6-16-86

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IN THE SUPREME COURT OF FLORIDA

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MAY 27 1986
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

OSCEOLA COUNTY, a political subdivision of the State of Florida,

Appellant,

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Appellee.

Case No. 68,791

Appeal From The District Court Of Appeal, Fifth District

APPELLANT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Osceola County seeks discretionary conflict and constitutional officer review of a decision by the District Court of Appeal, Fifth District, dissolving an order to show cause and denying a writ of prohibition.[1] The instant case, of statewide importance to the allocation, planning, and distribution of Florida's finite water resources; turns upon the question of whether the legislature may, by implication, grant an administrative agency the authority to delegate to yet another agency, the fundamental legislative power of establishing or modifying agency jurisdiction.

In 1984 Brevard County applied to the South Florida Water Management District, one of Florida's five regional water management districts,[2] for a water use permit to develop a large wellfield in the Holopaw area of Osceola County. The permit application was unusual in that Brevard County, where the water was to be consumed, is located in another water management district, the St. Johns River Water Management District ("St. Johns"). Brevard County intended to construct a wellfield and to pipe the water across water management district boundary lines to Brevard County.

1/ Osceola County v. St. Johns River Water Management District, 11 F.L.W. 595 (Fla. 5th DCA March 6, 1986).

2/ In Chapter 373, Florida Statutes, the legislature sets forth the geographic jurisdiction of each water management district by detailed metes and bounds legal descriptions. See § 373.069(2), Fla. Stat. (1985).

After South Florida refused to grant a permit without more information regarding the impact on water resources in Osceola County, Brevard County went to its "home district," the St. Johns River Water Management District, and filed another permit application seeking approval from St. Johns for the use of water located beyond that district's boundaries.[3]

When St. Johns notified Osceola of its intention to agenda Brevard's permit for a decision, Osceola County sought a writ of prohibition in the district court. Osceola's petition questioned the jurisdiction of St. Johns to grant a permit to withdraw and consume water located outside the legislatively defined geographic boundaries of the St. Johns' District. (App.11).

The district court granted an order to show cause prohibiting St. Johns from acting on Brevard's permit. St. Johns responded by asserting an implied legislative authority to allow inter-district transfers of water and asserted that such implied authority had been delegated by the Department of Environmental Regulation ("DER") to water management districts through Rule 17-40.05, Florida Administrative Code. (App.74). St. Johns was joined by Brevard and DER as amici. Osceola County replied that in adopting and amending Chapter 373, the legislature had explicitly delineated those cases in which an agency could transfer water across political or resource boundaries[4], but had provided

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[3]/ Moresi Affidavit, App.20.

[4]/ See § 373.223(2), Fla. Stat. (1985).

no authority for interdistrict transfers of water.[5]

A sharply divided district court, after oral arguments, denied the writ, on grounds that: "The legislature has impliedly granted D.E.R. the authority to allow interdistrict diversions of water and such authority is properly delegated to the water management districts." Osceola County, 11 F.L.W. at 596.

SUMMARY OF THE ARGUMENT

Conflict exists on two separate grounds with Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979), which held the legislature may not delegate to an administrative agency the "fundamental legislative task of determining which geographic areas and resources" are to be protected. Id. at 919. Conflict exists because the court below upheld an implied statutory delegation to an administrative agency, the DER, to exercise the fundamental legislative authority of permitting a water management district to exercise jurisdiction beyond its specific statutorily described geographic jurisdiction.

The decision below also conflicts with Department of Professional Regulation v. Pariser, 483 So.2d 28 (Fla. 1st DCA 1986), which held an agency acts outside its jurisdiction when it adds to a legislatively enumerated list of jurisdictional activities. Id. at 29.

5/ Osceola's Consolidated Reply, App.47.

The decision below affects a class of constitutional officers because it will disrupt specific statutory duties of county commissioners to plan for and protect water resources.

ARGUMENT

I. THE OSCEOLA COUNTY DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL.

Under Florida Rule of Appellate Procedure 9.030(a)(2) and Article V, Section 3(b)(3) of the Florida Constitution, this Court has discretionary jurisdiction to review decisions of the district courts of appeal that "expressly and directly conflict with the decision of another district court of appeal or of the Supreme Court on the same question of law."

The Fifth District's discussion of applicable legal principles establishes that express and direct conflict jurisdiction exists. See generally, Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). A review of the decision below identifies three conflicts with holdings of this Court and the District Court of Appeal, First District.

A. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN ASKEW V. CROSS KEY WATERWAYS, 372 So.2d 913 (Fla. 1979).

By holding that the legislature may impliedly grant an administrative agency the authority to delegate to another agency the legislative power to establish or modify the geographical limits of administrative jurisdiction, the decision below conflicts with

Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979). Cross Key involved a challenge to the power of an agency to establish "areas of critical state concern" within which strict environmental and resource controls would apply. The statute at issue in Cross Key[6] was a companion 1972 enactment to Chapter 373 at issue in the instant case.

Cross Key held that an agency could not, by rule, designate areas of critical state concern because determining the geographic boundaries and resources to be protected was "a fundamental legislative task." Cross Key, 372 So.2d at 919. The agency rule was invalidated by holding the statute an impermissible delegation of legislative powers under Article II, Section 3 of the Florida Constitution. Cross Key, 372 So.2d at 925.

There is direct conflict because the Fifth District held that an administrative agency, DER, had implied statutory authority under Chapter 373, Florida Statutes, to authorize, by rule, transfers of water across district boundaries, and thereby allow an administrative expansion[7] of legislatively delineated geographic jurisdiction of water management districts. See Osceola County, 11 F.L.W. at 596.

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[6]/ § 380.05(2), Fla. Stat. (1975) (The Environmental Land and Water Management Act of 1972).

[7]/ The court below expressly noted that "water management districts do not have independent authority to plan for inter-district diversions of water". Osceola County, 11 F.L.W. at 596.

The decision below not only conflicts with but, in truth, totally disregards Cross Key[8]. It allows an administrative agency, DER, to exercise by rule, the inherently legislative power of defining the limits of agency jurisdiction.

The decision below also conflicts with another holding in Cross Key, namely the requirement of legislative standards to guide an administrative agency in its implementation of statutory authority. Cross Key, 372 So.2d at 925. This holding, ignored by the Fifth District, was reaffirmed in Orr v. Trask, 464 So.2d 131, 134 (Fla. 1985), and is critical in the instant case where there are no standards to guide the agency's exercise of supposedly implied statutory authority.[9]

Under Osceola County, an administrative agency, not the legislature, becomes the primary decision maker as to the limits of administrative jurisdiction, what if any standards will be used in exercising such jurisdiction, and what the geographic permitting jurisdiction of each water management district will be. There is clear, if not embarrassing, conflict.

B. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE HOLDING OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN DEPARTMENT OF PROFESSIONAL REGULATION V. PARISER, 483 So.2d 28 (Fla. 1st DCA 1986).

The court below also held that an agency, DER, had implied statutory authority to promulgate an administrative rule, Rule

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8/ Cross Key was argued and briefed for the lower court. See Osceola's Consolidated Reply. (App.47.)

9/ In Cross Key, there were three minimum criteria in the statute. See Cross Key, 375 So.2d at 925. There are none in the instant case.

17-40.05, Florida Administrative Code, administratively authorizing transfers of water across water management district boundaries. It did so even though the legislature had explicitly provided statutory authority for other types of water transfers across political and resource boundaries, but had provided no statutory authority to allow transfers across water management district boundaries. See Osceola County, 11 F.L.W. at 596.

This conflicts with the First District's holding in Department of Professional Regulation v. Pariser, 483 So.2d 28, 29 (Fla. 1st DCA 1986). Pariser held that rulemaking authority may not be implied where the legislature has expressly provided specific methods of implementation:

> We recognize that rulemaking authority may be implied to the extent necessary to properly implement a statute governing an agency's statutory duties and responsibilities, [citations omitted] however, when the Legislature expressly has provided a method for implementation . . . we think it would be erroneous to additionally imply such authority . . . .

Pariser, 483 So.2d at 31.

The rule held invalid in Pariser was an attempt, by implied statutory authority, to establish additional grounds for administrative action, where the legislature had spelled out the specific bases under which action was permissible. Pariser, 483 So.2d at 29.

Similarly, in Section 373.223(2), Florida Statutes, the legislature explicitly set forth three circumstances under which

water management districts may allow permitting of water transport across political or resource boundaries:

> The governing Board or the department may authorize the holder of a use permit to transport and use ground or surface water beyond overlying land, across county boundaries, or outside the watershed from which it is taken if the governing board or department determines that such transport and use is consistent with the public interest . . . .

(emphasis added)

"Significantly, transfers outside district lines are not included." Osceola County, 11 F.L.W. at 597 (Sharp J. dissenting). There is direct conflict with Pariser.[10]

II. JURISDICTION EXISTS IN THIS COURT BECAUSE THE DECISION BELOW EXPRESSLY AFFECTS THE DUTIES AND RESPONSIBILITIES OF COUNTY COMMISSIONERS, A CLASS OF CONSTITUTIONAL OFFICERS.

County Commissioners are constitutional officers under Article V, Section 3(b)(3), Florida Constitution. E.g., Pinellas County v. Nelson, 362 So.2d 279 (Fla. 1978). The decision below directly and exclusively affects these constitutional officers in their ability to carry out statutory duties. See Spradley v. State, 293 So.2d 697, 701 (Fla. 1974).

Under Chapter 125, Florida Statutes, the organic enabling legislation for noncharter counties, county commissioners are

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10/ The decision below also conflicts with the rule of construction in Thayer v. State, 335 So.2d 815, 817 (Fla. 1976), reaffirmed in Pariser. Pariser, 483 So.2d at 29, providing that a statute speaks expressly in its silence.

mandated "to provide . . . water supply and conservation programs," § 125.01(k), Fla. Stat. (1985) and "[p]repare and enforce comprehensive plans for the development of the county," § 125.01(q), Fla. Stat. (1985). It is further required that "[l]ocal governments shall assess their current, as well as projected water needs and sources for a 10-year period." § 163.3177(6)(d), Fla. Stat. (1985).

The holding below prevents performance of these specific statutory duties. Counties will not know which remote jurisdiction may seek to transport and consume water resources located in the county through a foreign water management district.[11] A direct product of such uncertainty is an inability of county commissioners to plan and project ten-year water needs or sources or otherwise meet statutory duties. The decision below uniquely and exclusively affects the statutory duties of County Commissioners.

CONCLUSION

Jurisdiction exists on the basis of express and direct conflict with this Court and the First District. Jurisdiction also exists because the decision below directly and exclusively affects county commissioners, a class of constitutional officers.

Perhaps most importantly, this case should be considered because it presents serious, statewide public policy questions

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11/ See generally, Kemp, Deborah J., Interbasin Transfers of Water in Florida, 56 Fla. B.J. 9 (1982).

regarding planning for and administratively allocating, without legislative standards, Florida's precious and finite water resources.

WHEREFORE, Osceola County respectfully requests that this Court accept jurisdiction.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of May 1986, a true copy of the foregoing has been provided by United States mail to Vance W. Kidder, Esq., Clifton A. McClelland, Jr., Esq., Deborah A. Getzoff, Esq., Neal D. Bowen, Esq., and Valerie A. Roberts, Esq.

By _____
William L. Earl