Thomson v. Department of Environmental Regulation, 511 So. 2d 989 (Fla. 1987)

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NOTE

Administrative Law—Administrative Res Judicata: Giving The Developer Another Bite of the Apple—Thomson v. Department of Environmental Regulation, 511 So. 2d 989 (Fla. 1987)

Florida agencies authorized to restrict environmentally unsound use of land and water and individuals who own land and wish to exercise their ownership rights are involved in an ongoing process of confrontation and compromise. Occasionally, the agencies win a battle in favor of the environment, but often the interests of the property owners prevail. The Florida Department of Environmental Regulation (DER) is one of the agencies charged with preventing degradation of the environment. In line with its authority to control and prohibit air and water pollution and to promulgate current and long-range plans to provide for air and water quality control and pollution abatement, DER has developed rules relating to permits for "the operation, construction, or expansion of any installation that may be a source of air or water pollution." Under these rules, every proposed structure, large or small, that will intrude into waters over ecologically sensitive submerged lands must be approved by DER before construction can begin. This covers all docks, overwater platforms, marinas, and other similar structures.

The agency is required to process what turns out to be an enormous number of dredge and fill permits every year. The permit ap-


2. There are currently 300 active permits being processed at the main offices of DER in Tallahassee, Florida. The main office, however, only processes permits for larger projects. The total number of dredge and fill permits processed each year includes all the applications for smaller projects, like the one involved in the instant case, which are processed by DER's six district offices. During the period between July 1, 1987 and June 30, 1988, DER issued 1,860 dredge and fill permits. Telephone interview with Janet Llewellyn, Environmental Administrator, Wetland Resource Regulation, DER, (Aug. 16, 1988). Under the provisions of Rule 17-4.280(11)(e), DER must either grant, deny or act on the permit in some way within 90 days of receiving it; thus, the total number processed in a 12-month period is substantial. Fla. Admin. Code R. 17-4.280(11)(e) (1987).
plication process is detailed, lengthy, and sometimes very expensive. It also affects a great number of people because of the numerous kinds of structures falling within the purview of DER's jurisdiction.

The Florida Supreme Court recently reviewed a denial by DER of such a dredge and fill permit application in *Thomson v. Department of Environmental Regulation*. The Thomsons had applied for a permit to construct an overwater walkway and platform leading from their waterfront restaurant through a stand of mangroves. The initial proposed design was turned down by DER because of projected adverse environmental impacts. Several months later, the Thomsons submitted another application with a slightly modified design. The Department concluded that the applications were too similar and denied a permit on the basis of res judicata.

Although this case turned on a fairly narrow issue—whether the Thomsons' two applications were sufficiently different to preclude DER from applying res judicata—the case nevertheless afforded the Supreme Court of Florida a unique opportunity to articulate its position on the general applicability of administrative res judicata to environmental permitting proceedings. The case remains of interest because of the method employed by the supreme court in assuming jurisdiction over the matter. Although the court often exercises its conflict jurisdiction, for the court to find a conflict sufficient to support such jurisdiction in this instance required a leap of imagination. *Thomson* was proferred as conflicting with *Matthews v. State ex rel. St. Andrews Bay Transportation Co.*, a case decided by the Supreme Court of Florida fifty years ago, which is, by the supreme court's own admission, a case no longer relevant in the jurisprudence of Florida administrative law.

The supreme court reversed the ruling of the First District Court of Appeal, concluding that the appeals court had erroneously applied the doctrine of administrative res judicata to preclude the Thomsons' second application. In reviewing the doctrine as applied by both DER and the First District, however, the supreme court restated and possibly limited the availability of the doctrine to the environmental agencies for use in abbreviating and streamlining the permitting process. This Note briefly explores the role of res judicata in the administrative process by looking at workers' compensation benefits cases and zoning use cases and then explains how the doc-

4. 511 So. 2d 989 (Fla. 1987).
5. 111 Fla. 587, 149 So. 648 (1933).
trine has been used as an effective tool in relieving the burden upon governmental agencies charged with environmental permitting. This Note also briefly reviews changes in the doctrine's use over time which culminate in Thomson, and shows why the Thomson decision hands a small defeat to those who believe that the environmental permitting process is the best mechanism for regulating rapacious development.

I. Res Judicata in the Administrative Process

Res judicata is a "rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." Res judicata "puts to rest every justiciable, as well as every actually litigated, issue," as long as several preconditions are met: "identity of the thing sued for; identity of the cause of action; identity of parties; [and] identity of the quality in the person for or against whom the claim is made." "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them."

A. An Historical Perspective

For some time there was a strongly held concern that res judicata as it was recognized in judicial proceedings should not be applicable in administrative determinations. Courts' concerns with administrative res judicata revolved around the differences between judicial and administrative procedures: the "regularized procedure of courts conduces to application of the doctrine of res judicata," but administrative proceedings are "often summary, parties are sometimes unrepresented by counsel, and permitting a second consideration of the same question may frequently be supported by other similar reasons which are inapplicable to judicial proceedings."

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7. BLACK'S LAW DICTIONARY 1174 (5th ed. 1979).
9. Id. at 12.
10. RESTATEMENT OF JUDGMENTS § 1 (1942).
11. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.01, at 545 (1958).
12. Id.
The United States Supreme Court voiced this concern in a case decided near the turn of the century, *Pearson v. Williams.* A few weeks after his entry, he was arrested, made to appear before another board of special inquiry, and was ordered to be returned to England. The United States Supreme Court heard arguments that the board should not have had the power to redecide the issue once the man had been admitted. The Court refused to adopt this reasoning, stating, "The board is an instrument of the executive power, not a court. . . . Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute res judicata in a technical sense." 

Although the *Pearson* decision has been cited for the proposition that an administrative decision cannot be res judicata, the Court's holding is not that broad. Rather, because the administrative proceeding at issue in *Pearson* was summary, the Court's decision can be understood more narrowly to prohibit the application of administrative res judicata only when the administrative proceeding does not parallel a judicial proceeding.

The United States Supreme Court ultimately articulated the view that administrative determinations could be res judicata in *Sunshine Anthracite Coal Co. v. Adkins.* This case involved a commission's finding that a certain company's coal was bituminous, and the coal company's subsequent attempt to argue with tax officials that the coal was not. The Court noted that "a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." "The *Sunshine* case is in all respects a clear strong holding that the administrative determination was res judicata."

**B. A Current Perspective**

Today, most jurisdictions follow the United States Supreme Court's lead, adhering to the principle that the policies underlying

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14. *Id.* at 282.
15. *Id.*
16. *Id.* at 284-85 (citations omitted).
17. K. DAVIS, supra note 11, § 18.02, at 548.
18. 310 U.S. 381 (1940).
19. *Id.* at 402-3 (citations omitted).
20. K. DAVIS, supra note 11, § 18.02, at 555.
the doctrine of res judicata are "fully applicable to some administrative proceedings." The reasons against allowing two parties to relitigate the same issues are "precisely the same for some administrative determinations as they are for most judicial determinations." Thus, as a general proposition, determinations made by an administrative body can be res judicata as to an attempt to later relitigate the same issue before the same administrative body. One important consideration, however, is that certain "safeguards" exist to allow the use of the doctrine. They include: "due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence and the right to cross-examine adverse witnesses." These safeguards are intended to guarantee that an administrative proceeding is sufficiently quasi-judicial to permit the use of res judicata.

II. Res Judicata in the Florida Administrative Process

While Florida courts apply the basic proposition that administrative determinations can be res judicata, certain limitations on this rule have developed over time. To temper what otherwise might be a fairly rigid rule precluding relitigation, courts follow the admonitions of the Supreme Court of Florida in *Universal Construction Co. v. Ft. Lauderdale.* The case involved a contractor's suit against the City of Fort Lauderdale to recover damages upon a theory of quantum meruit for the cost of additional improvements the contractor had made on a project for the city. Although the state's high court found "all the requisites of res judicata" from the facts presented, the court was nevertheless "convinced that this doctrine should not necessarily be controlling under the facts and circumstances attendant upon this litigation." The court showed itself amenable to a less rigid application of res judicata: "[W]hen a choice must be made we apprehend that the State, as well as the courts, is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation." Indeed, the court stated broadly, "[T]his very Court among others, has an-

21. *Id.* at 548 (emphasis in original).
22. *Id.*
24. 68 So. 2d 366 (Fla. 1953).
25. *Id.* at 369.
26. *Id.*
27. *Id.*
ounced the salutary principle that the doctrine of res judicata should not be so rigidly applied as to defeat the ends of justice.  

Although *Universal Construction* did not involve an administrative body's determination, its general proposition that res judicata does not apply where use of the doctrine might cause manifest injustice has carried over into administrative proceedings. Courts seem to generally follow this idea in the administrative arena, relaxing or qualifying the doctrine "in any desired degree without destroying its essential service" when fairness would demand as much.

While heeding *Universal Construction's* admonition of selective, discretionary use of res judicata in administrative decisions, use of the doctrine by the courts has nevertheless increased over time, and it is now widely utilized by agencies to put a definite end to certain types of proceedings. Res judicata is applied in workers' compensation benefit evaluations, zoning change requests, and, in the area of concern in *Thomson*, environmental permitting cases. The policies underlying these different kinds of proceedings play a key role in defining the way administrative res judicata is applied.

A. Workers' Compensation

Workers' compensation cases reflect what is perhaps the most flexible use of res judicata to bar a petitioner from appearing before an administrative body successive times in order to argue a claim. The intent and social policy underlying workers' compensation statutes is to ensure that an injured worker will be able to obtain redress for injuries. Any mechanical application of res judicata to prevent modification of an inadequate initial award would defeat that end. The worker is injured and is entitled to benefits; once entitlement is firmly established, the only issue for the administrative body to decide is the amount of the benefits the worker will receive.

*Sauder v. Coast Cities Coaches, Inc.* involved a bus driver who had been injured on the job, and who had then submitted his claim to a deputy commissioner of the Florida Industrial Commission to be evaluated for benefits. At the original proceeding, the deputy found on the evidence before him that the injured worker had a ten-
percent permanent partial disability and entered an order for the payment of compensation benefits. Some years later, the worker petitioned for a modification of the original award of benefits, claiming his injury had been greater than the deputy commissioner had determined from the outset. A second deputy commissioner granted the modification, determining that the first deputy had made a mistake in the finding of fact involving the worker’s condition at the original proceeding.

The modification was later reversed by the full Commission, and this reversal was appealed to the Supreme Court of Florida. Accepting certiorari, the supreme court noted initially:

In order to support a modification . . . on the ground of the mistake in the determination of a fact, a claimant has the burden of showing that the mistake was one committed by the deputy and was not merely an erroneous conclusion formed by his own witnesses.

. . . . It is our view that all known evidence bearing on the claim should be submitted to the deputy. If the claimant fails to produce evidence available to him or produces unreliable evidence, he cannot later effectively maintain that the deputy committed error in relying upon the evidence which he himself produced.

Although the Supreme Court of Florida refused to support the second deputy commissioner’s rationale for modifying the initial award, the court did not find the initial determination to be res judicata. Instead, the court found that the initial award could be modified, because the claimant’s evidence of a change in his condition over time was sufficient to support such modification:

The so-called change of condition provision is available to bring relief to a claimant whose condition becomes progressively worse even though not anticipated by the original diagnosis. A change may also be the product of evidentiary factors not known at the time of the initial claim proceeding. The burden remains with the claimant to establish by competent substantial evidence the occurrence of the change . . . .

36. Id. at 164.
37. Id.
38. Id.
39. Id. at 164-65.
40. Id. at 165.
41. Id.
The court remanded the cause to the Florida Industrial Commission for consideration of the injured man's changed condition.\textsuperscript{42}

A more recent workers' compensation decision\textsuperscript{43} concerned an injured worker who was initially denied a claim for loss in wage earning capacity because the worker had not supplied evidence to the deputy commissioner of an unsuccessful work search in order to sufficiently demonstrate that his disability did indeed make him unemployable.\textsuperscript{44} After the denial, the worker conducted an exhaustive but unsuccessful work search and petitioned for a modification of the initial denial.\textsuperscript{45} The deputy commissioner denied this petition, ruling that the claimant's evidence of a work search should have been submitted at the initial hearing and, therefore, the issue of his unemployability was res judicata.\textsuperscript{46} In reversing this application of res judicata, the First District Court of Appeal held that the applicable statute in this case\textsuperscript{47} provides that a requisite change in condition for modification should include "a change in claimant's ability to get or hold employment, or to maintain his earlier earnings level."\textsuperscript{48} Emphasizing that section 440.28 provides a two-year period for changes in a claimant's condition to prompt a modification, the court noted that employability is the ultimate issue; the work search test is merely the vehicle to prove it.\textsuperscript{49} Noting further that "workers' compensation proceedings are inherently and uniquely 'piecemeal' in nature, for the simple reason that various aspects of a claimant's entitlements 'mature at different times,'"\textsuperscript{50} the court concluded:

[T]here are so many variables connected with the job search requirement that a "false reading" often results from the initial hearing on this issue. We think a far better result can be reached . . . by allowing any deficiencies in a claimant's job search effort to be remedied and corrected by means of a modification petition.\textsuperscript{51}

\textsuperscript{42} Id.
\textsuperscript{43} Flesche v. Interstate Warehouse, 411 So. 2d 919 (Fla. 1st DCA 1982).
\textsuperscript{44} Id. at 920-21.
\textsuperscript{45} Id. at 921.
\textsuperscript{46} Id.
\textsuperscript{47} FLA. STAT. § 440.28 (1987). The workers' compensation modification statute provides that an interested party can petition a deputy commissioner to review a case on the grounds of a change in condition or a mistake in fact. This review can occur any time within a two-year period from whenever compensation was first denied or whenever compensation was last received. Id.
\textsuperscript{48} Flesche, 411 So. 2d at 921 (quoting 3 A. LARSON, WORKMEN'S COMPENSATION LAW § 81.31(e) (1983)) (citations omitted).
\textsuperscript{49} Id. at 922.
\textsuperscript{50} Id. at 923 n.7 (citing Hunt v. Int'l Minerals and Chem. Corp., 410 So. 2d 640 (Fla. 1st DCA 1982)).
\textsuperscript{51} Id. at 926.
Thus, the respective courts in *Sauder* and *Flesche* concluded that workers' compensation decisions governing changes in employability or disability deserve treatment different from that afforded other administrative decisions. An injured worker who has proven entitlement to some disability benefits will be given subsequent opportunities to show that conditions have changed enough to justify additional benefits. The courts will not allow an administrative body's defense of res judicata to preclude an injured worker from making several applications to that administrative body for alterations in the amount of the compensation benefits.

**B. Zoning**

Res judicata is frequently invoked in zoning cases, most often to prevent an individual from requesting a previously denied zoning change. There is generally a fixed time period within which an applicant and any successors in interest to the same property are precluded from reapplying. However, zoning regulations are mutable, and an applicant can avoid the application of res judicata during this time period by showing that the requested change is different from the previous one, or that there has been some change in the classification or other status of the subject property. *Metropolitan Dade County Board of County Commissioners v. Rockmatt Corp.*\(^{52}\) involved the denial of a permit to operate a nightclub in an area where applicable zoning did not authorize night clubs.\(^{53}\) The permit was denied because "the requested special exception and unusual use permit would not be compatible with the area and its development would not conform with the requirements and intent of the Zoning Procedure Ordinance."\(^{54}\) The permit denial by the Dade County Zoning Appeal Board was upheld by the County Commission both on its merits and because a similar application filed by the plaintiff's predecessor in interest had been denied a year earlier.\(^{55}\) Affirming the denial on appeal, the Third District Court of Appeal noted that res judicata "is applicable to rulings of administrative bodies . . . unless it can be shown that since the earlier ruling thereon there has been a substantial change of circumstances relating to the subject matter with which the ruling is concerned, sufficient to prompt a different or contrary determination."\(^{56}\) Thus, because the same special excep-

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52. 231 So. 2d 41 (Fla. 3d DCA 1970).
53. *Id.* at 42.
54. *Id.* at 42 n.2.
55. *Id.* at 42, 44.
56. *Id.* at 44 (citations omitted).
tion and unusual use permit application had been made a year earlier, and, since the circumstances surrounding the property in question and the use for which it had been zoned had not changed, res judicata was applied and the permit was denied.\textsuperscript{57}

Several years later, the Third District heard a similar case.\textsuperscript{58} A previous property owner had applied for a reclassification of a corner lot in Dade County, Florida, to change its zoning to neighborhood business in order to build a Burger King.\textsuperscript{59} The Dade County Commission had denied the reclassification. The appellants had purchased the property with knowledge of the previous denial, but applied to change the property zoning to accommodate professional offices. They also applied for a permit to have the building house a Burger King. The County Commission reclassified the subject property, but once again denied the permit.\textsuperscript{60}

On appeal, the Third District noted:

This current attempt at liberalizing the classification of this particular piece of property marks the third time that the Dade County Commission has heard arguments on whether to permit construction of a "Burger King" . . . During the time between our prior decision . . . and the present, we have not been shown a substantial change of circumstances applicable to the property sufficient to overcome . . . the effect of administrative . . . res judicata.\textsuperscript{61}

The appellant contended that the recent reclassification was itself a sufficient change in circumstances in the property, but the court found such reclassification insubstantial to meet the standard required for a change in circumstances to preclude res judicata.\textsuperscript{62}

The Third District squarely addressed the issue of what magnitude of "changed circumstances" in the subject property was necessary to preclude res judicata on a zoning reapplication in Coral Reef Nurseries v. Babcock Co.\textsuperscript{63} Babcock Company's first application for a zoning change for certain of its property located in Dade County was

\textsuperscript{57} Id.

\textsuperscript{58} Burger King Corp. v. Metropolitan Dade County, 349 So. 2d 210 (Fla. 3d DCA 1977).

\textsuperscript{59} Id. at 211.

\textsuperscript{60} Id.

\textsuperscript{61} Id. (citing Metropolitan Dade County Bd. of County Comm'rs v. Rockmatt Corp., 231 So. 2d 41 (Fla. 3d DCA 1970)).

\textsuperscript{62} Id.

\textsuperscript{63} 410 So. 2d 648 (Fla. 3d DCA 1982).
denied for various reasons.\textsuperscript{64} Eighteen months later, Babcock filed new applications for the same rezoning.\textsuperscript{65} These applications, which "substantially differed" from the ones previously filed, were accepted.\textsuperscript{66} The zoning board found that there were sufficient changes in the subject property to prompt a reconsideration of the application. Thus, the Third District stated, "Where . . . there are changed conditions and new facts which did not exist at the time of the prior judgment of the Commission denying Babcock's rezoning application, administrative res judicata will not act as a bar to prevent the Commission from its later action."\textsuperscript{67} "Sweeping changes" in the application and the changed conditions in the subject property prompted the court to declare res judicata inapplicable.\textsuperscript{68}

The court went on to note that "the applicability of the res judicata doctrine is primarily within the province of the administrative body considering the matter in question, and that body's determination may only be overturned upon a showing of a complete absence of any justification therefor."\textsuperscript{69} The standard for review in zoning cases was therefore established as requiring "manifest" or "flagrant" abuse of discretion or "arbitrary impulse, whim or caprice"\textsuperscript{70} on the part of the reviewing agency.

Cases discussed up to this point demonstrate how the judiciary refined its attitude concerning agency use of administrative res judicata. Early concerns that the doctrine be applied very selectively (and definitely not where it would cause an injustice) gave way to a willingness not to disturb an administrative body's use of res judicata absent a flagrant abuse of agency discretion, or a "complete absence of any justification therefor."\textsuperscript{71} The cases and issues discussed to this point reflect the courts' varied application of res judicata in administrative proceedings to prevent a party from relitigating the same issues before an administrative body.

\textsuperscript{64} Id. at 649-50. The primary reason was that the property was viable as agricultural property, and rezoning would have deprived the community of such use of the land.
\textsuperscript{65} Id.
\textsuperscript{66} Id. The Third District found differences in the new application that "addressed the concerns raised by the Commission at the earlier hearing and sought to minimize the impact on the area's future growth and development." Id. at 650. Such differences included sweeping changes in the placement of roadways and sewer mains, a plan for park and school dedications, and other changes which were calculated to "discourage future growth beyond that envisioned by the county planners." Id.
\textsuperscript{67} Id. at 654.
\textsuperscript{68} Id. at 654-55.
\textsuperscript{69} Id. at 655.
\textsuperscript{70} Id. (citations omitted).
\textsuperscript{71} Id.
The workers’ compensation cases illustrate the courts using a very flexible approach in applying res judicata. Injured workers are not to be precluded from receiving benefits where a mechanical application of res judicata would defeat justice. Where workers are injured and have shown an entitlement to benefits, they will not be left uncompensated for their disabilities solely because of a prior claim. There is also a safety net built into this process; the worker may have two years to establish an inability to find suitable work, worsening of condition, or a mistake in the initial determination of the extent of the injury. During this time, the amount of the reward can be established.

In contrast, the zoning cases show the courts applying res judicata in a more ministerial manner. Because zoning laws are in place, an application for an unusual use permit cannot, and will not, issue where a previous and identical application has been denied. Unless the applicant can show a significant change in circumstances, the zoning board will assert res judicata. To provide a safeguard in this process, and in recognition of the fact that zoning issues often involve “fast growing areas, [where] changes occur with great rapidity,”72 a short time period (usually twelve months) is built into the process after which an identical application can be resubmitted.

This temporary use of res judicata to preclude burdensome reaplication assures an administrative body that “it need not process, entertain, or be beleaguered by reaplications until and unless the waiting period has passed and assures opponents of the application that at least for some fixed period of time they may rest easy.”73 When the appropriate time for reapplying arrives, the administrative body can then make a determination whether substantial changes have occurred in either the application or conditions surrounding the project area to preclude a more permanent application of res judicata.

C. Environmental Permitting

Unlike cases involving workers’ compensation benefits, cases dealing with environmental permitting do not involve a request to an administrative body for something to which the applicant has shown an entitlement. The environmental permitting process likewise differs from the zoning process in that zoning ordinances envision the granting of zoning changes as conditions in the urban areas and the prop-

72. Id. at 654 (quoting Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. 1957)).
73. Id. at 653.
Res judicata is used in the zoning context as a temporary measure; the applicant is permitted to resubmit the same application ad infinitum, as long as there is a twelve month interval between submissions.

Environmental permitting, on the other hand, reflects perhaps the least flexible use of administrative res judicata. If a planned project would be detrimental to the environment, the permit most likely will be denied. The only way for the applicant to obtain a permit for such a project is to reduce substantially its projected impacts on the environment, or later resubmit the same project for approval when it can be shown that conditions have changed to such an extent that the project no longer has adverse environmental impacts.

In the absence of either of these variables, a second application for a project once denied will not be successful irrespective of how much time has elapsed between applications. Thus, res judicata has been successfully applied to unburden agencies assigned the task of protecting the public safety and welfare from environmental hazards associated with excessive and uncontrolled development. An individual wishing to develop or construct a project with possible adverse environmental impacts is prevented from consuming an excessive amount of an agency's time by not being allowed to relitigate appropriate agency denial of an unacceptable project.

Shortly after Coral Reef, the First District decided Doheny v. Grove Isle, Ltd.\textsuperscript{74} Doheny involved an interested party/intervenor's appeal of DER's issuance of a default permit to a condominium concern for the construction of a marina adjacent to the condominium.\textsuperscript{75} The condominium group had applied to DER initially for a dredge and fill permit to allow it to construct the marina.\textsuperscript{76} Following a hearing on the matter, a hearing officer recommended that DER issue the permit.\textsuperscript{77} The Department, however, denied the permit, stating that the hearing officer had applied the wrong water quality standard in his evaluation of the project.\textsuperscript{78} The Department then remanded the case to the hearing officer, who looked at it a second time, and denied it on different grounds.\textsuperscript{79} The Department

\textsuperscript{74} 442 So. 2d 966 (Fla. 1st DCA 1983).
\textsuperscript{75} Id. at 968.
\textsuperscript{76} Id.
\textsuperscript{77} Id. (quoting Grove Isle, Ltd. v. Bayshore Homeowner's Ass'n, 418 So. 2d 1046, 1048 (Fla. 1st DCA 1982)).
\textsuperscript{78} Id. (quoting Grove Isle, Ltd. v. Bayshore Homeowner's Ass'n, 418 So. 2d 1046, 1048 (Fla. 1st DCA 1982)).
\textsuperscript{79} On remand, the hearing officer found that the condominium group had not made a showing separate from the water quality issue that the marina was "clearly in the public interest." Id. at 969 (quoting Grove Isle, Ltd. v. Bayshore Homeowner's Ass'n, 418 So. 2d 1046, 1048 (Fla. 1st DCA 1982)).
agreed with the hearing officer on remand and entered its final order denying the permit. Grove Isle, the condominium group, appealed the denial to the First District Court of Appeal.

Sometime prior to its appeal, however, Grove Isle submitted a second application which differed only slightly from the first. Finding insufficient information in the application concerning whether the project was clearly in the public interest, DER requested additional information from Grove Isle. When Grove Isle failed to submit any additional information, DER denied the permit.

Grove Isle eventually requested a hearing on the matter, and asked for a summary order on the second application in its favor because DER had not denied its permit within the requisite time period. Grove Isle asserted that this lack of timeliness entitled it to a default permit. After a hearing was held on the default permit, the hearing officer recommended that such a permit be granted to Grove Isle.

The Secretary of DER, pursuant to this recommended order, entered her final order in which she found, among other things, that res judicata was not available to bar Grove Isle’s second, slightly modified application. The Secretary found that Grove Isle’s second application, because it asked for a mixing zone, was sufficiently different from the first application and there was “no identity between the thing being sued for in the previous proceeding and the present action.” She did find, however, that since DER had rejected the first application because the proposed project was not clearly in the public interest, relitigation of the public interest issue would be barred by estoppel by judgment if such issue were to arise in a hearing on the second application. Ultimately, however, the Secretary adopted the hearing officer’s recommendation and ordered issuance of the default permit.

80. Id. (quoting Grove Isle, Ltd. v. Bayshore Homeowner’s Ass’n, 418 So. 2d 1046, 1049 (Fla. 1st DCA 1982)).
81. Id.
82. Id. at 971 (Nimmons, J., dissenting).
83. Id.
84. Id. at 972. In this case, 90 days was the time period within which DER had to act.
85. Id. “Any application for a license not approved or denied within the 90 day or shorter time period . . . shall be deemed approved . . . .” Fla. Stat. § 120.60(2) (1987).
86. Doheny, 442 So. 2d at 972 (Nimmons, J., dissenting).
87. The hearing officer who conducted the hearing on the default permit had initially directed Grove Isle to show cause why res judicata would not bar its reapplication, and had directed DER to show cause why it should not be deemed to have waived the defense of res judicata against Grove Isle’s attempt to reapply, since DER did not issue the permit denial in time. Id.
88. Id. at 973 (Nimmons, J., dissenting).
89. Id.
90. Id.
On review, the First District found that Grove Isle’s first application had been denied because it was not clearly in the public interest. Upon reviewing the second application the court further noted:

Inasmuch as this court affirmed the denial of Grove Isle’s first application on the grounds of the applicant’s failure to show that the proposal was clearly in the public interest and since it was determined that the first application was properly denied . . . it would appear that the reapplication should be denied unless the applicant could demonstrate some change or modification which would show that the project was clearly in the public interest . . . .91

The First District reversed DER’s issuance of the default permit to Grove Isle and remanded the matter to DER for further proceedings to determine whether the project, as modified, was in the public interest.92

The decision in Doheny seemed to indicate that courts were going to allow agencies a fair amount of latitude in applying res judicata where an applicant submitted a design for a project very similar to one already denied. The standard for applying the doctrine appeared to be that an agency’s denial, absent capriciousness or abuse of discretion, would be left intact. The only situations in which a previously denied project would become acceptable to an agency would be either where the design was sufficiently modified so as to present an entirely different impact on the environment, or where environmental conditions affecting the property in question had themselves changed.

III. THOMSON V. DEPARTMENT OF ENVIRONMENTAL REGULATION

Case law governing the appropriate use of administrative res judicata in environmental permitting was further developed by the First District’s opinion in Thomson v. State.93 In this case, the Petitioners (Thomsons) had applied for a permit to construct a walkway and roofed platform which was to extend out from their waterfront restaurant into waters adjacent to the intercoastal waterway.94 This walkway and platform were to be located over submerged lands within the Loxahatchee River-Lake Worth Creek Aquatic Preserve,95

91. *Id.* at 975-76.
92. *Id.* at 977.
93. 493 So. 2d 1032 (Fla. 1st DCA 1986), rev’d, 511 So. 2d 989 (1987).
95. *Id.*
lands owned by the Thomsons. The application was reviewed by DER, which conducted an on-site inspection of the project area. Once DER had determined that the project would have adverse environmental impacts, it issued a letter informing the Thomsons of its intent to deny the permit and informing them of their right to ask for an administrative hearing before the agency entered its final order. The following adverse environmental impacts were listed in DER's statement of intent to deny:

The proposed roofed platform and walkway will be located over seagrasses. The resultant shading is expected to destroy those seagrasses which, as a base of a detrital food web, contribute to the commercial and recreational shellfish and fishing industry. Seagrasses also provide habitat and nursery grounds for many marine organisms, consolidate sediments and can improve water quality by removing nutrients from the water and reducing turbidity. As a result of the above cited factors, degradation of water quality is expected.

The proposed activity would be expected to interfere with the conservation of fish and wildlife to such an extent as to be contrary to the public interest, and will result in the destruction of natural marine habitats, grass and marine life, and established marine soils suitable for producing plant growth of a type useful as a nursery or feeding grounds for marine life. When the Thomsons failed to request an administrative hearing to present their evidence on the issues involved, DER issued its final order denying the permit. Several weeks later, the Thomsons had an environmental specialist conduct a survey of the seagrass habitat around the area of the proposed project. This report "recommended modification of the location of the proposed structures as a means of minimizing impacts to existing seagrass beds." The Thomsons modified their platform design, slightly extended the proposed walkway, and then submitted another permit application to DER. The Department issued another notice of intent to deny and again notified the Thomsons of their right to request a hearing.

96. Id.
97. Id. at 2.
98. Thomson, 493 So. 2d at 1033-34 n.1.
100. Thomson, 493 So. 2d at 1039 (Zehmer, J., dissenting).
101. Id. at 1034.
In its second notice of intent to deny, DER reiterated concerns that were very similar to those expressed in its earlier denial: the proposed structures "[would] be located over and near marine bottom capable of supporting seagrasses." The Thomsons requested and were granted an administrative hearing. Ultimately, DER entered its final order of denial, stating: "The second application is for the same walkway in exactly the same location as was proposed in the first application. The platform, while in a slightly different location and configuration, overlaps the original platform in some areas."

Taking notice that there were some design changes to the gazebo platform, the Secretary nevertheless found these changes would not eliminate shading on the seagrass beds. The Secretary reiterated water quality concerns: "[T]he first notice [on the first application] listed four water quality criteria which would be violated by the project. Petitioners failed to state in their memorandum how the water quality of the modified location would be affected in relation to those criteria."

Finding the overall modification "not significant" and the circumstances "otherwise unchanged," the Secretary found res judicata applicable. The Secretary concluded:

In the first application proceeding, Petitioners were afforded the right to a hearing. The method for exercising that right was clearly set forth in the Notice. Petitioners waived that right and a final order denying the application on the merits was entered. I find that the subsequent application does not constitute a significant change from the first application.

It was from this order that the Thomsons appealed.

A. The First District's Opinion

The First District Court of Appeal affirmed DER's denial of the proposed project. Because the Thomsons had been afforded an opportunity for a hearing, the First District concluded that DER's adjudication of the issue was not "vitiated by [the Thomsons'] decision.

102. Id.
103. The second time, the Thomsons requested a formal § 120.57(1) factfinding hearing, but DER instead offered an informal § 120.57(2) hearing. Thomson, 493 So. 2d at 1034.
105. Id. at 3437.
106. Id.
107. Id.
108. Id. at 3438.
not to request a hearing.'"\textsuperscript{109} The First District found that due process considerations were therefore met.

The First District also concluded that DER had appropriately placed emphasis on affected water quality standards and conservation considerations as independent bases for the initial permit denial. Therefore, the Thomsons' "minor design modifications to the proposed platform"\textsuperscript{110} and absolute lack of modifications to a "major portion of the project"\textsuperscript{111} were not sufficient or substantial enough to preclude the application of res judicata.\textsuperscript{112}

In a dissenting opinion, Judge Zehmer, arguing for the "rights of private citizens,"\textsuperscript{113} found the differences between the two applications sufficient to prevent DER from summarily denying the second application by asserting res judicata.\textsuperscript{114} Of even more concern to Judge Zehmer, however, was his perception that a patent injustice was being worked against the Thomsons because they had never actually had a formal fact finding hearing where they could have presented their evidence of design modifications.\textsuperscript{115}

The dissent asserted that the Thomsons had modified their design after the initial denial, incorporating design recommendations which addressed the issue of seagrass shading.\textsuperscript{116} Further, Judge Zehmer discounted DER's emphasis on water quality standards and conservation interests, finding those of no importance because they had not been specifically singled out as important by DER in its permit denial.\textsuperscript{117} The Thomsons appealed the First District's decision.

B. The Supreme Court of Florida's Opinion

The Supreme Court of Florida assumed jurisdiction by asserting a conflict between the lower court's decision in Thomson and a case the supreme court had decided fifty years earlier, Matthews v. State ex rel. St. Andrews Bay Transportation Co.\textsuperscript{118} Matthews involved the Florida Railroad Commission's denial of an application for a certifi-
cate of public convenience and necessity which had been filed by the Union Bus Company in its quest to become a common carrier. The bus company amended its first application to include additional information and resubmitted it to the railroad commission.

Relying on statutory law, one of the bus company’s main competitors objected to this reconsideration, and the circuit court ultimately issued a writ of prohibition against the railroad commission to prevent it from reconsidering the bus company’s application. On appeal, the Supreme Court of Florida reversed the circuit court’s decision, holding that a railroad commission order “is not res adjudicata of another application of exactly the same nature subsequently filed. Every promulgated order of an administrative tribunal . . . may be superseded by another order.”

In a surprising move, the court in Thomson, after noting the existence of an “apparent” conflict between Matthews and Thomson, backed off its initial assertion: “[I]t is clear that any precedential value that Matthews may yet have is limited in its application to orders of the now defunct railroad commission.” Apparently convinced that this de facto lack of conflict was of relative unimportance, the court went ahead and issued its opinion on the matter.

The supreme court initially refused to find that the Thomsons were denied due process with respect to their first application. The court admitted, however, that “the principles of res judicata do not always neatly fit within the scope of administrative proceedings,” and “the doctrine of res judicata is applied with ‘great caution’ in administrative cases.” After laying this cautionary groundwork, the court proceeded to analyze the Thomsons’ two applications.

The supreme court focused primarily on the dissimilarity between the two applications, starting from the presumption that if the two applications were not the same, then DER’s summary denial of the first had no res judicata effect on the second. The court looked to the slightly different environmental impacts of the two designs in making its determination. It compared these effects and concluded that the first application was denied because of concerns about its potential for adverse effect on existing seagrass beds, but, in denying

119. Id. at 589, 149 So. at 648.
120. Id. at 589, 149 So. at 649.
121. Id. at 590, 149 So. at 649.
122. Id. at 591, 149 So. at 649.
123. Thomson v. Dept. of Envtl. Regulation, 511 So. 2d 989, 991 (Fla. 1987).
124. Id.
125. Id. (citations omitted).
the second application, the court found that DER had shifted its concerns to the potential for adverse effects on areas where seagrass might be grown in the future. Because of this shift in emphasis, the Supreme Court of Florida found "the doctrine of res judicata cannot be fairly applied to deny the Thomsons' second application on its face." 

Thomson shows the Supreme Court of Florida exercising "great caution" in deciding whether to apply res judicata to an environmental permitting decision. In determining that DER could not use res judicata against the Thomsons, the court cited Universal Construction as supporting authority. Thus, the court's primary concern in Thomson appears to be not whether the doctrine of res judicata could have been applied in a technically correct fashion in this case, but rather whether it would have been fair to do so.

The supreme court appears to agree in part with Judge Zehmer's dissent in the lower court's opinion, motivated more to correct what is perceived as a "patently unjust" treatment of the Thomsons' second application than to apply the standard for res judicata that had been articulated by other courts. Focusing on what he sees as a clear deficiency on DER's part in establishing a record, Judge Zehmer glosses over what the First District found was the heart of the matter: that the Thomsons had a fair opportunity to present their case in support of their permit application, and failed to take that opportunity. The First District and DER both found that the Thomsons' two applications were the same. Indeed, there was a great deal of analysis by DER and the district court in reaching this conclusion. Because the Thomsons submitted the exact same design for the walkway and only a slightly modified design for the gazebo, DER, having decided that the adverse environmental impacts of the first design would be too great (and not seeing sufficient modifications reflected in the second) applied res judicata to prohibit the Thomsons' reaplication.

Acting in a reasonable manner, DER determined that the first design would have adverse environmental impacts, and that the second design was a slightly modified version of the first. As a general rule, such agency determinations are left intact by a reviewing court unless there is a showing that the administrative body has acted with a "fla-

126. Id. at 991-92.
127. Id. at 992.
128. Id. at 991.
129. Id. at 992 (citing Universal Constr. Co. v. Ft. Lauderdale, 68 So. 2d 366 (Fla. 1953)).
130. Id. at 1037-45.
grant” abuse of discretion. That is clearly not the case here. Because this case involved agency discretion, rightfully overturned only in instances where the decision has been driven by caprice or where there is a “complete absence of any justification therefor,” the Supreme Court of Florida perhaps should have exercised “great caution” here and not reached out and assumed jurisdiction.

IV. Conclusion

The progression of administrative cases where res judicata has been most frequently applied demonstrates that courts have not hesitated to affirm administrative decisions using res judicata to preclude relitigation of a previously decided issue. Both the lower court and the supreme court in Thomson cite Coral Reef Nurseries v. Babcock Co. It is from the standard for res judicata articulated in Coral Reef that the supreme court takes its great leap in Thomson.

The court in Coral Reef perceived administrative res judicata as a means by which an administrative body could deny a reapplication and, thus, temporarily relieve the agency of having to relitigate an issue that had already been determined. The safety valve for the applicant is the one-year limit on the bar against reapplication. Whether res judicata would be used a year later to bar the same application because there were no changes in either the application itself or the subject property in question is an entirely separate issue.

The often-cited statement by the Coral Reef court that administrative res judicata should be applied with great caution is wrongly emphasized in Thomson. The court in Coral Reef observed that great caution was to be exercised in zoning cases. Although no administrative agency should apply res judicata rashly, the excessive caution applied in Thomson extends too far the principle enunciated in Coral Reef.

A zoning board should exercise great caution in using res judicata after the waiting period in zoning cases because, in fast growing areas, changes occur “with great rapidity.” The safety valve built into the zoning scheme to allow reapplication a year later reflects this concern. A zoning change applicant may get a very different result upon reapplication after a year of growth and population

132. Id.
133. 410 So. 2d 648 (Fla. 3d DCA 1982).
134. Id. at 654 (quoting Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. 1957)).
135. Id. (quoting Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. 1957)).
136. Id.
change. Zoning matters should be "liberally construed in favor of the applicant . . . to provide the necessary flexibility in the zoning ordinance."\textsuperscript{137}

This same flexibility is necessary in workers' compensation cases. Workers who have benefit claims are given plenty of opportunity to show changes in their condition over time that were not in existence and were not anticipated at initial hearings. Rigid application of res judicata to bar efforts to establish worsening conditions and corresponding entitlement to greater benefits would be a manifest abuse of discretion. Here, a safety valve adds flexibility to the process; workers may have two years in which to demonstrate that an initial determination by a commission was inadequate. During this period, the administrative body will not assert res judicata to show the matter has been definitively decided and therefore will not be heard again.

The same degree of flexibility is not necessary in the environmental permitting process. The agencies involved with permitting are statutorily mandated to protect environmentally sensitive areas and to regulate developmental impact on those areas. Parties like the Thomsons, who request a permit to measurably impact the environment, cannot assert an entitlement to such a permit. Rather, the burden is on the applicants to show that the projected impact is acceptable, in the public interest, and will not unnecessarily degrade the quality of the environment. Once a project is deemed to have a potential for adverse impact, it is incumbent upon the applicant to substantially modify the design to alleviate that impact. There is no waiting period after which an applicant may resubmit the same application; the natural environment is not that forgiving.

The standard for res judicata applied throughout these cases has eroded over time. Initially agencies were allowed to decide issues uniquely within their statutory expertise and adjudicate the rights of those parties before them. \textit{Thomson} seems to show the court growing more suspicious of this exercise of discretion, and more willing to place itself in a position to oversee agency decision making.

There is, of course, the other side to the same coin: "[T]he reason for applying res judicata to administrative agencies is not only to 'enforce repose' but also to protect a successful party from being vexed with needlessly duplicitous proceedings. . . . If the latter interest is not protected at the outset of the second proceeding, it will be

\textsuperscript{137} \textit{Id.} (citing Russell v. Board of Adjustment, 31 N.J. 58, 66, 155 A.2d 83, 88 (1959)).
lost irreparably." In other words, allowing an agency’s decision to not apply res judicata to deny a permit application can also work in favor of an applicant, if a project is later challenged by a third party.

The *Thomson* court settled on the standard for administrative res judicata as it was applied in *Coral Reef* and *Doheny* and, in so doing, has taken the flexibility built into zoning decisions and forced it upon the environmental permitting process. The First District and DER both found the Thomsons’ two applications so substantially similar in their potential adverse impact that res judicata was appropriate. The Supreme Court of Florida, in taking review and reversing the First District, has introduced a new element into the game. What was previously a perfectly appropriate use of agency discretion in executing and streamlining its functions may now be made less available.

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