TRAFFIC JAMS ARE NOT ENOUGH: ADMINISTRATIVE STANDING IN PERMITTING CHALLENGES

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The threshold issue of standing is a linchpin in the efficient and effective operation of the administrative and judicial systems. The test for standing varies slightly at the federal, state, and administrative levels, but in all systems the doctrine of standing ensures that only litigants with a substantial interest in a matter can invoke judicial powers to determine the merits of a case or controversy. In this way, the doctrine of standing operates to reduce court congestion and protect due process rights. The tests for standing have been refined over time in a litany of cases and decisions, but the fundamental purpose of the doctrine — limiting the scope of litigation — has remained constant. But what effect do shifting realities, such as population density and strained public infrastructure, have on this judicially imposed legal construct? Does use of a state road give rise to a proper interest for each of the hundreds of thousands of people who travel the road? What if use of that road was necessary for survival, such as evacuating during a natural disaster or securing emergency transportation? Where is the line of substantial interest drawn? The Second District Court of Appeal grappled with that question in the administrative litigation context in *Wallace v. Florida Department of Transportation*, 356 So. 3d 786 (Fla. 2d DCA 2023).[1]

The Evolution of the Agrico Two-Prong Test

Challenges to actions of an administrative agency are governed by Ch. 120 of the Administrative Procedure Act (APA). Individuals or entities whose substantial interests are adversely impacted by an agency's decision may petition for an administrative hearing under F.S. §§120.569 and 120.57.[2]

However, the APA does not define "substantial interest," and challengers must rely on established caselaw to parse the standard associated with this threshold issue. The seminal case defining the meaning of "substantial interest," and, therefore, standing to challenge administrative decisions, is *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). Under the *Agrico* substantial interests test, challengers have to establish first, that they "will suffer injury in fact which is of sufficient immediacy;"[3] and second, that the "substantial injury is of a type or nature which the proceeding is designed to protect." The court went on to explain, "[t]he first aspect of the test deals with the degree of injury. The second deals with the nature of the injury."[4]

Since *Agrico*, several rulings have provided clarification of the Agrico two-prong substantial interest test. Under the degree of injury prong, for example, an injury cannot be "too remote and speculative in nature to qualify under the first prong of the *Agrico* standing test."[5] Furthermore, "[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical."[6] The second prong has become known as the "zone of interest" test.[7] In the context of permitting, that zone of interest has generally been confined to the statutory permitting criteria.[8]

Testing the Limits

In the recent case of *Wallace*,[9] the petitioner, Dr. James Wallace III, tested the boundaries of what constitutes a substantial interest entitling him to a hearing under the APA. In December 2020, Wallace, as a resident of Siesta Key in Sarasota County, challenged a Florida Department of Transportation (FDOT) permit to connect a 23-acre multi-use development to Stickney Point Road, which was then a part of the state highway system. The multi-use development, called Siesta Promenade, was approved in 2018 by Sarasota County and includes a hotel, retail space, and multi-family residential units. It is located on the mainland of Sarasota County at the intersection of Stickney Point Road and U.S. 41 — a

little more than half a mile east of the Stickney Point Bascule Bridge, one of two bridges connecting the mainland to Siesta Key. The FDOT connection permit allowed Siesta Promenade to connect to Stickney Point Road at a point across from an existing road, turning a three-way intersection into a four-way intersection and requiring the addition of a traffic light.

In his petition to challenge the permit, Wallace stated he used the section of Stickney Point Road where the connection would be located "daily and sometimes multiple times per day" and that use was consistent over more than 20 years. He alleged,

> *[T]he proposed connection, traffic signal and intersection to accommodate the additional traffic from [Siesta Promenade] will cause [him] to become stuck in additional traffic congestion and during the season, maroon petitioner and his family making it more difficult for him to leave and return to Siesta Key to access medical care, goods and services that he needs and utilizes on the mainland.*[10]

Wallace also suggested the connection would delay emergency vehicles and slow hurricane evacuation. After FDOT dismissed his initial petition for lack of standing, Wallace filed an amended petition with substantially the same allegations, which FDOT referred to DOAH solely on the issue of standing.

Siesta 41 Associates, as the owner and developer of Siesta Promenade and the permittee, intervened and contested petitioner's substantial interest, as defined by *Agrico* and its progeny. The permit, granted under the State Highway System Access Management Act,[11] provides a reasonable right of access to every owner or property that abuts the State Highway System, but Wallace was not an abutting landowner. Siesta 41 argued the act is intended to address the point of connection, not congestion and traffic jams: "There is simply no cognizable interest in being able to travel a certain speed in a certain amount of time upon a roadway."[12] Siesta 41

also contended that Wallace's "broad and indeterminate statements" were not sufficiently particularized to confer standing because, if they were, "any party who may, at some point, have some type of emergency that may require responders to traverse" Stickney Point Road would have standing.[13] "This would not serve the long-established purpose of standing, to narrow the scope of permissible challengers to only those who would be genuinely affected by the decision."[14]

After receiving written arguments from each party on whether Wallace had standing to challenge the permit, Administrative Law Judge Linzie F. Bogan issued an order closing the file and relinquishing jurisdiction back to FDOT with the recommendation the petition be dismissed for lack of standing, holding that, "[s]imply stated, [Wallace's] purported injury of being 'stuck in additional traffic congestion' is not of the 'type or nature' that [Ch.] 335 is designed to address."[15] FDOT ultimately agreed in its final order:

> *Taken as true, Dr. Wallace's allegations that the traffic signal will cause him 'to become stuck in additional traffic congestion' and make access to the mainland and his home 'more difficult and time consuming' are the kind of citizens' general interests that do not establish standing. Further [Wallace] does not suffer a substantial injury of a type or nature which a proceeding under sections 335.18 through 335.188, Florida Statutes, is designed to protect.*[16]

On Appeal

On appeal, Wallace attempted to argue that the legislative policy statements of Ch. 335 generally and the act specifically framed the zone of interest. Relying on the broad, legislative intent language of the act, which states the "State Highway System is necessary to protect the public health, safety, and welfare,"[17] Wallace argued that any effect on the health, safety, and welfare of drivers on the state highways fell within the

zone of interest. If such an argument were accepted, this would expand the zone of interest of the act to encompass all those using state highways who contended an access permit damaged their "welfare."

Wallace also argued that residence on a barrier island made delays due to increased traffic on the island's main access road sufficiently "particularized" under the injury prong of the *Agrico* test. Under his logic, any one of the approximately 5,000 residents of Siesta Key would have standing to challenge a FDOT connection permit on Stickney Point Road, and any of the more than 800,000 residents of barrier islands in Florida would have standing to challenge connection permits — or, ostensibly, any FDOT decision — that might affect the flow of traffic on roads connecting the barrier island to the mainland.

Court Rejects Attempts to Expand Agrico

Eight days after the conclusion of oral argument in this case, the Second District Court of Appeal issued an opinion of per curium affirmed, upholding FDOT's decision to dismiss the petition without written opinion, leaving the agency's justification to speak for itself. Wallace sought a written opinion and/or certification of a question of great public importance, but the court quickly denied his motion a week later, again without written opinion.

The case brought to the court to the brink of a radical expansion of standing that threatened to overwhelm DOAH and the courts and all but halt development along state highways on the coast. The ALJ, agency, and district court of appeal refused to interpret the *Agrico* test in the broad way Wallace urged. While increasing traffic in coastal areas of the state may require new approaches going forward, the court may have recognized that interpreting the substantial interest test so broadly would effectively eliminate the word "substantial" in the "substantial interest" test, something the court was not willing to do. Thus, drivers do *not* have

the automatic right to challenge FDOT decisions affecting their daily commute, and residents of barrier islands do *not* have an automatic particularized interest in the roads that access the island.

[1] *Wallace*, 356 So. 3d at 786, motion for written opinion and/or cert. of question of great public importance den. (Mar. 3, 2023). The authors were counsel to Siesta 41 Associates, LLP, the permittee in this case, throughout all proceedings.

[2] Fla. Stat. §120.52(13)(b).

[3] *Agrico*, 406 So. 2d at 482.

[4] *Id.*

[5] *Int'l Jai-Alai Players Ass'n v. Florida Pari-Mutuel Comm'n,* 561 So. 2d 1224, 1226 (Fla. 3d DCA 1990).

[6] *Vill. Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regul., Div. of Florida Land Sales, Condominiums & Mobile Homes*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

[7] *See, i.e., Ward v. Bd. of Trs. of the Internal Imp. Trust Fund,* 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

[8] *Vill. of Key Biscayne v. Dep't of Envtl. Prot*., 206 So. 3d 788, 791 (Fla. 3d DCA 2016) (citing *Taylor v. Cedar Key Special Water and Sewerage Dist.*, 590 So. 2d 481 (Fla. 1st DCA 1991), for the proposition that "the department is not authorized to deny environmental permits based on alleged noncompliance with local land use restrictions or comprehensive plans," so the allegations are not within the zone of interest of the statute and thus do not provide standing).

[9] *Wallace*, 356 So. 3d at 786; FDOT Case No. 21-001; DOAH Case No. 21-0576.

[10] *Response to Dismissal without Prejudice and Amended Petition for FDOT Decision Reversal or Formal Hearing or Informal Hearing*, p. 7, FDOT Case No. 21-001.

[11] Fla. Stat. §§335.18-335.188 (2020).

[12] *Wallace v. Siesta 41 Assoc.*, DOAH Case No. 21-000576 (*Permittee's Amended Motion to Dismiss With Prejudice and Memorandum of Law in Support* at 10).

[13] *Wallace*, DOAH Case No. 21-000576 (Siesta 41 Associates LLP's Response to Order to Show Cause at 7).

[14] *Id.*

[15] *Wallace*, DOAH Case No. 21-000576, (Order Closing File and Relinquishing Jurisdiction at 4 (Mar. 26, 2021).

[16] FDOT Case No. 21-001, Agency Final Order at 8 (May 13, 2021).

[17] Fla. Stat. §335.181(1)(b) (2020).

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