

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

FLORIDA WATER SERVICES CORPORATION,

Petitioner/Appellant,

5th DCA Case **m:** 5D02-2071

vs.

L.T. Case **m:** H27-CA-2002-1004-RT

HANNAH M. “NANCY” ROBINSON, as Chair of the
Board of Commissioners of Hernando County, Florida;
MARY C. AIKEN, as a Member of the Board of
Commissioners of Hernando County, Florida;
CHRISTOPHER A. KINGSLEY, as a Member of the
Board of Commissioners of Hernando County, Florida;
DIANE B. ROWDEN, as a Member of the Board of
Commissioners of Hernando County, Florida; and
BETTY WHITEHOUSE, as a Member of the
Board of Commissioners of Hernando County, Florida;

Respondents/Appellees,

and

**SOUTHWEST FLORIDA WATER MANAGEMENT
DISTRICT**, an Agency of the State of Florida,

Intervenor/Appellee.

On Appeal from the
Circuit Court of the Fifth Judicial Circuit
In and For Hernando County, Florida

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Preliminary Statement, the Table of Defined Terms, the Statement of the Case, the Statement of the Facts, and the Argument presented in the *Initial Brief of Appellants* (the **INITIAL BRIEF**) are all fully adopted and reaffirmed by reference herein. All terms defined in the INITIAL BRIEF will have the same meaning and definition in this *Reply Brief of Appellant* and the said definitions are hereby incorporated herein by reference.

The *Appellees' Answer Brief* will be referred to as the **ANSWER BRIEF**, and references thereto will be in the form: (AB <Page m>). This *Reply Brief of Appellant* will be referred to the **REPLY BRIEF**, and references hereto will be in the form: (RB <Page m>). The *Appendix to Appellant's Reply Brief* will be in the form (RB App. <Page m>).

References to the INITIAL BRIEF, the *IB Appendix*, and the *Record* will be in the same form as noted in the Preliminary Statement of the INITIAL BRIEF. References to the Statement of the Case in the INITIAL BRIEF will be in the form: (IB/SOC <m>). References to the Statement of the Facts in the INITIAL BRIEF will be in the form: (IB/SOF <m>).

In a preliminary draft of its INITIAL BRIEF, prepared before the RECORD was completed, paginated, and published by the Clerk, FLORIDA WATER made reference to documents to be contained in the RECORD by the names thereof, with the intent to change those references to appropriate RECORD citations upon the completion of the INITIAL BRIEF. Unfortunately, not all such references were changed. Those errata are hereby noted, as follows:

- (1) At IB 29, the reference (T-CI) should be (R. 647-648);
- (2) At IB 29, the reference to (T-APR., 24; and RES., 7) should be (R. 127; and R. 163);
- (3) At IB 30, the reference to (REP. APP., TAB 10) should be (R. 657); and
- (4) At IB 35, the reference to (RES., 2-3) should be (R. 158-1599).

The APPELLEES were referred to as the RESPONDENTS in the INITIAL BRIEF, and may be also referred to as the APPELLEES in this REPLY BRIEF. Further, references to the individual APPELLEES, in their collective and/or collegial capacity as the BOARD OF COMMISSIONERS, will be referred to as the BOARD.

STATEMENT OF THE CASE

The BOARD and the individual APPELLEES, in the ANSWER BRIEF, have accepted FLORIDA WATER'S Statement of the Case in the INITIAL BRIEF, and, accordingly, have **acknowledged** and **admitted** the following (IB 1; and AB 1):

1. The BOARD, and its members (the individual APPELLEES), as the **decision-makers** with regard to applications for zoning amendment presented to the COUNTY, are:

“ . . . **the quasi-judicial fact finding (the JURY) and adjudicatory (the JUDGE) authority under the Zoning Ordinance. . .**” (emphasis added);

2. Both the WELLS 32/33 APPLICATION and the WELL 35 APPLICATION, as submitted by FLORIDA WATER to the COUNTY, requested approval of a PSFOD for each of the subject properties:

“ . . . **in order to develop the wells thereon to cure long standing and increasingly severe potable water supply shortage and line pressure problems being experienced by FLORIDA WATER and its customers in the SPRING HILL SYSTEMS . . .**” (emphasis added);

3. The BOARD voted on February 6, 2002, to deny the WELLS 32/33 APPLICATION, and on March 6, 2002, it voted to deny the WELL 35 APPLICATION, but did not immediately enter its FINAL BOARD ORDERS with regard to either thereof;

4. FLORIDA WATER filed its *Amended Suggestion of Disqualification and Motion for Recusal*, on March 15, 2002 (the Original Filings), and March 28, 2002 (the Amended Filings);

5. The BOARD, on April 2, 2002, both voted to deny, and entered its ORDERS denying, the *Amended Suggestion of Disqualification and Motion for Recusal*; and

6. The BOARD entered its FINAL BOARD ORDERS denying the ZONING APPLICATIONS on June 18, 2002, and, in doing so:

“ . . . **[the BOARD] was required to exercise its discretion in determining the content [of the FINAL BOARD ORDERS] . . .**” (emphasis added).

STATEMENT OF THE FACTS

The BOARD, in the ANSWER BRIEF, has not challenged the accuracy (although it has raised issues regarding the context of several) of the Paragraphs in the Statement of the Facts by FLORIDA WATER in its INITIAL BRIEF. Therefore, the accuracy, if not the applicability, thereof is admitted by the BOARD. Those contextual challenges are of three (3) categories (AB 1), and assert that:

1. The Paragraphs in the first category of challenges “. . . contain argument as opposed to facts. . . ;”
2. The Paragraphs in the second category of challenges “. . . contain references to a ‘potable water shortage’ as opposed to a ‘low water pressure problem’ the difference being an issue of continuing debate. . . ;” and
3. The Paragraphs in the third category of challenges “. . . contain statements regarding Florida Water’s beliefs as opposed to facts.”

The above noted challenges to FLORIDA WATER’S Statement of the Facts are, in all respects, inapposite. That the challenges by the BOARD to FLORIDA WATER’S Statement of the Facts are inappropriate and misapplied, is evident, as follows:

4. Each of the paragraphs of the Statement of the Facts alleged to be argument and not fact are supported by specific citations to the RECORD, the sources of which are neither controverted nor otherwise either challenged or rebutted, by the BOARD, in either the pleadings or in any other submittals by the BOARD, either in the RECORD or in the ANSWER BRIEF, and, therefore, stand as admitted facts for all purposes hereof.

5. The attempt to distinguish a “potable water shortage” from a “low water pressure problem” is **pettifoggery** [in other words, a **quibble** (in other words, an evasion of the point at issue, by making a minor objection) over insignificant details], at best, and **disingenuity** (in other words, false appearance of simple frankness), at worst. (RB APP. 1)

a. That is made clear by the simplistic but explanatory formula (intended to provide only a relational context, not a platform for precise calculation): $P = (V \div S) \times (S - D = N)$, or, after algebraic conversion, $S = (V \div P) \times (S - D = N)$, where, for a defined period of time, let:

P = the average water **Pressure**;
V = the **Volume** displaced by the system’s distribution lines;
S = the gallons of water **Supply** from wells;
D = the gallons of water **Demand** by CUSTOMERS; and
N = the **Net** gallons of water added to the system.

b. The above formula, demonstrates the obvious: that “water supply” and “water pressure” are simply two (2) elements of the same equation, and, thus, are interchangeable.

c. When there is inadequate *Pressure* for a given *Demand*, the *Volume* of the system has not changed, and, therefore, the only other variable, *Supply*, must be inadequate. In other words, without adequate *Supply*, there is inadequate *Pressure* to meet *Demand*.

d. It is to be noted that FLORIDA WATER used the terms “potable water shortage” and “low water pressure problem,” or words to those effects, interchangeably throughout its INITIAL BRIEF [see IB/SOF Paragraphs 8(c), 13, 14, 15, 51, 62, 84 (twice), and 87], without any objection by the BOARD to such interchangeable uses.

6. The BOARD is correct in its assertion that certain Paragraphs in the Statement of the Facts are, indeed, the opinions of FLORIDA WATER and/or its management. However, it is indicative either of an **arrant** (or, in other words, an unmoderated and extreme) lack of understanding of issues that relate to recusal, or of another disingenuity, for the “belief” objection to be raised. (RB 1)

a. Since the underlying issue is whether the BOARD and its individual MEMBERS are disqualified for having at least the appearance of prejudice, and must recuse themselves, it is the “beliefs” of FLORIDA WATER and its management that are relevant.

b. The BOARD has not challenged, and, indeed, legally cannot challenge, the *bona fides* of those beliefs.

c. In proceedings such as this, the BOARD may only challenge whether, under the circumstances extant herein, a reasonable person could reach the same conclusions and hold the same beliefs, regarding the existence of bias and prejudice, as does FLORIDA WATER.

d. Accordingly, the asserted “beliefs” of FLORIDA WATER and its management, must be taken as fact for all purposes hereof, subject only to the “reasonableness test.”

Therefore, all of the items in FLORIDA WATER’S Statement of the Facts, in its INITIAL BRIEF, are facts appropriate for consideration by this Court in its determination of this appeal.

SUMMARY OF ARGUMENT

In its Summary of Argument, the BOARD admits that it relies solely upon the fact that §38.10, *FLA. STAT.*, and *RULE 2.160, FLA. R. JUD. ADMIN.*, apply only to Article V judges [Art. V., *FLA. CONST.* (1968)], and not to quasi-judicial BOARDS. Nowhere, in either the summary of their argument, or in the

body thereof, do they address the common law due process imperative that provides every person whose substantial rights are to be judged in a quasi-judicial hearing the right to be free from the determination of those rights by a biased and/or prejudiced decision-maker.

It was not the intent of FLORIDA WATER, by citing that statute and rule in its INITIAL BRIEF, to suggest that they applied to the BOARD. The reference to them was solely intended by FLORIDA WATER to show that, by analogy, the standards of disqualification and recusal required thereby for Article V Judges have been, at least substantially (FLORIDA WATER believes fully), met.

ARGUMENT

The BOARD asserts, correctly, that §38.10, and *RULE* 2.160, apply to Article V judges only. However, the BOARD does not address the common law due process right to have quasi-judicial substantial rights by an unbiased decision-maker.

COMMON LAW BASED DISQUALIFICATION

As noted in the Statement of the Case, above in this REPLY BRIEF, the BOARD has admitted that the proceedings before it, and out of which this matter arises, were quasi-judicial proceedings. It then argues not that the circumstances do not warrant disqualification, but that the due process imperative to act as a quasi-judicial decision-maker, free of bias, prejudice, or conflict, does not apply to it. Such an argument approaches the pinnacle of arrogance, and can be characterized by the statement: “We will be as prejudiced as we want to be.”

In fact, the BOARD admitted, on the record, that it is, indeed, prejudiced, and argued that its prejudice was without remedy (IB 41; and R. 163). It is compelling that, notwithstanding FLORIDA WATER’S reference to that admission in the INITIAL BRIEF, the BOARD made no reference thereto, and gave no explanation thereof, in its ANSWER BRIEF.

The BOARD attempts to execute a minuet, with less than Astaire-like gracefulness, around this Court’s acknowledgment, in the *Rachel’s Cases*,¹ that a prejudiced and/or biased local governing body

¹**RACHEL’S-I:** *Seminole Entertainment, Inc., v. City of Casselberry*, 811 So.2d 693 (Fla. 5th DCA 2001) (clarification granted Dec. 20, 2001, but not yet determined); and **RACHEL’S-II:** *Seminole Entertainment, Inc., v. City of Casselberry*, 813 So.2d 186 (Fla. 5th DCA 2001).

cannot serve as the quasi-judicial decision-maker to determine the substantial rights, of the object of its prejudice and/or bias, in quasi-judicial proceedings before it.

The BOARD has admitted both that the *Rachel's Cases* arose from a quasi-judicial proceeding before a clearly prejudiced and biased local governing body, in which proceeding a motion to recuse the governing body was denied by the governing body, and that, in *Rachel's-I*, this Court reversed the circuit court's order refusing to enjoin the enforcement of the decision of the prejudiced quasi-judicial governing body, and held that the governing body had an institutional:

. . . bias so pervasive as to have rendered the proceedings violative of the basic component of due process.

While the issue before both this Court and the Circuit Court, in *Rachel's I*, was not a direct challenge to the denial of the motion for recusal, it was, in fact, a challenge to the enforcement, by a prejudiced local governing body of an order tainted by its prejudice. This Court answered that challenge with a resounding refusal to grant legal sanction to such an order. The procedural quandary created by *Rachel's II* did not diminish this Court's clear mandate, in *Rachel's-I*, that bias of the governing body will not be tolerated in quasi-judicial proceedings.

The BOARD did not address the impact of that ruling. In fact, one is left to wonder whether the BOARD is willing to recognize any constraint upon its quasi-judicial adjudications of substantial rights upon whatever political or other whim of the moment might seize its collective mind.

One cannot help but be reminded of the constraints imposed by the barons upon King John in 1216 at the plains of Runnymede, when the sovereign was forced to accept the *Magna Carta* as the delimiting parameter upon his previously absolute and unbridled power over the substantial rights of his subjects. As noted above, it is the pinnacle of arrogance for the BOARD and its individual members to suggest that such constraints are inapplicable to their determination of the substantial rights of the quasi-judicial supplicants before them.

The BOARD'S arrogance is made evident by the statement, in the *Answer Brief*, that: “. . . there is no legal authority providing for the recusal of quasi-judicial boards . . .” (AB 3). One is reminded of a certain **disingenuous** (RB App.) vice-presidential declaration that: “There is no controlling legal authority” prohibiting campaign solicitations on government telephones.

There is a significant line of cases, from both the federal and the Florida courts, confirming the right of quasi-judicial supplicants to have their substantial rights determined by impartial and unbiased decision-makers.² It is compelling that the BOARD completely ignores those cases, which so clearly tell it that it may not do what it has done. One must assume that, if cogent arguments existed contrary to FLORIDA WATER'S suggestion of the application of those cases to it, the BOARD would have alerted this Court to those arguments.

This Court, as exemplified by *Snyder-I*, has traditionally been stalwart in protecting the rights of quasi-judicial supplicants in quasi-judicial proceedings before local governing bodies.³ In *Rachel's-I*, this Court recognized that local governing bodies cannot act quasi-judicially when they are prejudiced and/or biased. Fortunately, this Court is not alone in its march toward confirming recusal as a remedy for the bias and prejudice of local governing boards. The Third DCA also has strongly suggested that such a remedy is appropriate.

In *Opa Locka*, the city council moved to fire the city manager. Three (3) of the five (5) members announced before the meeting that they would vote to do so. The city manager moved to recuse those three (3) councilors, was rebuffed, and sought and received prohibition from the circuit court, which determined the hearing to have been quasi-judicial. The Third DCA held, at 104, that the hearing was legislative in character, and, thus, the bias of the councilors, even if unseemly, was not fatal to their action.

²*Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L. Ed. 942 (1955); *Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); *Cherry Communications, Inc., v. Deason*, 652 So. 2d 803, 804 (Fla. 1995); *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3rd DCA 1991); *Atkinson Dredging Company v. Henning*, 631 So.2d 1129 (Fla. 4th DCA 1994); *City of Opa Locka v. State ex rel. Tepper*, 257 So.2d 100 (Fla. 3rd DCA 1972); *Izaak Walton League of America v. Monroe County*, 448 So.2d 1170 (Fla. 3rd DCA 1984); and *Rachel's-I*. Also see *St. John's County v. Smith*, 766 So.2d 1097 (Fla. 5th DCA 2001), Harris, J., dissenting; and IB 25 - 27.

³In *Snyder v. Board of County Commissioners of Brevard County*, 595 So.2d 65 (Fla. 5th DCA 1991) (*Snyder-I*), this Court, affirmed by the Supreme Court in *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993) (*Snyder-II*), established that zoning proceedings were quasi-judicial, not legislative, in character.

Accordingly, while prohibition was reversed, the court implicitly sanctioned recusal as a remedy for bias in quasi-judicial hearings before local governing bodies.

Likewise, in *Izaak Walton*, the entire Monroe County Board of Commissioners was held by the trial court to be institutionally and individually disqualified from considering a zoning matter, by reason of prior public pronouncements opposing the project, and a writ of prohibition was issued. In reversing, the Third DCA, at 1172, held that “. . . this case concerns the supremely legislative function of zoning . . .” [which we now know to be incorrect; see *Snyder*], and that, since bias and prejudice were not proscribed in the legislative arena, the biased commission was not disqualified. However, by implication, *Izaak Walton* approved such disqualification in quasi-judicial proceedings.

Never did the Third DCA, in either *Opa Locka* or *Izaak Walton*, suggest that recusal and prohibition were, *a priori*, inappropriate remedies for bias and/or prejudice and/or conflict of local governing bodies in quasi-judicial proceedings.

FORMAT FOR NON-STATUTORY DISQUALIFICATION

The BOARD relies heavily on the provisions of §38.10, and *RULE 2.160*, notwithstanding that they, by their explicit terms, apply only to Article V judges. In fact, the BOARD sows the seeds of its own demise, in this matter, by the cases which it cites. Instead of supporting its position, those cases illustrate its **errant** (RB App.) and faulty reasoning.

The BOARD cites *Foley v. Fleet*, 644 So.2d 551 (Fla. 4th DCA 1994), which involves a request for recusal of an Article V trial judge. In *Foley*, the motion was submitted thirty (30) days after counsel for the moving parties was specifically made aware of the potential grounds for disqualification. The *Foley* case arose very shortly after the adoption of *RULE 2.160*, which replaced *RULE 1.432(c)*, *FLA. R. CIV. P.*, effectively changing the time for the motion from “a reasonable time” to “ten days” after becoming aware of the grounds for disqualification. The Court, in *Foley*, while implying that thirty (30) days might have been a “reasonable time” under *RULE 1.432(c)*, held that the ten (10) day limit imposed by *RULE 2.160(e)* was mandatory and inflexible.

Accordingly, since FLORIDA WATER filed its suggestions of disqualification and motions for recusal within ten (10) days of becoming aware of the OVERT ACTS taken by the BOARD, the ten (10) day time

constraint of *RULE* 2.160(e) would not be triggered, even if that rule were applicable. [See IB: 3; 6 (IB/SOF 20); 9 (IB/SOF 35); 11 (IB/SOF 42); 11-15 (IB/SOF 44-49); and 35 - 37].

Further, the BOARD cites *In Re Estate of Carlton v. Rogers*, 378 So.2d 1212 (Fla. 1980). In *Carlton*, a justice of the Florida Supreme Court was requested to recuse himself pursuant to §§38.02 and 38.10, *FLA. STAT.*, but the Court, at 1216, held that those sections “. . . apply only to trial judges and not appellate judges.” Since the challenged justice, with the Court’s approval, then proceeded to determine whether he should recuse himself, it is clear that a non-statutory “common law of recusal” exists, and applies to non-statutorily based disqualifications.

That conclusion is confirmed by *Department of Revenue v. Leadership Housing, Inc.*, 322 So.2d 7, 9 (Fla. 1975), on *reconsideration* (1975), in which recusal of another Supreme Court justice was sought. That case acknowledged that “[t]here has been in Florida no prescribed format for non-statutory disqualification requests. . . .” and established, by judicial fiat, such a format for disqualification of Article V appellate judges. Accordingly, a format for the disqualification of quasi-judicial local officials may, and **perforce** (RB App.) should, be established, by judicial fiat.

Frankly, FLORIDA WATER, while it believes it to be misplaced, welcomes the BOARD’S strong reliance on §38.10 and *RULE* 2.160(e), since, if they are determinative, so would be Canon 3E of the *Code of Judicial Conduct*. There is no legitimate question that both §§(1)(a) and (c) thereunder, if applicable to the BOARD, would require recusal, and prohibition upon a failure to recuse.

TIMELINESS OF POST-HEARING MOTION

The BOARD cites *Carlton* for the proposition that a motion for disqualification must be filed before the hearing out of which the court’s ruling is issued. Unfortunately, the BOARD does not acknowledge to this Court that, in *Carlton*, the motion for recusal was based upon matters known prior to oral argument, but was submitted not only after oral argument, but after the court’s formal written opinion was issued, and requested that the justice recuse himself from consideration of the motion for rehearing. That is diametrically inapposite to the case *sub judice*, in which the OVERT ACTS were unknown to FLORIDA WATER until after both the FEBRUARY 6 HEARING and the MARCH 6 HEARING, and its SUGGESTIONS OF DISQUALIFICATION AND MOTIONS FOR RECUSAL were filed not only within ten (10) days of it becoming

aware of the OVERT ACTS, but also, more than three (3) months before the BOARD entered its FINAL BOARD ORDERS denying the ZONING APPLICATIONS.

The assertion by the BOARD, that it is, *a priori*, untimely to file a motion for disqualification after the hearing at which a ruling adverse to the moving party is announced, is belied by *Ball v. Yates*, 29 So.2d 729, 734 - 735 (Fla. 1946). In *Ball*, while recusal was denied, the court, at 734, ruled that, if good cause is shown, a motion for recusal can be filed and granted even after an adverse order is rendered. In so holding, the court, at 735, said as follows:

When recusation is requested by an unsuccessful litigant after the Judge or Justice has rendered or participated in a judgment or decision adverse to the party requesting it, and there is no disqualification, the problem or propriety of voluntarily retiring is made more acute and more difficult to decide. The law does not favor the substitution of a Judge or Justice in a cause after decision which essentially carries a benefit to the successful party, yet it **favors judges lending themselves to promoting confidence in the Court's acts when no injustice will be worked thereby.**

Not only did the BOARD ignore *Ball*, of which they must have been aware, since it was cited in *Carlton*, but it also ignored this Court's decision in *Marcotte v. Gloeckner*, 679 So.2d 1225 (Fla. 5th DCA 1996), which was prominently cited by FLORIDA WATER in its INITIAL BRIEF. In *Marcotte*, this Court held that a motion to disqualify filed after an adverse ruling, but before the entry of a written order thereon, and supported by an affidavit to the effect that the grounds for recusal (here, the OVERT ACTS) were discovered only after the adverse ruling, was not untimely.

VAGUE AND UNFOCUSED CONCERNS

The BOARD argues that, if recusal is an available remedy, the unfocused and vague discomforture long felt by FLORIDA WATER, regarding its relationship with the BOARD prior to the OVERT ACTS, somehow qualified as a predicate for recusal, thus making the SUGGESTIONS OF DISQUALIFICATION AND MOTIONS FOR RECUSAL untimely. But, it is clear from *Golder, Leadership Housing*, and *Carlton* that such unfocused and vague discomfortures do not support disqualification.

One has only to consider that vague and unfocused concerns and/or discomfortures cannot rise to the level of fact based "beliefs," and, therefore, cannot be the subject of an affidavit, to conclude that such concerns cannot properly be alleged as the predicate for a motion for recusal.

CONFLICT BETWEEN JUDGE AND PARTY

The BOARD continues its explication and defense of its actions by arguing, in its ANSWER BRIEF, that it had no intent to condemn the SPRING HILL SYSTEMS (AB 5). Thus continues the strange and **wayward** (RB App.) voyage of the BOARD and its members into the minefield of their economic and political self-interest based reaction to FLORIDA WATER'S challenge to their partiality.

The BOARD, and its individual members, immediately challenged, and have continued to challenge, the bona fides of FLORIDA WATER'S *Amended Suggestion of Disqualification and Motion for Recusal*, and defended their own motives and/or integrity (IB 29; and R. 127, 137-8, 163, and 653). That created an "intolerable conflict" between them and FLORIDA WATER, which is, itself, a mandatory ground for recusal [*Lake v. Edwards*, 501 So.2d 759 (Fla. 5th DCA, 1987)].

The BOARD confirms that it has a direct conflict-of-interest with FLORIDA WATER, by admitting (AB 5) that FLORIDA WATER believes that the BOARD, and its individual members, are:

“. . . deliberately denying FLORIDA WATER the ability to drill new wells and increase capacity thereby decreasing the value of FLORIDA WATER'S assets . . . [to] allow the BOARD to obtain [the SPRING HILL SYSTEMS] at a reduced price.”

That belief, alone, the reasonableness of which is not challenged, and is therefore admitted, by the BOARD, is sufficient to warrant disqualification of the BOARD.

In *Carlton*, there were no OVERT ACTS, as here, on which to base a recusal, and none was granted. In both *Golder* and *Leadership Housing*, while disqualification was not warranted on the facts extant at the time the motions were filed (which were the same in both cases), the justice (who was the same in both cases), in adversarially toned opinions, declined to recuse himself. In equally adversarially toned rejoinders, by way of memoranda supporting motions for rehearing, the moving parties disputed the reasoning of the challenged justice, who confirmed the original denial, but voluntarily recused himself. The Court, in *Golder*, at 7, confirmed the justice's disqualification of himself, and said that the conflict between the adversarial denials of disqualification and the equally adversarial disputations thereof “. . . created an intolerable adversary atmosphere between the appellee and [the justice]. . . .” As is explained in *Bundy v. Rudd*, 366 So.2d 440, 442 (Fla. 1978):

Our disqualification rule, which limits the trial judge to a bare determination of legal sufficiency, was expressly designed to prevent what occurred in this case—the creation of “an intolerable adversary atmosphere” between the trial judge and the litigant. See *Department of Revenue v. Golder*, 322 So.2d 1, 7 (Fla. 1975) (on reconsideration).

That is echoed by *Daytona Beach Racing and Recreational Facilities District v. Volusia County*, 372 So.2d 417 (Fla. 1978), *reh. den.* (1978). In *Daytona Beach Racing*, another justice of the Florida Supreme Court was challenged. In determining whether he should recuse himself, that justice held that justices of the Supreme Court were subject to disqualification, but that, under the circumstances extant therein, he was not required to recuse himself. Since neither §38.10 nor *RULE 2.160(e)* applied to that Supreme Court justice, his ruling could only be founded upon a common law of recusal. That common law of recusal is eloquently explained by Justice England, who was the justice challenged both in *Golder*, and in *Leadership Housing*. In *Golder*, Justice England, in an opinion accepted by the Court, *per curiam*, held as follows:

I believe it essential that judges contemplate the appearance of partiality at every turn. The acceptance of court-made justice delivered by imperfect humans relies heavily for its existence on the respect of the citizenry for those who dispense it. In order for the courts to remain as a civilized alternative to less acceptable means of resolving disputes, the public in general, and parties and their counsel in particular, must be reassured regularly that causes brought to the judiciary are decided on the law alone.

MISCELLANEOUS SHOTGUN PELLETS

FLORIDA WATER is uncertain why the Board has cited *Shuler v. Green Mountain Ventures, Inc.*, 791 So.2d 1213 (Fla. 5th DCA 2001), and *Post-Newsweek Stations, Florida, Inc., v. Kaye*, 585 So.2d 430 (Fla. 3rd DCA 1991), and *Heier v. Fleet*, 642 So.2d 669 (Fla. 4th DCA 1994), as they each support FLORIDA WATER'S position. *Shuler* was cited by FLORIDA WATER in its INITIAL BRIEF as a primary authority for its position. The "extrapolation" holding in *Post-Newsweek* is irrelevant to this matter, but the dissent therein was cited by FLORIDA WATER, in its INITIAL BRIEF, because of the eloquent and exhaustive explication of the standards applicable to consideration of a motion for disqualification. Further, *Heier* contains nothing inimical to FLORIDA WATER'S argument.

The BOARD **disingenuously** (RB App.) suggests to this Court that the FOREBEARANCE AGREEMENT makes unreasonable the belief by FLORIDA WATER that the BOARD is seeking to acquire FLORIDA WATER by condemnation. Not only has the BOARD'S SPECIAL UTILITY COUNSEL argued to FLORIDA WATER, and advised the BOARD, publicly and its individual members privately, that the FOREBEARANCE AGREEMENT is unenforceable, it expires in less than a year.

Further, the BOARD is also seeking to purchase the SPRING HILL SYSTEMS through FGUA, and has challenged the FGUA price allocation for the SPRING HILL SYSTEMS. Still further, in a failure of candor, the BOARD makes reference to FLORIDA WATER'S contract to sell its systems statewide (including, but not limited to, the SPRING HILL SYSTEMS), but failed to mention that it has sued both FLORIDA WATER and its contract buyer, seeking both to prevent the closing of that contract, and to have the contract declared void.

Accordingly, we must add LITIGATION ADVERSARY to the other four conflicted relationships (COMPETITOR; UNWELCOME SUITOR; REGULATOR; and QUASI-JUDICIAL DECISION-MAKER) between the BOARD and FLORIDA WATER.

Far from "extrapolating" speculative future results based upon an adverse discovery order, as was the case in *Post-Newsweek*, FLORIDA WATER'S beliefs are based on actual and explicitly planned OVERT ACTS by the BOARD that place the BOARD in direct conflict with FLORIDA WATER.

Far from FLORIDA WATER believing that pre-March 7, 2002, rulings and decisions of the BOARD adverse to FLORIDA WATER are grounds for disqualification, FLORIDA WATER simply now believes, with 20/20 hindsight, that those prior decisions were made for improper motive, and presents the making thereof as part of the total fabric against which it must interpret the BOARD'S post-March 6, 2002, OVERT ACTS. (See IB 37)

The BOARD asserts that FLORIDA WATER has made no allegation regarding personal bias on the part of the individual members of the BOARD. One must wonder how that conclusion is reached, since the BOARD can only act through its individual members. The institutional bias and prejudice of the BOARD is the sum of the collective biases and prejudices of its members [§1.01(3), *FLA. STAT.*; also see IB 38]. Further the suggestion that a 4-1 vote on one (1) of the two (2) ZONING APPLICATIONS is indicative of a lack of institutional bias begs credulity. The best interpretation of that circumstance is that the BOARD practices a tyranny of the majority.

The BOARD asserts that "... FLORIDA WATER'S suggestion of bias is not only unreasonable it is also irrational and indefensible. ...". That assertion is strange, indeed, and is entirely irreconcilable with the BOARD'S admissions: **(a)** that it is, in fact, institutionally biased (R. 163); and **(b)** that FLORIDA WATER,

in fact, believes that the BOARD is seeking to inappropriately depress the value of the SPRING HILL SYSTEMS to further the artificially cheap acquisition thereof, either by condemnation or by secondary purchase through FGUA, by the BOARD.

APPLICABILITY OF THE APA

The BOARD entirely ignores the evolution of the §120.52(1), *FLA. STAT.*, definition of “agency” in the context of the applicability of the APA to counties. That evolution has come in three (3) stages (IB 43-47). While the ORIGINAL STATUTE clearly excluded counties from the definition of “agency,” the INTERMEDIATE STATUTE (effective in 1996) clearly included counties within its ambit. The CURRENT STATUTE (effective in 1999) merely clarified the grammatical construct that requires the inclusion of Counties within that definition.

It cannot be coincidental that the legislature, in 1996, amended the definition of “agency” to include counties, since the due process rights inherent in the Supreme Court’s 1993 *Snyder-II* decision had by then begun to ricochet around the State. It is entirely logical for counties to be required to provide APA due process rights to administrative litigants appearing in quasi-judicial hearings before their boards and commissions, and the statutory amendments recognize that logic.

The BOARD argues that the COUNTY, by law, cannot be included within the ambit of the APA, and cites four (4) authorities for that proposition, the same being: *Op. Atty. Gen. 75-140*; *Sweetwater Utility Corp. v. Hillsborough County*, 314 So.2d 194 (Fla. 2nd DCA 1975); *Hill v. Monroe County*, 581 So.2d 225 (Fla. 3rd DCA 1991); and *Eckert v. Board of Commissioners of the North Broward Hospital District*, 720 So.2d 1151 (Fla. 4th DCA 1998).

Because of the evolving changes in the definition of “agency,” those authorities are inapposite to any consideration of the application of the current iteration of the APA to proceedings before county boards. However, notwithstanding that FLORIDA WATER responded, in the court below, to the citation of each thereof by the BOARD (R. 339-341, to which the reader is referred for a complete exposition of the irrelevance of those authorities), the BOARD has made no effort to argue contrarily. Apparently, the BOARD assumes that, no matter the facts, repetition makes truth.

The analysis pursuant to which *OAG 75-140*, *Sweetwater*, *Hill*, and *Eckert*, both are unhelpful to the BOARD, and are entirely consistent with the applicability of the APA to the BOARD, is confirmed by *Martin County v. Yusem*, 690 So.2d 1288 (Fla. 1997). In *Yusem*, the crux of the decision is a determination that the comprehensive plan amendment process is legislative, rather than quasi-judicial, in character. Accordingly, the court's admonition in *Yusem*, at 1295, that the APA was inapplicable is entirely consistent with the inapplicability thereof to legislative functions at all levels of government⁴ without specific inclusive language,⁵ is entirely consistent with the applicability of the APA to quasi-judicial actions by counties.⁶

In fact, every Florida case that discusses the applicability of the APA to local governments deals with the legislative role of a local governing body, as opposed to its quasi-judicial role. Despite an exhaustive search, FLORIDA WATER has been unable to locate any Florida case holding that quasi-judicial hearings by local governing bodies are not subject to the APA.

Even *Isaac Walton League of America v. Monroe County*, 448 So.2d 1170 (Fla. 3rd DCA 1984), is not such a case, notwithstanding that it holds that local officials are not disqualified, by reason of bias, from acting on zoning issues, as such issues were then deemed to be legislative in character. In *Isaac Walton*, at 1172, the court held (though we now know, from *Snyder-II*, incorrectly) that “. . . this case concerns the supremely legislative function of zoning. . . .”

The *Izaak Walton* Court, in 1984, well before the 1996 amendment to the APA's definition of “agency” to include counties therein, concluded, at 1172, that the APA was inapplicable because of the legislative character of zoning proceedings (of course, we now know, from *Snyder-II*, that zoning is quasi-

⁴See §120.50(1), *FLA. STAT.*; and *Opa Lacha*, at 104, wherein the Court equates the functions of the Legislature with the legislative functions of local governing bodies.

⁵For example, the inclusion of the Florida Public Service Commission, a legislative agency, within the ambit of the APA, both by §120.52(a)(4), and by Ch. 350, *FLA. STAT.*; see *ASI, Inc., v. Florida Public Service Commission*, 334 So.2d 594 (Fla. 1976), and *Legal Environmental Assistance Foundation, Inc., v. Clark*, 668 So.2d 982 (Fla. 1996)].

⁶Further, the BOARD can take no comfort to the *Yusem* Court's holding, at 1295, that the reference to counties in §163.3184, *FLA. STAT.*, is not a “specific inclusion,” since *Yusem* arose prior to the 1996 adoption of the INTERMEDIATE STATUTE.

judicial), not because of any inherent prohibition of its applicability to counties, and suggested by negative implication that APA type procedures would be appropriate in quasi-judicial proceedings. It is reasonable to assume that such judicial pronouncements, taken with *Snyder-II*, provided the impetus for the Legislature to adopt that amendment.

CONCLUSION

It shocks the conscience of the body politic, and runs counter to 800 years of “due process evolution,” for the BOARD, as FLORIDA WATER’S quasi-judicial decision-maker (in other words, both its JUDGE and its JURY) regarding the ZONING APPLICATIONS, also to be its LITIGATION ADVERSARY, its COMPETITOR, its REGULATOR, and its UNWELCOME SUITOR, all in matters arising from the same facts, circumstances, and relationships as does the matter *sub judice*.

The BOARD, collectively and institutionally, and its members, the individual APPELLEES, are biased and prejudiced, or, at a minimum, give the appearance of bias and prejudice, against, and have multiple conflicts-of-interest with, FLORIDA WATER and/or the ZONING APPLICATIONS, and are unable to provide FLORIDA WATER a fair and unbiased quasi-judicial hearing thereon. They are therefore disqualified from acting on the ZONING APPLICATIONS, and, by reason of their denial of FLORIDA WATER’S motions for recusal, FLORIDA WATER is entitled to issuance of a writ of prohibition against them.

The APA includes Counties within the definition of “agency” for quasi-judicial (non-legislative) proceedings. Zoning proceedings are quasi-judicial in nature. While the definition of “agency” does not exclude the legislative function of county governing bodies, such functions are excluded by §120.50(1), *FLA. STAT.*, and the APA thus applies only to their quasi-judicial functions.

Accordingly, this Court should reverse the denial by the trial court of FLORIDA WATER’S *Petition for Writ of Prohibition* directed to the BOARD, and direct the trial court to issue such a writ, pursuant to which: **(a)** both of the BOARD’S FINAL ORDERS are quashed; **(b)** both the BOARD, as presently constituted, and its individual members, the individual APPELLEES are prohibited from taking further action on FLORIDA WATER’S ZONING APPLICATIONS; **(c)** this matter is referred to DOAH for assignment of an administrative law judge for proceedings pursuant to the APA; and **(d)** this matter is further referred to the Governor for

appointment of a BOARD AD LITEM to receive and act upon the proposed order to be issued by the administrative law judge.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for FLORIDA WATER hereby certifies that the formatting of this **REPLY BRIEF OF APPELLANT** complies with the requirements of Rule 9.210(a)(2), *FLA. R. CIV. P.*, regarding font style.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February _____, 2003, a copy of the above and foregoing *Reply Brief of Appellant*, has been furnished by Hand Delivery to the below named addressee(s):

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APPENDIX

Selected Definitions From The Merriam-Webster Dictionary on CD-ROM (Zane Publishing, Inc., 1995)

TERM AND DEFINITION (The First Use Of The Term In The Text Is Bolded On The Indicated Page)	PAGES OF USE
arrant \ar-ent\ adj : being notoriously without moderation : extreme	3
disingenuous \dis-en-jen-ye-wes\ adj : lacking in candor; also : giving a false appearance of simple frankness	2, 3, 11
errant \er-ent\ adj 1 : wandering <an ~ knight> 2 : straying outside proper bounds 3 : deviating from an accepted pattern or standard	7
perforce \per-fors\ adv : of necessity	8
pettifog \pe-te-fog, -fag\ vb -fogged; -fogging 1 : to engage in legal trickery 2 : to quibble over insignificant details pettifogger n	2
quibble \kwi-bel\ n 1 : an evasion of or shifting from the point at issue 2 : a minor objection or criticism quibble vb quibbler n	2
wayward \wa-werd\ adj [ME, short for awayward turned away, fr. away, adv. + -ward directed toward] 1 : following one's own capricious or wanton inclinations <~ children> 2 : unpredictable, irregular <a ~ act>	10