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S.W. Fla. Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903 (Fla. Dist. Ct. App. 2000)

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highest court the question pertaining to whether the Dickinson stabilization doctrine applies in an appropriate Florida case.

Vanessa L. Condra

S.W. Fla. Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903 (Fla. Dist. Ct. App. 2000) (holding district rules involving water use permits (1) were a valid exercise of delegated legislative authority, (2) granted the water management district valid discretion, and (3) were not vague).

Southwest Florida Water Management District and the Environmental Confederation of Southwest Florida (collectively, the "District") challenged a comprehensive order of the Administrative Law Judge ("ALJ"), invalidating several existing and proposed District rules and agency statements. On cross-appeal, Pinellas County ("Pinellas") challenged several portions of the rules upheld by the ALJ's order. The court reversed the orders considered on appeal and affirmed the orders considered in the cross-appeal.

The District proposed rules and agency statements governing the water use permitting process under its jurisdiction in the Southern Water Use Caution Area ("SWUCA"). The 1972 Florida Water Resources Act ("Act"), codified in Chapter 373 of the Florida statutes ("Chapter 373"), governs Florida water rights. The Act grants authority to the Department of Environmental Protection ("DEP") to conserve, protect, manage, and control the waters of the state, with flexibility and discretion to delegate powers to water management districts. The Act includes provisions for reviewing district rules and agency statements.

Several of the District's existing and proposed rules and agency statements, which governed the issuance of Water Use Permits ("WUP"), were in dispute. Chapter 373 of the Act stipulated proposed water use must: (1) be reasonable-beneficial; (2) not interfere with any presently existing legal water right use; and (3) be consistent with the public interest. The District had authority to adopt reasonable rules pursuant to its water use permitting duties to implement this three-prong test. The DEP had exclusive authority to review those rules. The District proposed a fourteen-point criteria test that a WUP applicant must meet in order to fulfill Chapter 373's three-prong test.

The ALJ invalidated the District's proposed fourteen-point test, finding it conflicted with the balancing approach articulated in the state Water Policy Rules, the former authority governing WUP criteria. The court reversed, holding, under Chapter 373, DEP had exclusive authority to review whether rules are consistent with Water Policy Rules.

The ALJ invalidated the rule that allowed an applicant to meet WUP conditions by mitigating adverse impacts. Under the existing

rule, the permittee must mitigate adverse impacts to existing legal uses and environmental features to the District's satisfaction. The ALJ found the District's unbridled discretion lacked meaningful basis for review. The court reversed the order. Citing the plain meaning of mitigation, the court found that because the District determined what constituted an adverse impact, it certainly had the professional judgment to determine what mitigated an adverse impact. Where a determination is site-specific and scientific, as with mitigation, the exercise of professional judgment is appropriate and acceptable.

The ALJ invalidated the proposed portion of the rules that required applicants to investigate feasibility for reclaimed water use and reuse where economically, environmentally, and technically feasible (the "feasibility rule"). The ALJ found the requirement lacked statutory authority. The court reversed the order under the reasonable-beneficial use component of the three-prong test of Chapter 373. Although the ALJ agreed the concept of reuse is implied in reasonable-beneficial use, he found Chapter 373 implicitly limited a district's ability to require reuse to situations where it can be shown that reused water is available. The court rejected the argument, finding authority in the Act's language. The court held the Act did not limit the District's authority under a reasonable-beneficial use test but allowed the District to presume reclaimed water is available to a WUP applicant under certain conditions.

The ALJ further challenged the feasibility rule as an invalid exercise of delegated legislative authority because the Florida statute granted the feasibility determination to the applicant. The court rejected the argument, finding the ALJ's interpretation inapplicable. The court concluded it was illogical for a statute to provide the District with authority to require reuse feasibility investigation without granting authority to require reuse where reclaimed water use was reasonable-beneficial and in the public interest.

The ALJ also invalidated the feasibility rule for vagueness and as a grant of unbridled discretion to interpret the terms "economically, environmentally, and technically feasible." Following precedent, the court held it must read the terms for their common and ordinary meaning and explained that terms are vague where men of common intelligence must guess at their meaning. A further test requires analysis of the objectives and purposes of the statute's enactment. The court defined each term pursuant to these guidelines and held that site-specific or individual applicant-specific considerations prevent the District from articulating more refined criteria. Thus, the court reversed the ALJ's invalidation of the feasibility rule.

The ALJ invalidated portions of District rules that required investigation of desalination feasibility and implementation. The ALJ found an invalid exercise of delegated authority because the rules were unconstitutionally vague and vested unbridled discretion in the District. The court rejected the ALJ's argument, citing the District's authority to implement Chapter 373. The court also reversed the vagueness challenge, citing its holding that the terms "economically,

environmentally, and technically feasible” required a site-specific determination and use of professional judgment.

The final appeal the court considered and reversed involved the ALJ’s finding that Chapter 373 granted the District authority to issue water use permits only for “consumptive use of water.” The District rules required a wholesale public supply customer to obtain a separate permit for quantities beyond amounts used for consumption. The court’s determination hinged on the definition of water for consumption. The court affirmed the District’s authority to require wholesale public supply customers to obtain a separate permit to effect conservation requirements.

In its cross-appeal, Pinellas challenged the ALJ’s failure to invalidate the requirement that water supply utilities adopt a “water-conserving rate structure.” Pinellas argued the District lacked statutory authority. The court agreed with the ALJ, finding consideration of a utility’s conservation efforts, including rate structure, appropriate in determining water allocations and applying the reasonable-beneficial test. The court held rate autonomy does not imply exemption from permitting requirements under Chapter 373 and affirmed the ALJ’s validation of the rule.

Note: The court substituted this January 4, 2001 opinion for its earlier opinion of September 1, 2000. In this later opinion, the court noted two minor points. First, where the court’s September 1 opinion held the proposed regulation applied to wholesalers did not intrude into contracts of public supply permittees and wholesale customers, the substituted opinion declined to rule on this issue. Second, the substituted opinion affirmed that where any portion of the Florida Water Act conflicts with any other state law, the Florida Water Act controls and, thus, here section 373.223(1) would control over section 153.11(1)(b).

Christine Ellison

S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. Dist. Ct. App. 2000) (holding Southwest Florida Water Management District exceeded its authority by promulgating a rule granting certain exemptions from environmental resource permitting requirements).

South Shores Partners, Ltd., (“South Shores”) applied to the Southwest Florida Water Management District (“District”) for a permit to develop a 720-acre tract of land. The property had an existing canal system adjacent to Tampa Bay (“Bay”). As part of the project, South Shores proposed to build a connecting waterway between the canal system and the Bay. The Save the Manatee Club feared the proposed waterway would cause an increase in powerboat traffic into the Bay, resulting in boat traffic endangering both the manatee and its habitat.