IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
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DEPARTMENT OF TRANSPORTATION,

Appellants,

vs.

DR. and MRS. AUGUSTA LOPEZ-TORRES, and TOWN OF OCEAN RIDGE, FLORIDA,

Appellee.
_____/

CASE NO.: 69,035

AMICUS CURIAE BRIEF

for the

BOYNTON BEACH COMMUNITY REDEVELOPMENT AGENCY

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INTRODUCTION

For the purposes of this brief, the following abbreviations shall apply:

1. The Appellants, Florida Department of Transportation, shall be referred to as "DOT".

2. The Appellees, Dr. and Mrs. Lopez-Torres, Town of Ocean Ridge and the Audubon Society of the Everglades shall be referred to collectively as the Appellees.

3. Chapter 120, Florida Statutes (1985) shall be referred to as the APA.

4. Sections 163.3161 - 163.3211, Florida Statutes (1985), the Local Government Comprehensive Planning Act and Land Regulations, shall be referred to as the "Comprehensive Planning Act".

5. References to the Record on Appeal will be denoted by the letter "R" followed by the Record page number.

STATEMENT OF CASE

This is an appeal pursuant to Florida Rules of Appellate Procedure, 9.030(2)(v), from a Decision of the Fourth District Court of Appeal filed on April 30, 1986, that passed upon questions certified to be of great public importance.

This case originated by Dr. and Mrs. Lopez-Torres filing a Request for Administrative Hearing, March 26, 1984, to prevent the Department of Transportation from constructing a new bridge between Boynton Beach and Ocean Ridge because of adverse impact on their residential property. (R-23) The Town of Ocean Ridge petitioned to intervene on the basis that vital municipal interests were threatened by the proposed bridge construction, which motion was granted by Order entered July 3, 1984. (R-36) Petition by Audubon Society of the Everglades, Inc. to intervene was granted August 31, 1984. (R-85-86)

The Appellees in the case sub judice filed a Motion for Summary Recommended Order which was argued before the administative hearing officer. (R-1-22) The hearing officer ruled in favor of the appellees. (R-276-284) The Recommended Order of the hearing officer concludes that certain decisions of the Department of Transportation relating to the location and construction of a bridge were made in a manner inconsistent with the provisions of the Comprehensive Plan of the Town of Ocean Ridge. (R-283)

In accordance with the Administrative Procedures Act the Recommended Order was considered by the agency head, the Secretary of the Department of Transportation. On January 21, 1985, the Secretary entered a Final Order. The Final order recites that the Secretary has reviewed the records, including certain ex parte communications filed, and the Recommended Order of the hearing officer. The Final Order adopts the finding of facts of the Recommended Order and makes an additional finding based on post hearing evidence submitted.

The Final Order entered by the Secretary of Transportation rejects the conclusions of law of the hearing officer and holds that as a matter of law, the legal responsibility of the Department is exclusive and that the Department is not bound in any respect by the transportation or other provisions of a comprehensive plan of a local government. (R-303-305)

The Appellees filed a timely appeal from the Final Order entered by the Secretary of the Department of Transportation in the District Court of Appeals, Fourth District, on February 15, 1985. The Fourth District Court of Appeal reversed the Secretary's decision and remanded for proceedings consistent with the opinion. The Court certified three questions as of great public importance:

1. WERE THE PROCEDURAL STANDARDS EMPLOYED IN THE CASE AT BAR SUFFICIENT TO JUSTIFY THE DOT'S DECISION ON THE MERITS?

2. HAS THE LEGISLATURE PREEMPTED MUNICIPALITIES FROM EXERCISING ANY CONTROL OVER THE ESTABLISHMENT OF STATE ROADS AND BRIDGES?

3. DOES THE DOT HAVE THE AUTHORITY TO ROUTE A STATE ROAD BRIDGE THROUGH OR INTO A MUNICIPALITY IN A CORRIDOR THAT SPECIFICALLY CONFLICTS WITH THE MUNICIPALITY'S COMPREHENSIVE GROWTH PLAN?

STATEMENT OF THE FACTS

The statement of facts is as set forth in the Recommended Order of the hearing officer, as follows:

1. The project, proposed by the Department and opposed by the other parties, will be a new four-laned bascule bridge (approximately 1351 feet in length and 87 feet in deck width), spanning the Intracoastal Waterway between Boynton Beach and Ocean Ridge, in Palm Beach County, Florida. It will require the construction of an approach road, consisting of a continuation of Northeast Second Avenue, extending from existing State Road 804 (from the west) to State Road A1A in Ocean Ridge. The bridge and approach road will require the acquisition of a 100 foot right-of-way for the length of the project, approximately 3200 feet.

2. The purpose of the project is to replace an existing two-lane 48-year-old bascule bridge spanning the Intracoastal Waterway. This bridge is part of Ocean Avenue and is approximately 700 feet south of the site for the proposed bridge. The older bridge will be dismantled and removed as soon as the new bridge is built. The cost of removal is included in the proposed project.

3. At least part of the proposed bridge, with approach road, lies within the boundaries of Ocean Ridge.

4. Since June, 1976, Ocean Ridge has consistently opposed construction of a new bridge at Northeast Second Avenue. On December 6, 1976, the town commission adopted a formal resolution, No. 76-28, opposing, on various ground, construction of a proposed bridge on Second Avenue.

5. The local comprehensive plan, adopted by the commission in 1982 and still is effect, opposes construction of a bridge as now proposed - at Northeast Second Avenue. As grounds, the plan sites increased traffic congestion, air pollution, destruction of mangroves, safety hazards, and esthetics. A specific objective of the plan's transportation element is to:

> A. Maintain the two (2) lane character of SR A1A (Ocean Boulevard) and prevent the construction of a four-laned bridge and roadway extending Second Avenue into Ocean Ridge as originally planned and recently abandoned.

(Pg. 75, Ocean Ridge Comprehensive Plan)

A specific recommendation of the plan is to:

2. Continue to oppose construction of the Second Avenue bridge in an effort to discourage increased traffic congestion and safety hazards in the Town.

Id.

6. Ocean Ridge officials interpret this Comprehensive plan as expressing a policy of opposition to construction of a bridge at Northeast Second Avenue. Their interpretation is supported, even compelled, by the plain language of the plan. Clearly, construction of the proposed bridge would not be consistent with the plan.

7. The right-of-way needed to construct the proposed bridge, with approach road, has not yet been acquired.

8. The stated purpose of, and justification for, the proposed bridge is not to immprove Northeast Second Avenue, but to replace the existing Ocean Avenue bridge, which is described as out-of-date, unsafe, inadequate, and in a deteriorating condition. (R-279-280)

Included in the evidence received by the hearing officer was various agency documents relating to the Agency's preliminary decision to build the bridge at the Second Avenue location. (R-279)

In the Final Order the Secretary accepted the findings of fact of the hearing officer and made an additional finding of fact that the comprehensive plan for the Town of Boynton Beach makes provision for the construction of the bridge at the new Northeast Second Avenue location which finding is not disputed by Appellants. (R-303)

The facts are not in dispute. (R-303) The issues of statutory construction are of great public interest to the State of Florida. At issue is the efficacy of the basic statutory framework for comprehensive planning and growth management. Clearly framed in this appeal are legal issues of planning and growth management of first impression in Florida.

SUMMARY OF ARGUMENT

ISSUE I:

WHETHER THE PROCEDURAL STANDARDS EMPLOYED IN THE CASE AT BAR WERE SUFFICIENT TO JUSTIFY DOT'S DECISION ON THE MERITS.

ARGUMENT

The APA does not compromise DOT's delegated authority to plan the location of bridges. There was substantial and competent evidence to support DOT's decision to construct the bridge where it proposed.

ISSUE II:

WHETHER THE MUNICIPAL COMPREHENSIVE PLANNING ACT ENABLED MUNICIPALITIES TO DICTATE THE LOCATION OF STATE ROADS AND BRIDGES.

ARGUMENT

The Florida Legislature has grantd DOT plenary authority to construct and maintain the State Road System, thereby preempting that subject from control of local government through the Comprehensive Planning Act.

ARGUMENT
ISSUE I

WHETHER THE PROCEDURAL STANDARDS EMPLOYED IN THE CASE AT BAR WERE SUFFICIENT TO JUSTIFY DOT'S DECISION ON THE MERITS.

All procedural mandates were adhered to by DOT in reaching its conclusion that the bridge should be constructed at its proposed location. Furthermore, there was substantial and competent evidence before DOT, as an administrative agency, to substantiate its decision. Accordingly, the lower court erred in reversing the secretary's decision. As this Court said in Pirman v. Florida State Improvement Commission, 78 So.2d 718 (Fla. 1955):

> This is another example of taxpayers and property owners attempting to substitute their judgment or have the Court substitute its judgment for that of the constituted authorities vested with the power to designate the location of a road.
>
> The selection of locations for public improvements has caused more delay in constructing such public improvements than any other cause. This is especially true with reference to roads and bridges. It is impossible to select a site or location for a major road or bridge which will satisfy the desires of all the citizens and taxpayers.

Two statutes control the process of determining and planning the location of bridges in the State of Florida. On the one hand, the legislature has made a broad grant of discretionary authority to DOT to decide the location of bridges within the state road system. Chapter 388, Florida Statutes (1985). This

broad grant of discretionary authority has been validated by the Florida Supreme Court. State v. Florida State Improvement Commission, 75 So.2d. 1 (Fla. 1954). On the other hand, the legislature has created a statutory right of persons who have a substantial interests in administrative decisions to have such decisions heard before a hearing officer. Section 120.57, Florida Statutes (1985). The lower court misunderstood the relationship between these two statutes in reversing DOT's decision.

Jurisdiction for the maintenance and construction of the state road system is delegated to the Department of Transportation. Section 334.044, Florida Statutes (1984) provides in pertinent part that the Department of Transportation shall have the following general powers and duties:

> (1) to assume the responsibility for coordinating the planning of a safe, viable and balanced state transportation system serving all regions of the state, and to assure the compatability of all components including multi-modal facilities.
>
> (6) to acquire, by the exercise of the power of eminent domain as provided by law, all property and property rights whether public or private which it may determine are necessary to the performance of its duties and the execution of its powers.
>
> (10) to develop and adopt uniform minimum standards and criteria for the design, construction, maintenance and operation of public roads pursuant to the provisions of Section 336.045.
>
> (11) to establish a numbering system for public roads to functionally classify such roads, and to assign jurisdictional responsibility.

(13) to designate existing and to plan proposed transportation facilities as part of the state highway system and the state park road system and to construct, maintain and operate such facilities. (emphasis added)

Section 335.02, Florida Statutes further provides that:

> the Department shall have the authority to locate and designate certain roads as part of the state highway system and to construct and maintain them with funds available to the Department. Any road when so located and designated shall become the property of the state and shall be under the jurisdiction and control of the Department. (emphasis added)

The proposed bridge would have approach roads which would connect two (2) state roads (State Road 5 to State Road AIA 1), and as such would be part of the state transportation system (R-279).

In State v. Florida State Improvement Commission, 75 So.2d 1 (Fla. 1954), the Florida Supreme Court judicially validated the legislature's broad grant of discretionary authority to the DOT to make decisions such has the one involved herein:

> In the planning and construction of roads and bridges discretion must be placed somewhere. The needs of communities, counties and the state may be considered by these agencies in which discretion is vested. It is well settled in this state that the authority of the Legislature over roads and bridges is plenary unless restricted or forbidden by some particular provision of the Constitutin of the United States or of the State of Florida. The authority of the administrative agencies to whom is entrusted these governmental functions is limited only by the lawful exercise of their discretion. Within their respective areas of authority these public agencies exercise their discretion to devise plans and select sites to best serve

> the public need. When the plans adopted by such agencies do not exceed their lawful authority they should be upheld because the Court will not substitute its judgment for that of administrative agencies.
>
> . . . .
>
> The establishment, continuance and location of roads and bridges is vested in the discretion of administrative agencies. The sites or locations of public improvements have always been questions over which men differed. Experience has demonstrated that squabbles and disputes over locations and sites of public improvements always come into being at the very contemplation of a major public improvement.

75 So.2d at 3, 4. That this authority is preemptive was made clear in Webb v. Hill, 75 So.2d 596 (Fla. 1954):

> The boards of municipalities and counties of the state are vested with no authority, duty or discretion with reference to the location, designation and construction of the state roads comprising the state highway system. They may argue, take sides, protest, or attempt to persuade or use influence for the special benefit of their property of municipality, but they have no lawful authority. The authority to exercise discretion and make decisisons is vested in the State Department by the Legislature.

As the dissenting opinion in the lower court noted, "Consistent judicial recognition of this broad discretionary authority has continued unabated up to the time of this decision."

This delegated authority to determine the location of a bridge must be harmonized with the APA. The courts have held that every agency action is a "recognizable rule or an order" under the APA or is "incipiently a rule or order." Department of General Services v. Willis, 344 So.2d 580, 584 (Fla. 1st DCA

1977). Except when an agency acts by formal rule making, Section 120.54, Florida Statutes, or by declaratory statement concerning the applicability of a statute, rule or order, Section 120.565, Florida Statutes, all agency action, on appropriate challenge, will mature into an order present with characteristics of the APA's Section 120.57. A party whose substantial interest are or will be affected by agency action is entitled to a Section 120..57 hearing. Although, the administrative hearing in the case sub judice has been treated as a formal hearing by all parties, the submission to the hearing officer by the Petitioner for summary judgment evolved the hearing into an informal hearing since there was at that point no disputed facts. See, Village Salon, Inc. v. Division of Alcoholic Beverges, Department of Buones Resulation, 463 So.2d 2778 (Fla. 1st DCA 1954).

The APA does not compromise DOT 's ultimate authority to decide the location of bridges within the state highway system. In McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), an appeal was taken by the appallents from the denial of an application to organize and operate a bank. The statute governing the issuance of such a permit gave broad discretion to the Comptroller to determine if a permit should be granted with several factors to be considered. Formal proceedings under the APA before a hearing officer was initiated and concluded with the hearng officer issuing a recomended order to grant the permit. The Comptroller entered a final order rejecting many of the hearing officer's findings of

fact, as not based on competent substantial evidence and rejecting several of the hearing officer's conclusions of law and denied the permit. The Court noted that the APA does affect the scope and manner of exercise of agency discretion:

> 1. The APA prescribes the process by which disputed facts are found;
>
> 2. It requires that the agency adopt as rules its policy statements of general applicability, requires agency proof of incipient policy not expressed in rules and permits countravailing evidence and arguments;
>
> 3. It requires an agency to explain the exercise of its discretion and subjects that explanation to review.

346 So.2d at 577

In determining the weight to be given the agnecy's substituted findings of fact the Court stated:

> In determining whether substantial evidence supports the agency's substituted findings of fact, a reviewing court will naturally accord greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual issues or otherwise susceptible to ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight . . .
>
> At the other end of the scale, where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.

346 So.2d at 579.

In the case subjudice, the lower court expressed concern that DOT had not made any findings of fact since the hearing officer ruled as a matter of law that the bridge would not be relocated. However, such is not the case. DOT was required by Section 339.155, Florida Statutes (1985), and did in fact hold numerous public hearings to solict public imput about the proposed bridges. This section requires DOT to hold a planning hearing, a facility and site or corridor hearing and a design hearing. There were countless opportunities for all parties to express their views of the issues, and all parties did including the Appellees. Furthermore, it was the Appellees who moved for summary judgment, not DOT. If the Appellee had any other facts to present, they should have done so prior to moving for summary judgment. DOT accepted the hearing officer's findings of fact which are not contrary to DOT's decision. The factors to be considered by DOT in developing a state-wide transportation system, Section 339.155(2) and (3), Florida Statutes (1985), under the decision in McDonald, are opinions which are infused by policy considerations for which the agency has special responsibility.

Accordingly, in light of the numerous opportunities for public imput provided by DOT, the broad discretion committed to DOT in selecting the location of highways and bridges, and the fact that it was the Appellees who moved for summary judgment, all procedural mandates were followed and the lower courts decision should be reversed.

ISSUE II

WHETHER THE MUNICIPAL COMPREHENSIVE PLANNING ACT AUTHORIZES MUNICIPALITIES TO DICTATE THE LOCATION OF STATE ROAD AND BRIDGES.

Prior to the passage of the Local Government Comprehensive Planning Act and Land Development Regulation, Chapter 163, Part II, Florida Statutes, 1985, it was abundantly clear and uncontroverted that DOT had plenary authority to decide the location of bridges and highways that were a part of the state highway system. The Community Redevelopment Agency contends that this broad discretion was not compromised by the passage of Comprehensive Planning Act.

As stated at length previously in this brief, the Legislature has granted to DOT broad discretion in the location of state bridges and highways. See, e.g., Section 334.044 and 339.155, Florida Statutes, (Supp.1984). Furthermore, the legislative grant of discretionary authority to DOT has been recognized by the Florida Supreme Court in State v. Florida State Improvement Commission, 75 So.2d, (Fla. 1957), and its preemptive nature was made clear by the Court in Webb v. Hill, 75 So.2d 596 (Fla. 1954).

The reason for this delegation of authority to DOT was best stated by the Court in Florida State Improvement Commission; "In the planning and construction of roads and bridges discretion

must be placed somewhere." This discretion had to be placed in a state agency to avoid the type of conflict presented by this case with one municipality deciding to put a bridge in one place and the second municipality deciding to build it in another place. It does not require the wisdom of Solomon to conclude that an entity responsible for an overall transportation scheme should be delegated this authority to avoid impasses of the nature in this case.

Appellee and the Court below, however, contend that the Legislature deviated from this wise conclussion and granted individual municipalities the authority to compromise DOT's authority and in cases negate it all together with the passage of the Comprehensive Planning act. This conclusion and reasoning supporting it is flawed and not supported by the applicable statutes or sound public policy.

One of the intended purposes of the local Comprehensive Planning Act was to "encourgage and assure cooperation between and among municipalities and counties and to encourage and assure coodination of planning and development activities of units of local government with the planning activities of regional agencies and state government in accord with applicable provisions of law." Section 163.3161, Florida Statutes (1985) This is a recognition by the Legislature that legally adapted plans have to comply with and be coordinated with overall state plans. This principal is more specifically recognized by the legislature in Section 163.3211, Florida Statutes (1985):

> Nothing in this act is intended to withdraw or diminish any legal powers or responsibilities of state agencies or change any requirement of existing law that local regulations comply with state standards or rules.

The legislature has provided municipalities numerous forums to assure that competing local concerns are considered by DOT in exercising its discretionary authority. See, e.g., Section 339.155(3), 4(b); 339.175. However, the law remains as succinctly stated by the Court in Webb v. Hill:

> The boards of municipalities and counties of the state are vested with no authority, duty or discretion with reference to the location, designation and construction of the state roads comprising the state highway system. They may argue, take sides, protest, or attempt to persuade or use influence for the special benefit of their property or municipality, but they have no lawful authority. The authority to exercise discretion and make decisions is vested in the State Department by the Legislature.

CONCLUSION

The legislature has granted discretionary authority to DOT to determine the location of bridges within the state highway system. This authority has been recognized by the Supreme Court. The rights of parties to have an administrative decision reviewed by a hearing officer does not compromise the delegated authority. There was substantial and competent evidence to support DOT's decision to construct the bridge as planned by DOT. Furthermore, DOT's plenary jurisdiction for the construction and maintenance of the state highway system has preempted municipalities from such decisions even under the Comprehensive Planning Act. Accordingly, the decision of the Court below should reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Franz E. Dorn, Esquire, Florida Department of Transportation, 605 Suwannee Street, Tallahassee, Florida 32301; Hugh MacMillan, Jr., Esquire, Attorney for Dr. and Mrs. Lopez-Torres, 189 Bradley Place, Palm Beach, Florida 33480; John C. Randolph, Esquire, Attorney for Town of Ocean Ridge, Post Office Drawer "M", West Palm Beach, Florida 33402; and James R. Brindell, Esquire, Attorney for Audubon Society of the Everglades, Post Office Box 71, Palm Beach, Florida 33480, this 11th day of September, 1986.

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