

O/A 1-7-80 7

IN THE SUPREME COURT OF FLORIDA

OSCEOLA COUNTY, a political)
subdivision of the State of)
Florida,)
))
Petitioner,)
))
vs.)
))
ST. JOHNS RIVER WATER)
MANAGEMENT DISTRICT,)
))
Respondent.)
_____)

CLERK OF THE SUPREME COURT
DEPUTY CLERK

CASE NO: 68, 791

Appeal From The District Court of Appeal, Fifth District,
No. 85-678

AMICUS CURIAE BRIEF OF
BREVARD COUNTY

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STATEMENT OF THE CASE AND OF THE FACTS

Brevard County, through the South Brevard Water Authority, applied to the St. Johns River Water Management District for a consumptive use permit. The water to be consumed in Brevard County was to be obtained from a well field in the South Florida Water Management District. Brevard County is located in the St. Johns River Water Management District. Osceola County, part of which is located in the St. Johns River Water Management District and part of which is located in the South Florida Water Management District, filed a petition for writ of prohibition in the Fifth District Court of Appeal asking that Court to prohibit the St. Johns River Water Management District from considering the application filed by Brevard County.

In a decision issued on March 6, 1986, the Fifth District Court of Appeal denied the petition for writ of prohibition. Osceola County seeks review in this Court claiming that the decision of the Fifth District Court of Appeal conflicts with this Court's decision in Askew vs. Cross Key Waterways, 372 So. 2d 913(Fla. 1979). This Court has accepted jurisdiction of this case and Brevard County has filed a petition for leave to file an Amicus Curiae brief on behalf of Respondent St. Johns River Water Management District.

SUMMARY OF THE ARGUMENT

The Florida Water Resources Act of 1972, Chapter 373, Florida Statutes, gives the Department of Environmental Regulation the power to authorize interdistrict water transfers. This authority does not constitute an unlawful delegation of legislative power and will withstand constitutional scrutiny. As stated by the lower court, to frame the issue as Petitioner asks the Court to do requires a contrary conclusion, whereas focusing on the true issue involved leads to the conclusion that there has been no unlawful delegation of legislative authority. Osceola County vs. St. Johns River Water Management District, 486 So. 2d 616, 617 (Fla. 5th DCA 1986).

The real issue, as stated by the Fifth District is whether D.E.R. has statutory authority to administratively prescribe procedures and guidelines for interdistrict water transfers. 486 So. 2d at 617. An analysis of Chapter 373, as well as Cross Key Waterways and its progeny supports the Fifth District Court of Appeals finding that D.E.R. has such authority.

ARGUMENT

THE DEPARTMENT OF ENVIRONMENTAL REGULATION OF THE STATE OF FLORIDA HAS STATUTORY AUTHORITY TO ADOPT AN ADMINISTRATIVE RULE PRESCRIBING THE PROCEDURE TO BE FOLLOWED AND THE GUIDELINES TO BE OBSERVED BY RESPECTIVE WATER MANAGEMENT DISTRICTS IN CONSIDERING INTERDISTRICT WATER TRANSFERS.

Chapter 373, Florida Statutes, gives the Department of Environmental Regulation authority to adopt the rule which is the subject of this litigation, Rule 17-40.05, Florida Administrative Code. Chapter 373 is known as the Florida Water Resources Act of 1972. Section 373.016 sets forth the legislative policy regarding the waters of the State of Florida. Subsection (3) recognizes that water resource problems vary from region to region and vests in the Department of Environmental Regulation the power and responsibility to conserve, protect, manage and control the waters of the State. That section gives to the D.E.R. flexibility and discretion to accomplish those ends by delegating powers to the various water management districts, but permits the D.E.R. to exercise any power which a water management

district is authorized to exercise. Section 373.026 gives the D.E.R. the power to administer the Florida Water Resources Act throughout the State and grants it general supervisory authority over all of the water management districts. Section 373.036 addresses the formulation of a comprehensive state water use plan.

Section 373.196 sets forth legislative findings concerning cooperative efforts between municipalities, counties, water management districts, and the D.E.R. in order to meet the water needs of rapidly urbanizing areas to supply adequate and dependable supplies of water where needed without resulting in adverse effects on other areas. Subsection (3) states that municipalities and counties may enter into cooperative agreements with other municipalities and counties to meet their respective needs for dependable and adequate supplies of water.

Part II of the Act deals with the permitting of consumptive uses of water. Section 373.217 sets forth the legislative intent to provide a means for D.E.R. to authorize reasonable programs for issuance of permits "subject to judicial review and also subject to review by the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission." Section 373.223 sets forth the conditions for obtaining a consumptive use permit and states, in subsection (2), that the holder of a use permit may be

authorized by D.E.R. or the governing board of the water management district to transport and use water "beyond overlying land, across county boundaries, or outside the watershed from which it is taken"

Section 373.616 and 373.6161 state that the provisions of the Act are to be liberally construed in order to effectively carry out its purposes and that the procedures described in the Act are to be applied with "such latitude consistent with the intent thereof as shall best meet the requirements or necessities therefor." Section 373.617 provides for judicial review.

All of the above sections amply demonstrate that the legislature has delegated authority to D.E.R. to carry out the intent and purposes of the water resources act and has adequately prescribed standards and guidelines by which that power is to be exercised.

Petitioner's argument in this case misstates the issue and turns upon an illogical and impractical construction of §373.223(2). Petitioner argues that Chapter 373 does not specifically authorize interdistrict transfers of water and that §373.223(2) requires a contrary conclusion since it specifies that transfers are allowed "beyond overlying land, across county boundaries, or outside the watersheds from which it is taken." This argument ignores the reality of the geographical boundaries of the water management districts and the fact that those

boundaries are "artificial divisions that may and sometimes should be transcended when planning for the most beneficial use of our state's water resources." Osceola County, 486 So. 2d at 619. Indeed, the record shows that some Counties in the State of Florida lie in more than one water management district. It is absurd to argue that the statute allows transfers of water across county boundaries but, in some cases, would prohibit transfers within one county where that county happens to straddle two water management districts. Petitioner's argument ignores the fact that water knows no political boundaries.

Petitioner insists on categorizing the subject rule as one which authorizes one district to exercise jurisdiction on resources outside its territorial boundaries. That is not the case. Rule 17-40.05 deals with the transport of water across district boundaries once the user has received a consumptive use permit. St. Johns River Water Management District in the instant case is being asked to consider an application for a consumptive use permit. Before any transport can even be considered, that permit must be granted and, pursuant to Rule 17-40.05, the transport must be approved by the South Florida Water Management District. St. Johns is not seeking to exercise jurisdiction over South Florida; rather, it is merely considering an application for a consumptive use permit which is the first step in the process under consideration.

Petitioner relies principally upon Askew vs. Cross Key Waterways, 372 So. 2d 913(Fla. 1979) in its argument that there has been an unlawful delegation of legislative power in the instant case. In Cross Key Waterways, the statute found unconstitutional was defective because it delegated fundamental legislative tasks to an administrative agency. The Cross Key Waterways Court recognized that an administrative agency may "flesh out" an articulated legislative policy as long as it is not making the initial determination of what the policy should be. Id. at 920. The Cross Key Waterways Court cites a California case, CEED vs. California Coastal Zone Conservation Commission, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (Dist.Ct.App. 1974) in its argument. Id. at 920-21. The Court in CEED explains that the constitutional doctrine which prohibits delegation of legislative power "rests on the premise that the Legislature may not abdicate its responsibility to resolve the 'truly fundamental issues' by delegating that function to others" Id. CEED points out that the legislature can delegate the task of implementing policy once the fundamental policy decision has been made and states that "a statute empowering an administrative agency to exercise a judgment of a high order in implementing legislative policy does not confer unrestrictive powers." Id.

The statutory scheme in Cross Key Waterways was defective because the primary policy decision was delegated to an

administrative body. The Court distinguished "flexibility in administration of a legislative program" from "reposing in an administrative body the power to establish fundamental policy." Id. at 924. In the instant case, the fundamental and primary policy decisions have been made by the legislature and set forth in Chapter 373. In addition, there are sufficient standards and guidelines throughout the Chapter so that the administration of the program can be carried out by D.E.R. As stated in St. Johns River Water Management District vs. Deseret Ranches of Florida, Inc., 421 So.2d 1067, 1069 (Fla. 1982): "The Statewide Water Management Plan created and implemented by Chapter 373 is primarily a State function serving the State's interest in protecting and managing a vital natural resource. In fact, the Fifth District in the present case took notice of the interrelationships of various areas of the State and found that water management districts further the State functions of water resource conservation, control, planning, and development."

Although the legislature may not delegate the power to say what the law is, it may enact a law, complete in itself, which leaves some discretion with an administrative agency. Brewer vs. Insurance Commissioner and Treasurer, 392 So.2d 593, 595 (Fla.1st DCA 1981). The Court in Brewer cites Conner vs. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968) regarding the distinction between "delegation of the power to make the law, which necessarily

involves a discretion as to what the law shall be, and the conferring of authority or discretion in executing the law pursuant to and within the confines of the law itself." 292 So.2d at 595. As noted by the Court in Joe Hatton, Inc.: "the subject matter of a statute may, however, be such that only a general scheme or policy can be laid down by the Legislature, and the details of the legislative policy can best be handled at the administrative level." 216 So.2d at 212.

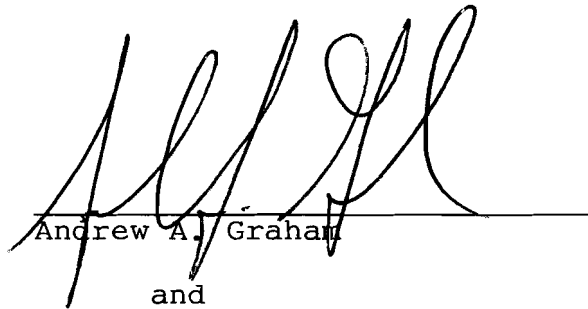
Further, as noted in Brewer, there is an exception to the rule requiring express standards to guide the exercise of discretion: "where the act relates to the administration of a police regulation and is necessary to protect the general welfare, morals, and safety of the public, it is not essential that a specific prescribed standard be expressly stated in the legislation. In such situations the Courts will infer that the standard of reasonableness is to be applied." 392 So.2d at 596. That distinction is also noted in Astral Liquors, Inc. vs. Department of Business Regulation, 463 So.2d 1130 (Fla. 1985). The Astral Liquors, Inc. Court states that "where the legislature authorizes an agency of the State to enforce a statute enacted under the police power, the Legislature is not required to provide specific rules to cover all conceivable situations that may confront the agency." Id. at 1131-32.

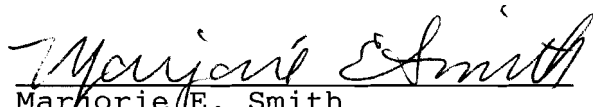
Once the fundamental and primary policy decision has been made by the legislature, and adequate standards and guidelines have been established, "Subordinate functions may be transferred by the legislature to permit administration of legislative policy by an agency with the expertise and the flexibility needed to deal with complex and fluid conditions. State, Department of Citrus vs. Griffin, 239 So.2d 577 (Fla. 1970). Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation." Microtel, Inc. vs. Florida Public Service Commission, 464 So.2d 1189, 1191 (Fla. 1985).

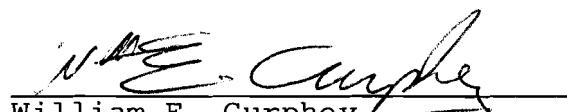
The Water Resources Act does not give D.E.R. unbridled authority to make statewide water policy decisions. There are adequate safeguards provided in the statute, including §373.114 which provides for the Governor and Cabinet to review any order or rule to insure consistency with the provisions and purposes of the Act. In addition, judicial review is provided. The Act is to be liberally construed in order to effectuate its purposes including consideration of the total water needs throughout the State of Florida.

CONCLUSION

There has been no unlawful delegation of legislative authority in this case and the decision of the Fifth District Court of Appeal should be upheld by this Court.

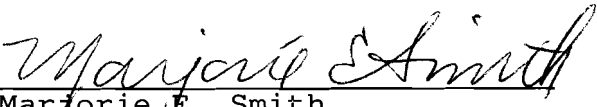

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 1986, a true copy of the foregoing has been provided by United States mail to the following list of addressees.


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