St. Johns River Water Mgmt. Dist. v. Cece, No. 5D22-2426, 2023 WL 5156257 (Fla. 5th DCA 2023).

Florida Fifth DCA Holds that Only Submitting Recalculations Showing Current Storm Water Management System Functioning with Increased Developed Lots for a Permit Application is Not a "Proposed Project"

The Fifth DCA concluded that merely submitting recalculations as a permit application without a proposal for physical changes to a stormwater structure or composition was not a "proposed project" for the Administrative Law Judge ("ALJ") to consider causing no departure from the essential requirements of the law. Also, there was no "stalemate" because the St. Johns River Water Management District could have granted or denied the proposal, but allowing new evidence to be considered after the ALJ's second recommended order would lead to "endless litigation" because it would begin the entire review process over again.

Cedar Island Homeowners' Association applied for a stormwater management system permit which would increase the permissible allowable impervious surface area within the development. Some lot owners of the development were concerned that continued development in the subdivision would increase the impervious surface area beyond what the stormwater system could manage and for which it had been previously permitted. In the permit application, the HOA did not propose that it would make physical changes to the structure or composition, and the District did not require alterations as a condition to issue the permit. Instead, the HOA only submitted a recalculation, to demonstrate that the current system that is already permitted could effectively manage an increased load. The HOA's engineering expert who created these calculations did not base any of the calculations on the existing system. The HOA submitted as-built plans created when the stormwater management system was constructed in 2002, which deviated in significant ways from the originally permitted design. The District conducted an inspection of the existing stormwater management system and found several compliance issues. The District's Technical Staff also noted that some of the homes included an impervious footprint larger than accounted for in the original design. Thus, the HOA and the District knew well before the administrative hearing that the existing system and the as-designed system were remarkably different in many structural and functional regards. The lot owners sought administrative review to challenge the permit.

The ALJ concluded that the HOA did not carry its burden of providing "reasonable assurance" that its proposal would comply with applicable rules. Also, the ALJ acknowledged that the HOA could bring the system into compliance, but the HOA never expressed any definitive intent that it would bring the system to its design specifications. It is the responsibility of the applicant, not the District, to provide the requisite reasonable assurances.

The District filed exceptions to the ALJ's recommended order stating that if there were issues of non-compliance or violations of the existing Permit, one should consider whether the proposed modifications would resolve those problems. However, there was no proposal by the HOA to change the physical condition of any part of the existing system and no suggestion that the HOA had any intention of revising the as-built system to resemble the as-designed system that its expert relied upon. The HOA's expert never performed any calculations to determine if the current system could handle either the current or the proposed increased runoff load. The District issued a remand order, but the ALJ's ruling on remand said that the ALJ did not reject the remand, but there was no "proposed project" which would be analyzed in accordance with the remand order.

The District and HOA sought appellate review and the issue under review was whether the ALJ's Second Order departed from the essential requirements of the law resulting in irreparable harm in the form of a "stalemate," leaving the parties at an impasse. The Court concluded that the permit application the District wanted the ALJ to reconsider simply did not exist because the HOA did not propose in its application to bring the existing system into compliance with the original design or to construct an otherwise permittable system, so there was no "proposed system" for the ALJ to consider and therefore no departure from the essential requirements of the law. Also, there was no stalemate or irreparable harm because the District could enter a final order either granting or denying the HOA's permit. Allowing the case to be remanded for the ALJ to consider an application with new evidence that was not provided with the proposal for the application would lead to "endless litigation."