm exceeds its proposed budget, the firm is not paid. An extreme measure, to be sure, but one that works for some organizations.

While on the subject of billing, you should insist upon itemized billing that outlines with specificity all charges. Further, if you feel weekly billing updates to be excessive, you should, at a minimum, demand monthly updates. Some entities go as far as requiring outside firms to submit monthly bills using a format selected by the entity. The format identifies each attorney and paralegal and other support staff member by name, the number of hours exerted by each person, and a detailed description of the services rendered.

When reviewing litigation budget proposals, it is essential that the submitting firm be required to justify the estimates submitted. Such justifications, at a minimum, should come in the form of research conducted reflecting the length of time such cases take to litigate, the frequency in which such cases are dismissed outright, recent judge or jury awards for like cases, and the frequency in which such cases are filed and ultimately appealed.

In short, if you don't know where the money goes, you can never hope to control litigation costs nor budget future matters effectively.

In-house Litigation Support

One litigation cost-cutting measure that has proven effective is the use of in-house staff to serve as your organization's litigation support team. More often than not, this untapped resource is qualified to prepare deposition summaries, perform legal research, prepare witnesses for depositions or take/sit in on depositions, as well as perform basic administration. They are often equally

adept at organizing the file, pulling and copying documents, retrieving public documents, scanning documents, preparing trial exhibits, and serving as messengers/couriers. It is not at all unusual to realize a significant savings as compared to the costs inherent in outsourcing such duties. Further, you enjoy a Level amount of command and control over these often-burdensome costs.

Depending upon the size and expertise of your in-house counsel staff, you may wish to have them complete such tasks as basic computerized and traditional legal research, to conduct informal interviews and witness searches, drafting memoranda of law, or attending perfunctory hearings such as case management conferences, motions to continue or extensions of time, and so forth.

Summary:

It is axiomatic that, merely because a case has been "farmed out" doesn't mean your body politic will not expect you to be glib about its status and costs. By closely reviewing all costs, insuring outside counsel's activities are monitored, bills reviewed as well as remaining an integral part of the case, you go a long way in protecting your entity from the excessive fiscal woes inherent in litigation.

Joseph G. Jarret, Esquire
Attorney At Law
Certified Mediator& Arbitrator

***Joseph G. Jarret** is the Polk County Florida, Attorney, a Certified Florida Supreme Court Mediator and Arbitrator, and a former assistant Manatee County Attorney. He is the former Chief Counsel for the Hardee County Office of the 10th Judicial State Attorney. He is the past president of the Manatee and Hardee County Bar Associations, and is the Secretary / Treasurer of the Florida Association of County Attorneys and a member of the Executive Council of the City, County & Local Government Section of the Florida Bar. He is a former United States Army Combat Arms (Airborne) Officer with service in the Middle East, Africa and Central Europe. Jarret holds the Bachelor of Science Degree in Criminal Justice, from Troy State University (W. Germany Campus) the Masters in Public Administration from Central Michigan University, the Juris Doctor from Stetson Law school, and a post-graduate Certificate in Public Management from the University of South Florida. Jarret has published over 75 articles in various professional journals, eight of which have appeared in the* Florida Bar Journal. *He is a nationally recognized speaker on public entity liability issues and has most recently lectured on behalf of the Florida Bar, the Florida Supreme Court, Alternative Dispute Resolution Center, the Florida County Attorneys Association, the Florida Prosecuting Attorney's Association, the Wyoming Law Enforcement Academy, the Michigan State Police Academy, and the Southwest Illinois Law Enforcement Commission. He currently serves Stetson University College of Law as an adjunct seminar lecturer, and is an Adjunct Professor of Business Law for Webber International University.*

Legal Writing Award Presented at Annual Meeting

Joe Jarret, County Attorney for Polk County, is the 2005 recipient of the Section's, *Osee R. Fagan*, Legal Writing Award. He was also recently awarded the "Best Author Award" and "Best Article Award" by the Public Risk & Insurance Management Association. Joe has published over 85 articles in various professional journals, eight of which have appeared in the *Florida Bar Journal*. His published works have been cited by the Florida Courts of Appeal, Florida Statutes Annotated, and the University of *Florida Law Review*.

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

Kathryn Kaye Collie, Orlando ..... Chair
Mary Helen Campbell, Tampa ..... Chair-elect
Craig H. Coller, Miami ..... Immediate Past Chair
Joseph Jarret ..... Editor
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Statements or expressions of opinion or comments appearing herein are those of the editor(s) or contributors and not of The Florida Bar or the Section.

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Section Annual Meeting

May 6, 2005

Student Award presented to Katie Auger, Barry University School of Law, by Ken Tinkler, Chair of the Student Award Committee.

Robert Manning, Florida International University College of Law, accepting the Student Award from Chair of the Student Award Committee, Ken Tinkler.

Chip Rice and Robert Ginsburg after presentation to Mr. Ginsburg of the prestigious Ralph A. Marsicano award.

Incoming Chair, Kaye Collie, accepting gavel from Craig Coller.

Kaye Collie, Chair of the Section presenting Craig Coller, with the Chair's gift.

Jonie Coffey, Robert Ginsburg, Craig Coller, and Cynthia Johnson-Stacks after the presentations.

Standing L to R: Marion Radson, Robert Ginsburg, Craig Coller, Michael Grogan, Herbert Thiele. Seated: Elizabeth Hernandez, Kaye Collie, Susan Churuti

Susan Churuti, a past chair of the Section, received the Paul S. Buchman Award.

Robert Ginsburg and wife Margie at the Annual Meeting Luncheon.

Section Members at the Annual Meeting

Florida Case Summaries

Editor's Note: The following case law summaries were reported from April 1, 2005, through June 31, 2005.

Section 1. Recent Decisions of the Florida Supreme Court

Juveniles — City Curfew Ordinances — Juvenile curfew ordinances were unconstitutional to the extent they impinged a fundamental right of juveniles but were not narrowly tailored to achieve asserted compelling interests.

The cities of Tampa and Pinellas Park enacted similar juvenile curfew ordinances. The individual cited for violation of the ordinances initiated this action. The Second DCA ruled the ordinances unconstitutional, and certified as a question of great public importance to the Florida Supreme Court, the issue of whether the ordinances were constitutional. On review, the court considered upheld an earlier ruling that strict scrutiny should apply since the ordinances regulated the fundamental rights to freedom of movement and privacy. The compelling governmental interests advanced and agreed. However, the ordinances were faulted in their application to the extent they applied to a class broader than what was cited as the evil sought to be overcome. Additionally, one of the ordinances failed to make exceptions for juveniles who were out after curfew, even with parents or on emergencies with parental permission. Accordingly, the court concluded the ordinances failed to pass strict scrutiny in that they were drafted to operate by the least restrictive means to achieve the asserted goals. *State of Florida v. J.P., State of Florida v. T.M.,* 30 Fla. L. Weekly S331 (Fla. May 5, 2005).

Section 2. Recent Decisions of the Florida District Courts of Appeal

Workers' Compensation — Law Enforcement Officers — Statutory Disability Presumption – District court reversed judge of compensation claim, concluding 2002 amendment to section 112.18(1), Fla. Stat. should apply retroactively without regard to date of accident or injury.

Seminole County Sheriff's Office appealed a JCC ruling the claimant, a deputy sheriff who suffered a stroke in 1999, was entitled to statutory presumption his hypertension was accidental and suffered in the line of duty pursuant to §112.18(1), apparently arguing the 1999 date of accident preceded any entitlement to a presumption for law enforcement officers. On review, the District Court held the subsequent amendment of §112.18(1) in 2002 was merely a change to the procedure for establishing entitlement to benefits that should apply retroactively, without regard to the date of the accident and injury, since the substantive right to recovery due to the stroke event of 1999 remained unchanged. *Seminole County Sheriff's Office and Gallagher Bassett Services v. Frank Johnson,* 30 Fla. L. Weekly D826 (Fla. 1st DCA March 24, 2005).

Annexation — Standing to Challenge — Trial court erred by granting writ of certiorari challenging another's annexation where challenging city was not affected by annexation and anticipated no material injury from annexation.

City of Auburndale approved annexation of 196 acres of land with the intent of using it for a wastewater spray field. The Town of Polk City had rights to provide water and wastewater services to the annexed property. Following Auburndale's adoption of annexation ordinance, Polk City petitioned the circuit court for certiorari review of administrative action. The circuit court entered an order granting certiorari, quashed Auburndale's approval of the ordinance and invalidated the ordinance. Auburndale appealed to the district court where it was held the Town of Polk City lacked standing to challenge the annexation since the Town's right to provide certain services did not arise to the level of an exclusive right to provide such services. Furthermore, even if the Town had an exclusive right to provide services, Auburndale's intended use of the property would give rise to no need for water or wastewater services; if such a need arose, Auburndale's use would not disrupt the Town's ability to offer those services. Accordingly, the court held the Town of Polk City was not affected by the annexation as a matter of law, granted Auburndale's petition for certiorari and quashed the circuit court's order. *City of Auburndale v. Town of Polk City,* 30 Fla. L. Weekly D843 (Fla. 2nd DCA March 30, 2005).

Vacation of Right-of-Way — Home Rule Powers — Trial court erred in holding city was not vested with authority to impose conditions on the vacation of a right-of-way.

The City of Temple Terrace appealed a trial court ruling holding it was not empowered to condition the vacation of a right-of-way sought by plaintiff, Tozier. Tozier requested the city abandon a right-of-way adjacent to his business location. Tozier offered depictions suggesting a 10,000 square foot structure and approximately $750,000 in improvements would be constructed at the location. Based upon Tozier's representations, the city council ultimately passed an ordinance vacating a portion of the right-of-way, but conditioned it upon certain acts that were to be incorporated into a development agreement between the City and Tozier. The ordinance clearly expressed vacation was subject to specific terms and conditions in an enforceable development agreement. The final site plan submitted for approval by Tozier contained a structure of only 1,800 square feet. Given the City's hopes for how Tozier's initial development proposal would complement an overall redevelopment plan for the area, the final site plan presented by Tozier was rejected. Tozier filed suit and the circuit court entered an order declaring the City was not empowered to

pass an ordinance vacating property subject to conditions subsequent and cited a 1971 case which rejected a similar attempt by a city, and severed that portion of the ordinance containing the conditions, effectively giving Tozier the desired right-of- way vacation. On review, the second district concluded the grant of power contained in Chapter 166, the Municipal Home Rule Powers Act of 1973, effectively superceded the 1971 opinion relied upon by the trial court. Accordingly, the court held the City's ordinance requiring certain development conditions be met prior to actual vacation was found lawful as a matter of home rule authority. *City of Temple Terrace v. Kenneth E. Tozier,* 30, Fla. L. Weekly D1102 (Fla. 2nd DCA April 29, 2005).

Torts — Sovereign Immunity — Operational Level Functions — Trial court erred in granting summary judgment for city where defect causing plaintiff's fall was incorporated by design and therefore considered an operational-level action.

Plaintiff twisted her foot and sustained injury when she stepped in a "decorative groove" contained in the walkway design surrounding a tree. The city prevailed at the trial court, primarily arguing it was protected by sovereign immunity because the allegedly dangerous condition in the walkway was an aesthetic feature of the original design, rather than the result of deterioration or poor maintenance. However, the district court cited cases which hold choices to incorporated particular design elements in government owned property, where such elements are alleged to be dangerous or defective, may be characterized as operational level decisions and are actionable. Accordingly, the court reversed the summary judgment and remanded the case. *Shirley Schmid v. City of Miami Beach,* 30 Fla. L. Weekly D1215 (3rd DCA May 11, 2005).

Torts — Trial court erred in granting summary judgment to co-defendant state DOT in plaintiff's slip and fall suit where finding city entered agreement with county to maintain defective sidewalk alone did not mean dot was not responsible for maintaining area where plaintiff fell.

City of Tampa appealed a trial court's summary judgment in favor of the State Department of Transportation in a lawsuit brought by a citizen who tripped and fell over an uneven portion of sidewalk at drainage inlet near I-275. The city entered an inter-jurisdictional road maintenance and operation agreement under which the City agreed to perform certain of the County's maintenance and operational responsibilities on certain portions of the county road system that are located within the city. The area where Plaintiff fell was one of the roads. Under the agreement with the County, the City was charged with maintaining sidewalks, among other things. However, the district court reasoned such an agreement to be responsible for the sidewalk area did not automatically foreclose the possibility DOT retained some residual responsibility for the areas in question, especially in light of testimony offered at trial as to the long-standing understanding DOT was responsible for those areas adjacent to interstate roads. Summary judgment in favor of DOT was reversed. *City of Tampa v. Linda Ezell and Department of Transportation,* 30 Fla. L. Weekly D1406 (2nd DCA June 3, 2005).

Certiorari — Density — Circuit court applied proper certiorari standard and afforded procedural due process in affirming city council's refusal to adopt a new ordinance increasing density of petitioner's property.

Petitioners sought reversal of a circuit court that affirmed a city council decision to maintain existing density limitations. Over the years before Petitioners became titleholders to the land, the city council enacted several ordinances increasing density limitations. Petitioners approached the council regarding increasing density, but made strenuous arguments as to why their predecessors in interest were denied certain procedural due process protections. However, since the only issue acted upon by the city council was consideration of an ordinance to increase the density of the property, arguments regarding the lawfulness of the property's existing density limitations were not properly before the circuit court. Accordingly, the district court found no procedural due process violations, the essential requirements of law were observed, and there was competent substantial evidence to support the underlying city council decision. The judgment was affirmed. *Gerald J. Snyder; The Links at Terra Ceia, Ltd. V. City Council of the City of Palmetto,* 30 Fla. L. Weekly D1411 (Fla. 2nd DCA June 3, 2005).

Section 3. Recent Decisions of the United States Supreme Court

No cases reported.

Section 4. Recent Decisions of the United States Court of Appeals, Eleventh Circuit

Outdoor advertising — Mootness — District court was without jurisdiction to render summary judgment on behalf of city since city's amendment of zoning ordinance effectively mooted issue raised by outdoor advertiser's suit.

National Advertising Co. filed suit against the City of Miami, Miami-Dade County, alleging provisions of the decade old zoning ordinance impermissibly favored commercial speech over non-commercial speech. Following the filing by National, Miami amended its zoning ordinance to completely alter regulations pertaining to commercial and non-commercial speech, effectively removing the allegedly unconstitutional portions of the ordinance. National argued that a determination of the issue should proceed given the likelihood Miami would re-enact the challenged portions of the ordinance. However, the court cited law holding government entities are given deference in the presumption they are unlikely to reinstitute illegal activities. Furthermore, National could produce no evidence to suggest the City of Miami was likely to reenact the challenged provisions of the zoning ordinance. Absent such evidence, the court held the claims at issue moot and order the district court to dismiss the action. *National Advertising Co. v. City of Miami, Miami-Dade County,* 18 Fla. L. Weekly Fed. C356 (11th Cir. March 21, 2005).

continued...

CASE SUMMARIES
from page 9

Civil rights — Speech — District court erred in upholding section 12.533(4) Fla. Stat., as that section should have been characterized as a content-based restriction of speech that could not withstand strict scrutiny review.

Gordon Dillon was sued in his individual capacity and official capacity as police chief of Key West, Florida. Plaintiff obtained information from a pending internal police investigation and published a commentary based on the information. Thereafter, Dillon issued an arrest warrant, arrested, and jailed the plaintiff. The plaintiff, a news reporter, sought injunctive and declaratory relief, as well as damages under 42 U.S.C. 1983 for Dillon's enforcement of §112.533(4) in violation of his First, Fourth, and Fourteenth Amendment rights. The district court found the statute content neutral and granted Dillon's motion for summary judgment. On review, the eleventh circuit reversed, characterizing the statute as a content-based restriction, stifling a particular type of speech content – speech regarding pending investigations. Accordingly, under a strict scrutiny analysis, the court did not find the interests advanced by the city sufficiently compelling to justify the statute's chilling effect. The court further found Dillon eligible for qualified immunity since his enforcement of the statute arose when the statute's unlawfulness was not clear. However, given the chief's status as a final policymaking authority as to law enforcement matters in the city, the city was exposed to 1983 liability for enforcing the statute. *Dennis Reeves Cooper v. Gordon A. Dillon,* 18 Fla. L. Weekly Fed C355 (11th Cir. March 22, 2005).

Zoning — Telecommunications Act — District court did not err in holding local zoning board did not improperly reject application to build cell phone site on golf course within a residential community.

Village of Wellington was sued by Linet, Inc., a cell tower service provider, after the Village's Planning and Zoning Board denied the requested permit to build a cell tower. The denial was based largely on public outcry and other public testimony that the cell tower would result in lowered property values. However, another cell tower of an greater height than that sought by Linet was permitted elsewhere in the town. In its suit, Linet claimed violation of the Telecommunications Act of 1996 in terms of discrimination in the treatment of cell tower services, a claim under 42 U.S.C. §1983 based on violation of the Telecommunications Act, a lack of substantial evidence to support the Village's tower permit denial, and a state law due process violation claim. The District court granted summary judgment on the §1983 claims, stating the Telecommunications Act itself provided comprehensive statutory scheme to redress his claims; the court also granted summary judgment on the remaining claims. Linet appealed to the eleventh circuit, which affirmed the district court judg-

Calendar of Events

EXECUTIVE COUNCIL SCHEDULE
2005-2006

September 9, 2005
11:00 a.m. – 1:00 p.m.
Tampa Airport Marriott • Tampa

October 27, 2005
5:00 p.m. – 6:00 p.m.
Rosen Centre Hotel • Orlando

January 13, 2006
9:00 a.m. – 12:00 p.m.
Teleconference Meeting

May 11, 2006
Hyatt Regency Coconut Point • Bonita Springs

May 12, 2006
Section Annual Meeting
Hyatt Regency Coconut Point • Bonita Springs

June 23, 2006
Boca Raton Resort and Spa
Boca Raton

SEMINAR SCHEDULE
2005-2006

Public Employment Labor Relations Forum
October 27-28, 2005
Rosen Centre Hotel • Orlando

2006 Certification Review Course
May 11, 2006
Hyatt Regency Coconut Point • Bonita Springs

29th Annual Local Government Law in Florida
May 12-13, 2006
Hyatt Regency Coconut Point • Bonita Springs

ment. The circuit court cited the recent Supreme Court opinion City of Rancho Palos Verdes v. Abrams for the conclusion no remedy under §1983 is available for violations of the Telecommunications Act. The court dismissed Linet's argument public complaints about aesthetics were insubstantial by holding that complaints about aesthetics, coupled with evidence of an adverse impact on property values can constitute substantial evidence sufficient to reject a construction application. Finally, the court rejected the Telecommunications Act claim of discrimination since the Act itself contemplates there might be some discrimination by local governments between telecommunications providers, given the various aesthetic or safety concerns implicated. The court concluded the remaining due process claim was barred by the statute of limitations. Accordingly, the district court decision was affirmed. *Michael Linet, Inc. v. The Village of Wellington,* 18 Fla. L. Weekly Fed. C501 (11th Cir. May 6, 2005).

Zoning — Ordinances — Signs — District court erred in not granting preliminary injunctive relief to sign owner where offending sign code held to constitute a prior restraint on speech based on sign permit requirement and violative of first amendment based on enumerated exemptions from regulation.

Plaintiff Solantic appealed a district court's denial of preliminary injunctive relief in connection with its complaint against the City of Neptune Beach's sign ordinance. Solantic complained the code improperly regulated signs based on content in violation of the First Amendment and further represented an invalid prior restraint to the extent the sign permit process placed no time limits on permitting decisions from city officials. On appeal, the eleventh circuit reversed the district court. The sign code prohibited the type of electronic variable message center sign erected by Solantic, based on the asserted interests of aesthetics and public safety. However, the code went on to exempt from its regulation things such as lighted Christmas displays. The code also signs on private property if the were for the purpose of guiding traffic and parking. The code further distinguished specified that certain signs required a sign permit before being erected, while other sign types were exempt from the permit requirement. The eleventh circuit considered these types of factors and concluded the sign code was unconstitutional in that it extensively regulated some sign types and exempted others based on the nature of the messages they seek to convey. The court also agreed with Solantic that the asserted interests in safety and aesthetics had not been recognized as compelling governmental interests that might sustain the regulations. The court also attacked the ordinance as failing to achieve its desired ends by the least restrictive manner in that the code permitted lighted signs in some instances, while not in others, without explaining how safety or aesthetics might be impacted in the former instances but not in the latter. Finally, the court agreed the sign permit scheme represented a prior restraint on speech to the extent it placed no restrictions on the time limit within which government officials were required to render a decision on a permit request, effectively creating the opportunity for the government to pocket veto objective signs while expediting permits for desirable signs. Finally, the court took the unusual step of deciding the preliminary injunction claim on the merits and granting the relief sought by Solantic, remanding the case for resolution of Solantic's claim it did not owe the City for past sign code violations. *Solantic, LLC v. City of Neptune Beach,* 18 Fla. L. Weekly Fed. C575 (11th Cir. May 31, 2005).

Zoning — Ordinances — Religion — Civil Rights — District court erred in granting summary judgment to county where evidence showed county treated nonreligious groups differently under required special permit scheme for certain extraordinary uses in residential zone.

Plaintiff appealed a district court's grant of summary judgment in favor of Defendants, Orange County, Florida. Plaintiff claims the county ordinance requiring special exception permit in order to operate a religious organization in residential districts, violated the Religious Land Use and Institutionalized Persons Act, placing a substantial burden on his religious exercise and violates the equal terms provision of RLUIPA, treating his religious assembly different from non-religious assemblies. On review, the court held the County's requirement of applying for a special exception to operate a religious organization in a residential area does not rise to the level of "burden" required to state a claim under RLUIPA. Additionally, the court held that among the differing classes of uses named in the challenged ordinance which do not require the special exception permit, the only one that could be considered an assembly for purpose of comparing its treatment to that of Plaintiff's religious assembly was a family daycare home. In its analysis of Plaintiff's facial challenge of the ordinance, the court held the government, by excluding family daycare homes from the special permit requirement, was simply acknowledging the fundamental right to freedom of personal choice in marriage and family life. Since the distinction in treatment afforded family daycare homes satisfied the compelling governmental interest and least-restrictive-means tests, it could not form the basis of Plaintiff's equal terms facial challenge of the ordinance under RLUIPA. In its consideration of Plaintiffs as-applied challenge of the ordinance, the court concluded the County treated Plaintiff's religious assembly different than non-religious assemblies, therefore violating the equal treatment provisions of RLUIPA. Based on a finding of different treatment, the court applied strict-scrutiny analysis of the ordinance, concluded the County set forth no compelling justification for its unequal treatment of religious assemblies and reversed the district court's grant of summary judgment against Plaintiff's equal treatment claim under RLUIPA. The court also reversed summary judgment for the County and remanded the case based on Plaintiff's due process claims of vagueness. To the extent the County ordinance did not define religious organization, yet seeks to enforce religious assemblies, the district court erred in its use of the definition provided in the ordinance for

continued...

"religious institution." *Konikov v. Orange County, Florida,* 18 Fla. Law Weekly Fed. C585 (11th Cir. June 3, 2005).

Section 5. Recent Decisions of the United States District Courts for Florida

Zoning — Religion — District court denied religious group's claims under religious land use and institutionalized persons act and Florida religious freedom restoration act because asserted burdens by group did not satisfy substantial burden threshold of acts and group offered no support for disparate treatment theory based on favorable treatment to other groups where other groups' use was accessory to a residential use rather than a purely nonreligious assembly granted same accommodations denied the religious group.

The Williams Island Synagogue, Plaintiffs, brought a two-count complaint against the City of Aventura, alleging violation of the Religious Land Use and Institutionalized Persons Act and the Florida Religious Freedom Restoration Act. Given the similarly between the two acts, the District Court essentially used the same analysis in granting summary judgment to the City under both acts. Plaintiffs sought to re-locate their place of worship because growth resulting in services at the existing facility to become somewhat calamitous due to late arrival of worshipers and other issues that disturbed their worship services. The group targeted a proposed worship site within a public assembly room that was accessory to a residential development. The group sought a so-called community facilities permit to use the public assembly room as required of religious groups under the City's zoning regulations. However, groups who resided at the residential development were entitled to use the public assembly room for religious purposes and otherwise under the city code, since the use was accessory to an existing residential use. The city initially granted the community facilities permit, but subsequently withdrew it. Plaintiff then brought suit alleging the city's community facilities permit scheme violated RLUIPA's prohibition against zoning decisions that substantially burden an religious assembly's ability to adhere to its beliefs, unless the decision is supported by a compelling governmental interest. The court dismissed this claim when it considered the Plaintiff's evidence that late arrival of female worshipers at the existing worship location required female worshipers to pass through areas designated for male worshipers, distracting from prayer and worship services. This, in the court's view, did not rise to the level of protection afforded under RLUIPA, which prohibits substantial burden that alter a group's ability to adhere to its beliefs. Plaintiffs asserted a second count alleging disparate treatment under RLUIPA. Under the equal terms provision of RLUIPA, the relevant question is whether zoning regulation treats religious assemblies on less than equal terms with nonreligious assemblies and institutions. Plaintiffs argued it was treated unequally from those individuals who reside at the proposed worship location in that the residents did not need a community facilities permit to use the facility for worship and other uses, but Plaintiff's religious group was required to secure the special permit. However, the court agreed with the City's argument no disparate treatment occurred since the Plaintiff was a purely religious group while the others who could freely use the public assembly room were entitled to such use since it was attendant to their status as residential owners of the particular facility. Accordingly, the groups were materially different and therefore no showing of disparate treatment between a religious group and a purely non-religious group could be made. Furthermore, Plaintiffs could provide no support that rights attendant to residential status could be equated with those of purely nonreligious groups for purposes of comparison to treatment of Plaintiff synagogue under RLUIPA disparate treatment analysis. The City's motion for summary judgment was granted.

The Williams Island Synagogue, Inc. v. City of Aventura, 18 Fla. L. Weekly Fed. D495 (S.D. Fla. February 24, 2005).

Section Student Award Winners

by Kenneth A. Tinkler, Senior Assistant County Attorney, Hillsborough County

This year all of Florida's Law Schools participated in the Section's Law Student Awards Program. As a result, for the first time, ten awards were issued at the Section's Annual Meeting and at academic award ceremonies. The award recognizes the student at each law school who most excels in the area of Local Government Law. In recognition of their outstanding performance, each student was invited to the Section's Annual Meeting Luncheon, given a plaque from the Florida Bar, and an award check of $250.

Award recipients this year were: **Katie Auger**, *Barry University Dwayne O. Andreas School of Law*, **M. R. Jordan**, *Florida Coastal School of Law,* **Robert Manning**, *Florida International University College of Law*, **Amy Parekh Mehta**, *Nova Southeastern University Shepard Broad Law Center*, **Karen Wetzler Miller**, *Florida State University College of Law*, **Susan Stark Lichtstein**, *University of Miami School of Law*, **Ruth Rhodes**, *Florida A&M University College of Law*, **Maja S. Sander**, *Stetson University College of Law*, **Ignacio Jesus Vazquez, Jr.,** *St. Thomas University School of Law*, and **Jacqueline Watanabe**, *University of Florida Levin College of Law.*

LOT MAINTENANCE
from page 1

violator's heavily encumbered property and becoming liable for his or her debts attached thereto.

When it comes to junkyard cases and the like, a very effective way to get around these two obstacles is with the use of a lot maintenance program and lien. The typical local government lot maintenance program is utilized strictly for mowing overgrown lots. However, a creative ordinance can extend lot maintenance to the cleaning up, removing, and disposing of construction or demolition debris and rubble, residential and commercial garbage and yard trash, junk automobiles and parts, junk equipment, old tires, household goods or appliances, and just about anything else that could be considered junk or waste.[5]

The best part is that a lot maintenance ordinance can make the lot maintenance lien a special assessment lien superior in dignity to all other liens, mortgages, and judgments encumbering a property except liens for taxes.[6] The ordinance should authorize the zoning enforcement official to levy the special assessment lien against a lot in the amount of the local government's costs of abating the nuisance plus any administrative expense, along with a rate of interest to accrue on a yearly basis.[7] The ordinance must specify that the lien shall be a first lien equal to a lien for nonpayment of property taxes.[8] Such a special assessment lien can be levied and foreclosed on homestead property.[9]

Most local governments or their code enforcement officials have weathered the constant complaints from citizens about an unsightly junkyard blighting their neighborhood, and many such officials have experienced the frustration of dealing with a stubborn property owner who refuses to remove the junked vehicles and other debris littering his or her property while continually ignoring the huge accumulating code enforcement board fine.

In such a situation it can be maddening to code enforcement officials when they realize they cannot go after the violator with a lien foreclosure because the property is homestead and thus protected against their lien. Their hands are tied, and all they can do is listen to the barrage of complaints while the violator thumbs his nose at them. Even if the property in violation is not homestead, foreclosure of the code enforcement lien may be precluded if the property is found to be encumbered with large superior mortgages or other liens and judgments.

The lot maintenance lien provides a solution. Under a properly worded ordinance as described above, these obstacles can be overcome and foreclosure may be accomplished to either force the violator to comply or take his property away from him. Here's how it works. After proper notice has been given to the violator and ignored, the local government can proceed under the lot maintenance ordinance to go in and clean up the violator's property by removing and disposing of all the junk. Once the clean-up operation is complete, the zoning enforcement official may levy the lot maintenance (or special assessment) lien on the property to cover the costs and administrative expense plus interest. Since this lien is a first lien equal to a lien for nonpayment of property taxes, unlike the code enforcement board lien, it is in first place and superior to all other encumbrances on the property except liens for property taxes. The lien, along with all other liens, mortgages, and judgments on the property, may be foreclosed, even if the property is homestead.

After the right, title, or interest claimed by the other lien holders is foreclosed, the property can be sold free and clear at the foreclosure sale. The county or city should be able to recover the amount of its lot maintenance lien from the sale proceeds paid by the successful bidder. If the county or city ends up acquiring the property at the sale, then the property can be sold later, hopefully for a lot of money, or can be used by the county or city for whatever purpose it deems appropriate.

Thus, if properly utilized, a lot maintenance ordinance and lien can be an important and effective code enforcement tool in this regard.

Endnotes:

[1] § 162.02, Fla. Stat.; Miskin v. City of Fort Lauderdale, 661 So. 2d 415 (Fla. 4th DCA 1995); and Demura v. County of Volusia, 618 So. 2d 754 (Fla. 5th DCA 1993).
[2] Monroe County v. McCormick, 752 So. 2d 1239 (Fla. 3d DCA 2000).
[3] § 162.09(3), Fla. Stat.; and Demura, 618 So. 2d at 756.
[4] Id.
[5] See e.g. § 58-31, County of Volusia Code of Ordinances.
[6] See Gailey v. Robertson, 123 So. 692 (Fla. 1929); First Nationwide Mortgage Corporation v. Brantley, 851 So. 2d 885 (Fla. 4th DCA 2003): Miami Shores Village v. Gibraltar Savings and Loan Association, 561 So. 2d 27 (Fla. 3d DCA 1990); and Stein v. City of Miami Beach, 250 So. 2d 289 (Fla. 3d DCA 1971).
[7] See e.g., § 58-42, County of Volusia Code of Ordinances.
[8] See e.g., § 58-45, County of Volusia Code of Ordinances.
[9] Art. X, § 4(a), Fla. Const.

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Buchman Elected President of FMAA

Ken Buchman, city attorney for Plant City, was elected president of the Florida Municipal Attorneys Association at the organization's 24th annual seminar at Amelia Island.

More than 200 lawyers from across the state attended the seminar and business meeting which featured continuing legal education courses on the latest topics and trends in municipal law.

Buchman will serve a one-year term as president. Buchman chaired the City, County and Local Government Law Section in 2003-2004.

Annual Section Budget

City, County and Local Government Law Section for Fiscal Year 2005-2006

The proposed budget was approved by the Executive Council, January 2004. *The Board of Governors of The Florida Bar approved this budget at their April 2004 meeting.*

Revenues	**Budget**
Dues	40,000
Dues Affiliate	90
Dues Retained by TFB	<17,560>
Net Dues	**22,530**
CLE Courses	9,135
Audio Tape	2,500
Course Materials	200
Newsletter Sub	0
Registrations	1,500
Sponsorship	3,000
Member Service Program	15,000
Investment Allocation	6,643
Miscellaneous	250
Other Income	**38,228**
Total Revenues	**$60,758**
Expenses	
Employee Travel	2,467
Postage	1,500
Printing	350
Officer Office Expense	25
Newsletter	2,600
Membership	100
Supplies	50
Photocopying	150
Officers Travel Expense	1,500
Meeting Travel Expense	3,000
CLE Speaker Expense	200
Committee Expense	100
General Meeting	300
Board or Council Meeting	1,000
Bar Annual Meeting	1,500
Section Annual Meeting	11,500
Midyear Meeting	250
Section Service Program	10,000
Retreat	1,500
Stetson Reception	500
Membership Directory	3,500
Awards	3,000
Scholarships	3,000
Grant Programs	5,000
Civility Week Plaque	2,000
Law School Liaison	3,000
Web Site	3,000
Council of Sections	300
Symposium	12,000
Operating Reserves	**8,254**
Miscellaneous	9,000
CLER Credit Fee	150
Total Expenses	**$90,796**
Beg. Fund Balance	**94,895**
Ending Fund Balance	**$64,857**

Section Reimbursement Policies:

General: All travel and office expense payments are in accordance with Standing Board Policy 5.61 or more restrictive Section policies identified elsewhere in this budget notice. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(h), 5.61(e)(6) which is available from Bar headquarters upon request.

Convention — Chair's Travel: Costs of Chair's suite at convention is paid by the section. Included in this are costs associated with its use as a hospitality suite. All reimbursement of expenses will be in accordance with Standing Board Policy 5.61(e) 1 through 6.

Final Section Budget

City, County and Local Government Law Section for Fiscal Year 2004-2005

Revenues	Budgeted	Actual
Dues	35,000	37,645
Dues Affiliate	90	0
Dues Retained by TFB	<17,560>	<18,871>
Net Dues	**17,530**	**18,774**
CLE Courses	10,386	8,859
Sect Reim of Loss	0	<980>
Audio Tape - Section S	2,500	6,930
Course Materials	200	123
Newsletter Sub	0	169
Registrations	1,500	0
Sponsorship	2,500	0
Member Service Program	18,000	0
Allowance	0	<5>
Investment Allocation	4,318	5,253
Miscellaneous	250	0
Other Income	**39,654**	**20,349**
Total Revenues	**$57,184**	**$39,123**
Expenses		
Employee Travel	2,487	512
Postage	1,500	1,145
Printing	350	147
Officer Office Expense	25	0
Newsletter	2,600	2,604
Membership	500	0
Supplies	50	37
Photocopying	150	86
Officers Travel Expense	800	497

Expenses	Budgeted	Actual
Meeting Travel Expense	1,500	1,616
CLE Speaker Expense	2,000	0
Committee Expense	100	65
General Meeting	250	0
Board or Council Meeting	1,000	1,157
Bar Annual Meeting	2,000	614
Section Annual Meeting	8,500	7,341
Midyear Meeting	250	0
Section Service Program	15,000	11,273
Retreat	1,500	0
Stetson Reception	500	0
Membership Directory	3,300	3,605
Awards	850	816
Scholarships	3,000	2,302
Grant Programs	10,000	0
Local Bar Assn. Awards	5,000	788
Civility Week Plaque	2,000	62
Law School Liaison	3,000	0
Web Site	6,704	6,704
Council of Sections	300	300
Symposium	12,000	0
Operating Reserves	**2,387**	**0**
Miscellaneous	4,750	4,746
Course Credit Fee	150	0
Total Expenses	**$94,503**	**$46,417**
Net Operations	**<37,319>**	**<7,294>**
Beg. Fund Balance	**86,369**	**108,835**
Ending Fund Balance	**$49,050**	**$101,541**

LRS

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During 2004-05, The Florida Bar Lawyer Referral Staff made over 135,000 referrals to people seeking legal assistance. Lawyer Referral Service attorneys collected over $7 million in fees from Lawyer Referral Service clients.

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NOTE: If your office is in Baker, Broward, Clay, Collier, Duval, Escambia, Franklin, Gadsden, Hillsborough, Jefferson, Leon, Liberty, Nassau, Orange, Palm Beach, Pinellas, Santa Rosa, or Wakulla county, please contact your local bar association lawyer referral service for information.

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