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## Yonge v. Askew, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974)

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**Administrative Law—JUDICIAL REVIEW—REPORTS OF STATE AGENCIES CONSTITUTE COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT DENIAL OF DREDGE AND FILL PERMIT APPLICATION EVEN THOUGH REPORTING AGENCY HAS NO JURISDICTION OVER PROPOSED PROJECT.—*Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).**

Crystal River Development Corporation, owner of approximately 700 acres of uplands bordering on the Crystal River, made plans for a substantial housing development on that property. The plans called for construction of a canal system that would provide many of the lots with a direct connection to Crystal River. Construction of the canals required dredging approximately 12,000 cubic yards of earth from the river bottom.<sup>1</sup> The corporation applied to the Trustees of the Internal Improvement Trust Fund<sup>2</sup> for permission to dredge,<sup>3</sup> then amended the application to meet the objections of certain state agencies that had filed ecological reports. Objections of other state agencies, however, were not satisfied.<sup>4</sup> The application was then made part of the agenda of a regularly scheduled meeting of the Trustees. The applicant was represented at the hearing by counsel who made an unsworn oral presentation in support of the application. Relying on the objections of several state agencies, the Trustees denied the application.<sup>5</sup> From this denial the corporation petitioned the First District Court of Appeal for a writ of certiorari<sup>6</sup> pursuant to the Florida Administrative

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1. Under the proposal, the developer would excavate about 1.8 million cubic yards of material from upland canals, connect those canals to Crystal River by dredging about 12,000 cubic yards of sovereignty lands from the river and fill low marsh lands near the river bed. See Brief of Respondents at 1, A-6, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974). Since the bulkhead line already was established, see note 44 *infra*, the developer was not required to get Trustees' permission for the upland excavation or filling. Permission was required, however, for dredging the navigational channels into the Crystal River. See generally FLA. STAT. §§ 253.122-.124 (1973).

2. Hereinafter frequently referred to as the "Trustees." The Trustees are composed of the governor and cabinet of the State of Florida. FLA. STAT. § 253.02(1) (1973).

3. A party wishing to dredge material from the submerged lands below navigable waters of the state must obtain a permit from the Trustees. FLA. STAT. § 253.123(3)(a) (1973). Permits also might be required from a local agency and from the Army Corps of Engineers. See notes 15-16, 21-22 and accompanying text *infra*.

4. See note 45 *infra*.

5. A transcript of the proceeding, which is very short, was filed with the Trustees' brief. Brief of Respondents at A-7, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

6. The *Yonge* court noted the informality of the Trustees' procedure, and that the procedure fell far short of the standards necessary for the quasi-judicial proceeding contemplated by the Administrative Procedure Act. The court felt that review by certiorari was appropriate only after a quasi-judicial hearing. *Yonge v. Askew*, 293 So. 2d 395, 397 (Fla. 1st Dist. Ct. App. 1974). Judge Spector in his concurring opinion was even more emphatic on this point. See 293 So. 2d at 402. The court, however, appears to be in error when it states that "[r]eview of final administrative action under [the Adminis-

Procedure Act.<sup>7</sup> The court denied certiorari, stating that the corporation had failed to overcome "the presumption of correctness" that clothed the Trustees' action and that the Trustees' decision was supported by competent substantial evidence.<sup>8</sup>

At English common law the beds of all navigable waters below the mean high-water mark were held by the sovereign for the benefit of the public.<sup>9</sup> The interests of the public in these lands has been said

trative Procedure Act] is confined exclusively to final administrative orders rendered . . . in the performance of quasi-judicial functions . . ." 293 So. 2d at 397 (footnote omitted). A cursory reading of the statute demonstrates that it provides for review in the district courts of appeal of "the final orders of an agency entered in *any* agency proceeding, *or* in the exercise of any judicial or quasi-judicial authority . . ." FLA. STAT. § 120.31(1) (1973) (emphasis added). There is also adequate case law holding that *any* final agency action is reviewable. *See e.g.*, *Charbonier v. Wynne*, 282 So. 2d 171 (Fla. 2d Dist. Ct. App. 1973) (dictum); *Arvida Corp. v. City of Sarasota*, 213 So. 2d 756 (Fla. 2d Dist. Ct. App. 1968); *Board of Pub. Instr. v. Sack*, 212 So. 2d 819 (Fla. 1st Dist. Ct. App. 1968). The court's error was inconsequential inasmuch as the court accepted the parties' agreement to treat the record as if it had been received in evidence as sworn, competent proof in a quasi-judicial hearing. It should be noted that this does not amount to an attempt to confer jurisdiction by consent. Rather, the parties consented only to the value or reliability of the evidence submitted.

7. FLA. STAT. ch. 120 (1973). This statute has been replaced by a new Administrative Procedure Act which becomes effective January 1, 1975. *See* Fla. Laws 1974, ch. 74-310 [reference will be made to particular provisions of the Act by parenthetically indicating the section number by which the provision will be codified]. The problem of judicial review and informal administrative procedures discussed in note 6 *supra*, should be remedied by the provisions of the new Act that require more formal proceedings for permit applications.

Under the new Act a permit falls within the definition of a "license," Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(6)); thus, pursuant to § 120.60(1), the Trustees must provide a formal hearing "to the extent that the proceeding involves a disputed issue of material fact," unless the affected party requests an informal hearing and the agency agrees. *See* Fla. Laws 1974, ch. 74-310, § 1. In the formal proceeding, the agency generally must provide for a hearing, conducted by a hearing officer, in which certain procedures must be followed. The required procedures include notification of the affected parties, opportunity for both sides to present evidence (including rebuttal evidence) and to cross-examine, transcription of the evidence and testimony, and submission of the hearing officer's recommendations, which include his findings of fact, conclusions of law and interpretation of rules. Additionally, the agency must issue an order that specifically states the reasons for the agency action and generally must conform to the suggestions of the hearing officer. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57(1)).

The Trustees, however, because they constitute an "agency head" within the meaning of the Act, may choose to conduct the hearing themselves without the use of a hearing officer. *See* Fla. Laws 1974, ch. 74-310, § 1. It is unlikely that the Trustees—the governor and the cabinet—will take this option. Their duties are already too numerous and too diverse. Consequently, after the effective date of the Administrative Procedure Act, most initial determinations on dredging permit applications probably will be made at the hearing officer level.

8. 293 So. 2d at 401-02. It should be noted that after further amendment the Crystal River project was approved by the Trustees on August 20, 1974. *See* Trustees of the Internal Improvement Trust Fund file no. 253.123-1009 (Citrus County).

9. *See* *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894).

to include at least the public rights of "navigation, commerce, fishing, and other useful purposes."<sup>10</sup> This doctrine crossed the Atlantic with the colonists<sup>11</sup> and was accepted in Florida at an early date.<sup>12</sup> Florida's submerged sovereignty lands currently are held and controlled by the Trustees of the Internal Improvement Trust Fund.<sup>13</sup>

Permission to dredge navigational channels<sup>14</sup> in Florida's sovereignty waters may be granted only after an individual obtains permits from as many as three different agencies, each having discretionary power in considering the application. In each case, ecological and environmental considerations can be major factors in an agency's decision. First, permission to dredge usually must be obtained from local authorities.<sup>15</sup> If local approval is required, the county commissioners or similar city officials generally are responsible for this decision, though the responsibility may be delegated to the county or city engineer or to some other board, such as the Pinellas County Water and Navigation Control Authority.<sup>16</sup> The standards of such a local agency will depend upon the language of a local ordinance or of the statute creating the agency. The statute creating the Pinellas Authority provides that, if the Authority finds that the proposed development would "materially affect adversely any of the rights or interests of the public," the Authority is to deny the permit.<sup>17</sup>

Permission to dredge channels in sovereignty waters next must be obtained from the Trustees of the Internal Improvement Trust Fund.<sup>18</sup>

10. *State v. Gerbing*, 47 So. 353, 355 (Fla. 1908).

11. *See Shively v. Bowlby*, 152 U.S. 1, 14-15 (1894).

12. *See Alden v. Pinney*, 12 Fla. 348, 390-91 (1869). Although Florida accepted the public trust doctrine in *Alden*, it was not until 1893 that the doctrine was the subject of any substantial comment in Florida. *See State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893). There the Florida Supreme Court stated that

the navigable waters of the state and the soil beneath them . . . were held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all people of the state for at least the purposes of navigation and fishing and other implied purposes . . . .

*Id.* at 648.

13. *See* FLA. STAT. § 253.12(1) (1973).

14. *See* F. MALONEY, S. PLAGER & F. BALDWIN, *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE* 378-385 (1968), discussing the requirements for dredge and fill operations.

15. *See, e.g.*, DADE COUNTY, FLA., CODE § 2-103.1 to .13 (1974); JACKSONVILLE, FLA., CODE tit. 22, ch. 600 (1971).

16. *See, e.g.*, Fla. Laws 1957, ch. 57-1853, §§ 3, 4 (creating the Sarasota County Water and Navigation Control Authority); Fla. Laws 1955, ch. 31182, § 8 (creating the Pinellas County Water and Navigation Control Authority).

17. Fla. Laws 1955, ch. 31182, § 8(e).

18. FLA. STAT. § 253.123(3)(a) (1973); FLA. ADMIN. CODE § 18-2.09. Section 253.123(3)(a) provides in pertinent part that a dredging permit for "[construction, improvement or maintenance of navigational channels] shall be granted after consideration of a biological

Before granting a permit the Trustees must be convinced that the proposed dredging is in the public interest.<sup>19</sup> In determining whether this standard is met the Trustees are required by statute to consider biological or ecological studies of the planned dredging operation.<sup>20</sup>

Finally, if the submerged lands are within the navigable waters of the United States, a person seeking to "excavate or fill" also is required to secure approval from the Army Corps of Engineers and the Secretary of the Army.<sup>21</sup> The Fifth Circuit has held that a dredge and fill permit application for a project in navigable waters may be denied for ecological reasons, stating "there is no doubt the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act."<sup>22</sup>

By meeting the standards for a permit from an agency at a higher level of government the developer is not relieved from the requirement of securing a permit from the local government;<sup>23</sup> usually a permit will not issue from the higher level agency until the developer obtains a permit from the local agency.<sup>24</sup> If a developer is denied permission to dredge by any of these agencies, his only recourse is an action in the

or ecological study . . . upon a showing of the public interest which will be served by such works." (Emphasis added.)

The developer in *Yonge* unsuccessfully argued that after the ecological studies had been considered by the Trustees, they were under a ministerial duty to issue the dredging permit. Petitioner's Brief for Certiorari at 6-11, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974). The court rejected the petitioner's contention, finding that such a result would render the requirement of an ecological study "a useless and meaningless gesture." 293 So. 2d at 399.

19. FLA. STAT. § 253.123(3)(a) (1973).

20. FLA. STAT. § 253.123(3)(a) (1973).

21. See 33 U.S.C. § 403 (1970). See also 33 U.S.C.A. § 1344 (Supp. 1974), which relates to permits for the discharge of dredge or fill material into navigable waters. See generally Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19 (1973).

22. *Zabel v. Tabb*, 430 F.2d 199, 214 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

23. For example, the rules promulgated by the Trustees of the Internal Improvement Trust Fund provide that compliance with its permit requirements "in no way relieves [the] applicant from obtaining a Department of Army permit or permits from local governing bodies or authorities if such permits are required for dredging projects. All required permits must be secured before any work commences on the sovereignty lands of the State." FLA. ADMIN. CODE § 18-2.09.

24. It is the policy of the Army Corps of Engineers to delay approval of permits for work until state or local requirements are met. See *Bankers Life & Cas. Co. v. Village of North Palm Beach*, 469 F.2d 994, 996 n.2 (5th Cir. 1972), cert. denied, 411 U.S. 916 (1973).

In *Bankers Life* the court held that the applicant would not be heard to complain if, while battling the Trustees in state court over their denial of his permit application, the Corps of Engineers' standards become more stringent, so that, while the applicant would have obtained the permit from the Corps before the Trustees took their action, he could later be denied it. 469 F.2d at 994.

proper court to compel issuance of a permit.<sup>25</sup> If a developer does go to court he will find that the scope of judicial review of permit denials is different for each level of government.<sup>26</sup>

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25. The proper avenue for review of local decisions is through an action in the circuit court, *see Zabel v. Pinellas County Water & Navig. Cont. Auth.*, 171 So. 2d 376 (Fla. 1965), unless the agency is made subject to the new Administrative Procedure Act by "general or special law or existing judicial decisions." Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(1)(c)). The new Administrative Procedure Act provides that agency decisions are to be reviewed by petition in the district courts of appeal. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.68(2)). The proper remedy for review of a permit denial by the Army Corps of Engineers is an action in the federal district court. *See Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

The problems encountered by a developer who resorts to judicial action to obtain a permit is illustrated by the following: Alfred Zabel and David Russell obtained title to 11.5 acres of submerged bottom lands from the Trustees. At the time, sale of land by the state carried with it the right to dredge and fill, so the owners were not required to obtain permission from the Trustees. Zabel and Russell made application to the Pinellas Water and Navigation Control Authority for a permit to dredge and fill the 11.5 acres and were turned down. The owners went to the circuit court to compel issuance of the permit, but the circuit court upheld the decision of the Authority. An appeal was taken by the owners. The district court of appeal upheld the lower court in *Zabel v. Pinellas County Water & Navig. Cont. Auth.*, 154 So. 2d 181 (Fla. 2d Dist. Ct. App. 1963). The owners then appealed to the Florida Supreme Court, which reversed stating the denial had resulted in a taking without just compensation. *Zabel v. Pinellas County Water & Navig. Cont. Auth.*, 171 So. 2d 376 (Fla. 1965). On remand, the Authority argued that there should be further hearings. The circuit court disagreed and ordered issuance of the permit, whereupon the Authority appealed. The First District Court of Appeal agreed with the circuit court and ordered the Authority to issue the permit. *Pinellas County Water & Navig. Cont. Auth. v. Zabel*, 179 So. 2d 370 (Fla. 2d Dist. Ct. App. 1965). At this point, the Authority complied.

After succeeding at the local level, the owners applied to the Secretary of the Army for a permit to dredge and fill and were turned down. This was challenged in federal district court. The court found for the owners and ordered the Army Corps of Engineers to issue the permit. *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969). The decision of the District Court was appealed and the Fifth Circuit reversed. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970). The Supreme Court denied certiorari. *Zabel v. Tabb*, 401 U.S. 910 (1971). Thus, after taking their case to eight courts, the owners found themselves without a permit.

26. If the county commissioners have authority over the issuance of local dredging permits, Florida case law suggests that an applicant denied such a permit must show a clear abuse of discretion in order to have the denial overturned. *See Davis v. Keen*, 192 So. 200 (Fla. 1939); *Osban v. Cooper*, 58 So. 50 (Fla. 1912).

If the issuance of local permits is controlled by a statutorily created agency, such as the Pinellas County Water and Navigation Control Authority, the scope of judicial review depends on the language of the statute. In *Zabel v. Pinellas County Water & Navig. Cont. Auth.*, 171 So. 2d 376 (Fla. 1965), the Florida Supreme Court held that the law creating that agency, *see note 16 supra*, imposed the burden of proof on the Authority to show that proposed projects would have an adverse effect on the public interest. Thus, absent a clear showing of adverse effect, a denial of the permit was a taking of property without just compensation.

Judicial review of a Trustees' decision to deny a dredging permit is governed by the substantial evidence rule. *See* 293 So. 2d at 401. *See also* notes 30-34 and accompanying text *infra*. A permit denial issued by the Army Corps of Engineers is not reviewed under the

A developer challenging a decision by the Trustees undertakes a very difficult task. The courts of Florida have reacted favorably to administrative decisions and generally presume that administrative officers will perform their duties faithfully.<sup>27</sup> Florida courts historically have displayed an even higher regard for decisions made by the Trustees of the Internal Improvement Trust Fund:<sup>28</sup>

[W]e take note of the fact that the Trustees of the Internal Improvement Fund are five constitutional officers of the executive branch of the government. If we are ever to apply the rule that public officials will be presumed to do their duty, it would appear to us to be most appropriate in this instance.<sup>29</sup>

Consequently, a party challenging a decision reached by the Trustees bears a heavy burden in attempting to show that the decision applies an incorrect rule of law, is beyond the Trustees' delegated powers or is not supported by competent substantial evidence.

In Florida the scope of review of facts previously determined by administrative agencies is subject to the substantial evidence rule.<sup>30</sup>

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substantial evidence rule, codified in 5 U.S.C. § 706 (2)(E) (1970); it is to be set aside only if it is found to be arbitrary or capricious. See *DiVosta Rentals, Inc. v. Lee*, 488 F.2d 674, 680 (5th Cir. 1973).

27. See *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943); *Glendinning v. Curry*, 14 So. 2d 794 (Fla. 1943).

28. See *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957); *Pembroke v. Peninsular Terminal Co.*, 146 So. 249 (Fla. 1933); *Morgan v. Canaveral Port Auth.*, 202 So. 2d 884 (Fla. 4th Dist. Ct. App. 1967); *Conoley v. Naetzker*, 137 So. 2d 6 (Fla. 2d Dist. Ct. App. 1962). If the Trustees' decision is attacked collaterally in a suit between private parties, then the presumption is, for all practical purposes, conclusive. See *Pembroke v. Peninsular Terminal Co.*, *supra* at 258.

29. *Hayes v. Bowman*, 91 So. 2d 795, 802 (Fla. 1957).

30. See *United States Cas. Co. v. Maryland Cas. Co.*, 55 So. 2d 741 (Fla. 1951); *Nelson v. State ex rel. Quigg*, 23 So. 2d 136 (Fla. 1945); *Callahan v. Curry*, 15 So. 2d 668 (Fla. 1943). See generally *Parsons, The Substantial Evidence Rule in Florida Administrative Law*, 6 U. FLA. L. REV. 481 (1953); Note, *Judicial Review of Administrative Findings of Fact: The Doctrine of Jurisdictional Facts in Florida*, 2 U. FLA. L. REV. 86, 93 (1949).

The administrative procedures of the new Administrative Procedure Act may create confusion in the application of the substantial evidence rule by reviewing courts. As mentioned in note 7 *supra*, under the new Act it is very likely that a hearing officer, not the Trustees, will make the initial determination of dredging permit applications. There can be no doubt that the substantial evidence rule is to apply to agency orders promulgated after a hearing before the Trustees or any other agency, but when the initial findings are made by a hearing officer, a question arises as to whether the substantial evidence rule applies to findings of fact made by a hearing officer or to the changes made by the agency when reviewing the findings of the hearing officer. The new statute provides that the agency may reject the officer's recommendations and conclusions of law, but his findings of fact are to stand unless the agency finds and states with particularity that the findings are not supported by substantial evidence. See Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57(1)(j)). If the agency finds that the examiner's findings are not based on

Under this rule the courts are to examine the evidence to ensure that the correct rule of law has been applied; the findings of the administrative agency will be upheld as long as the correct rule has been applied and there is competent substantial evidence to support the findings.<sup>31</sup> Hence, the conclusions of administrative agencies will not be invalidated because there is evidence that would yield a different result,<sup>32</sup> even though the court itself might have reached a different conclusion.<sup>33</sup>

Seldom, if ever, do statutes authorizing discretionary decisions by administrative agencies specifically delineate what may be considered competent substantial evidence. Generally, attempts by the courts to define it are couched in rather broad terms. In *De Groot v. Sheffield*, for example, the Florida Supreme Court described competent substantial evidence as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."<sup>34</sup>

In view of this vague guideline, the practitioner should look to specific cases to determine what may be considered competent substantial evidence. The statute involved in *Yonge*, setting forth the requirements for dredging permits, provides that a permit "shall be granted . . . upon a *showing of the public interest* which will be served by such works."<sup>35</sup> It is true that the statute requires consideration of "a biological or ecological study,"<sup>36</sup> but neither the statute nor the regu-

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substantial evidence, and then makes its own findings of fact, the new Act provides that judicial review of this action is still to be governed by the substantial evidence rule. See Fla. Laws 1974, ch. 74-310, § 1 (§ 120.68(10)).

It appears that the reviewing court may adopt one of two approaches in applying the substantial evidence rule. First, the reviewing court may ask whether the *hearing officer* had substantial evidence for his findings. If this approach is taken the court assumes that the hearing officer is the main finder of fact, and the court steps into the shoes of the agency. If the court finds substantial evidence, it will affirm the hearing officer's decision even if the agency that reviewed the hearing officer's decision found no such evidence. Cf. *United States Cas. Co. v. Maryland Cas. Co.*, 55 So. 2d 741 (Fla. 1951). If, on the other hand, the court asks whether the *agency* had substantial evidence for its decision, the court is placing the agency in the position of the prime fact finder and the agency will have considerably more discretion than it would have under approach one, above. See *Scheuerman v. Florida Real Estate Comm'n*, 215 So. 2d 29 (Fla. 4th Dist. Ct. App. 1968).

31. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *State Dep't of Agric. & Consumer Serv. v. Strickland*, 262 So. 2d 893 (Fla. 1st Dist. Ct. App. 1972).

32. See *Florida Indus. Comm'n v. Nordin*, 101 So. 2d 890 (Fla. 1st Dist. Ct. App. 1958).

33. See *Florida Motor Lines, Inc. v. State Railroad Comm'n*, 132 So. 851 (Fla. 1931).

34. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

35. FLA. STAT. § 253.123(3)(a) (1973) (emphasis added).

36. FLA. STAT. § 253.123(3)(a) (1973).



lations<sup>37</sup> specify other factors<sup>38</sup> that should be considered in determining the "public interest," or the weight that the ecological study is to be given when balanced against other factors. Since the *Yonge* case apparently was the first challenge to a denial of a dredge permit,<sup>39</sup> and since the basis of the challenge was the competency and substantiality of the evidence,<sup>40</sup> the case defines to some extent the evidence that can be considered by the Trustees in dredge permit hearings.

In reaching the decision challenged in *Yonge*, the Trustees had considered a resolution by the Board of County Commissioners of Citrus County<sup>41</sup> favoring the project, as well as reports from the Department of Pollution Control, the Game and Fresh Water Fish Commission, the Department of Natural Resources, the Coastal Coordinating Council and the Trustees' professional staff.<sup>42</sup> Each state agency objected to the dredging project as initially proposed,<sup>43</sup> but after substantial amendments the developer was able to quell the opposition of the Department of Pollution Control and the Game and Fresh Water Fish Commission.<sup>44</sup> Based primarily upon the remaining ob-

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37. See FLA. ADMIN. CODE § 18-2.09.

38. Other relevant factors would seem to include the need for housing, economic development or navigational channels.

39. See Petitioner's Brief for Certiorari at 3, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

40. See notes 47-49 and accompanying text *infra*.

41. See Petitioner's Brief for Certiorari at 2, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974). The Citrus County Commission approved the petitioner's dredging application and found that the proposed development was in the public interest. The petitioner implied that this finding by the county commission was sufficient proof to require the Trustees to find the project in the "public interest," see *id.* at 15, 20, 22, a prerequisite that must be met before a dredging permit will issue. See FLA. STAT. § 253.123(a)(3) (1973).

The court rejected the developer's argument and pointed out that the applicant for a dredging permit has the "burden of making an affirmative showing" that the proposed development is in the public interest. 293 So. 2d at 401. Such a burden was not met by a mere resolution of the local county commission: "While the development of petitioner's land may be in the public interest of Citrus County, there is no showing that it is in the interest of all the people of the State of Florida for whom respondents hold the bottoms of Crystal River in trust." *Id.*

42. 293 So. 2d at 398-99.

43. See *id.* at 399.

44. On appeal the developer argued that the state agencies had used the threat of project disapproval as a means to require a certain type of development on the upland areas over which the state agencies had no actual jurisdiction. The objections of the Game and Fresh Water Fish Commission provide an interesting example of this leverage used by state agencies. The Commission originally objected to the project for two reasons: (1) a bald eagle and eagle nest were found on the property and (2) the project would degrade water quality. The Commission noted that much of the land involved in the project was marsh land which is "extremely important" to fish and wildlife resources as well as water quality. These marsh areas were under

tidal influences and [were] inundated by as much as a foot of water daily.

jections of the Department of Natural Resources, the Coastal Coordinating Council and the Trustees' staff, the Trustees denied the dredging permit.<sup>45</sup>

On review by the First District Court of Appeal the developer claimed that the only state agencies that could submit "competent and

. . . The marsh filters and utilizes impurities and excess watershed nutrients and slows runoff time, thereby buffering the effect of flood and drought conditions to the . . . estuarine ecosystem.

Brief of Respondents at A-5, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974). The Commission recommended that the applicant exclude the marsh areas from his dredging project and deed them to the state. *Id.*

In order to secure the Commission's approval for the project, the developer agreed not to dredge or fill any of the intertidal marsh areas even though the bulkhead line was established along the shore line of the Crystal River. *Id.* at A-7. The bulkhead line usually is considered the point to which the filling of lands bordering navigable waters of the state will be permitted. See FLA. STAT. § 253.122(1) (1973). Thus, in order to secure the dredging permit, the developer agreed not to fill lands that he could have filled had he not sought the permit. The developer also agreed to dedicate to the state the area around the tree that contained the eagle's nest. 293 So. 2d at 398.

45. The Department of Natural Resources argued that the system planned by the developer would destroy "significant areas of productive freshwater and tidal marshlands and creek systems." Brief of Respondents at A-2, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974). The Department noted that the low lands fronting the Crystal River were covered by productive marsh areas and that the marshes were bounded by green belt areas containing low, wet, hammock vegetation. Under the developer's proposal, a significant amount of these areas would be destroyed by dredging and filling. The department recommended against the project unless it was redesigned (1) to preserve the natural marsh and hammock areas and (2) to eliminate most of the proposed interior waterway system, except for the construction of marinas. *Id.* at A-2, A-8.

The Coastal Coordinating Council objected to the project because the proposed excavation areas included portions of marsh lands that were vital to marine productivity of the Crystal River. Specifically, it argued that the excavation would remove natural grass swales which filtered urban runoff from present development around Crystal River. Additional urban runoff would increase the turbidity of the river and degrade the water quality as well as further imperil a large concentration of an already endangered species, the manatee or sea cow. The Council recommended as minimum requirements before approving the project that (1) construction be set back out of the marshes and (2) that there be no excavation. *Id.* at A-3.

The position of the Trustees' staff was that the petitioner's application should be denied because all further development requiring navigational channel access to Crystal River should be curtailed. 293 So. 2d at 399. The staff noted that the turbidity of Crystal River, a unique, spring fed river famous for its clarity, had increased over recent years and that further development could only aggravate the damage. In the presentation to the Trustees, Mr. Joel Kupferberg, Executive Director of the Trustees of the Internal Improvement Trust Fund, stated that

"the waters of the Crystal River [have] become so turbid, that . . . where at one point you could drop a dime in . . . 10 feet of water off the end of the dock, and see it shimmering on the bottom . . . [y]ou can't do that anymore. [The cause of this is] the destruction of the filters that are the flood plain of the river, and in direct proportion to the on-going destruction of these filters will be increasing turbidity and degradation of one of these unique spring fed waters of Florida."

Brief of Respondents at A-7, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

substantial" studies were the Department of Pollution Control and the Game and Fresh Water Fish Commission.<sup>46</sup> The developer argued that since the Department of Pollution Control has sole jurisdiction over water quality, and the Game and Fresh Water Fish Commission has sole responsibility for the preservation of animal life in and about the rivers of Florida,<sup>47</sup> any reports filed by other agencies were not competent substantial evidence and should not have been considered by the Trustees.<sup>48</sup>

The court rejected the petitioner's arguments and, relying on the presumption of correctness accorded Trustees' actions, recognized broad discretion on the part of the Trustees to determine what evidence should be considered in dredge permit hearings:

[The Trustees] are charged with the responsibility of preserving the navigable waters of this state not only for the benefit of upland owners but also for all of the people of Florida. Theirs is the duty of *taking a broad and objective view of all matters under their jurisdiction* which might adversely affect the public interest and of reaching their decisions in a manner consistent with the greatest good for the greatest number.<sup>49</sup>

46. Petitioner's Brief for Certiorari at 14-15, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

47. See 293 So. 2d at 400. The petitioner pointed out that the Department of Pollution Control, created by the Florida Air and Water Pollution Control Act of 1967, Fla. Laws 1967, ch. 67-436, was given rule-making authority in the area of pollution control, and that any such power that other agencies might have in the pollution control area has been repealed. See FLA. STAT. §§ 403.061(7), 403.261 (1973).

48. Petitioner's Brief for Certiorari at 16-20, *Yonge v. Askew*, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

There can be no doubt that the agencies whose reports the Trustees considered have expertise in the field of water pollution and its effect on marine ecosystems. The executive director of the Department of Natural Resources is under a statutory command, see FLA. STAT. § 370.017 (1973), to advise and make recommendations to the Trustees on any matters concerning natural resources. The Coastal Coordinating Council, created within the Department of Natural Resources, has as one of its duties the development of "a comprehensive state plan for the protection, development, and zoning of the coastal zone" area. FLA. STAT. § 370.0211(4)(d) (1973). Thus it is unlikely that the agencies consulted by the Trustees were unable to submit competent evidence.

It should also be noted that the administrative regulations of the Trustees specifically provide that after the filing of a completed application for a dredging or other permit, the following agencies are to be advised that such application is pending:

- (a) U.S. Army Corps of Engineers, directed to the appropriate district headquarters;
- (b) Department of Natural Resources;
- (c) Game and Fresh Water Fish Commission;
- (d) Department of Pollution Control;
- (e) Field Operations Division of the office of the Trustees,

FLA. ADMIN. CODE § 18-2.094(1)(a).

49. 293 So. 2d at 400 (emphasis added),

The *Yonge* decision is useful both to developers and environmentalists. The opinion clearly imposes on the developer the burden of showing that a proposed dredging project will serve the public interest; additionally, it defines more comprehensively the evidence that may be considered in determining whether the public interest is being served. From the holding in *Yonge*, it is apparent that the Trustees may consider as evidence ecological or biological reports from any state agency whose staff is scientifically capable of commenting on the environmental ramifications of the proposed project.<sup>50</sup> Since the standard invoked by the court is scientific capability, and not jurisdictional or rule-making authority, it would appear that ecological reports concerning proposed dredging projects prepared by *any* qualified person or organization might be acceptable as competent evidence. Moreover, it is evident that a general apprehension that further dredge and fill projects eventually will destroy the balance of a marine ecosystem also may be considered by the Trustees in determining whether dredging proposals are in the public interest.<sup>51</sup>

The result in *Yonge* is one that should not have been unexpected: it is compatible with historic precedent affording the Trustees much discretion in making decisions<sup>52</sup> and with current social concern about the environment. The case provides judicial recognition of the concept that the public interest may dictate that some areas within the state remain free from development and the encroachment of man. Since the Trustees hold title to state owned lands in trust for all the people of Florida, the court has decided that they should have the discretion to determine which of these lands should be left undeveloped. By doing so the court appears to sanction *sub silentio* the position that more concern needs to be shown for the environment and that the judiciary should be hesitant to interfere when the government takes reasonable action to assure environmental protection.

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50. See note 48 *supra*.

51. 293 So. 2d at 399-401.

52. See notes 27-29 and accompanying text *supra*.