

SUPREME COURT OF FLORIDA

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DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

CASE NO. 69,035

DR. and MRS. AUGUSTO LOPEZ-TORRES,
TOWN OF OCEAN RIDGE and AUDUBON
SOCIETY OF THE EVERGLADES,

Respondents.

ANSWER BRIEF OF RESPONDENTS
DR. AND MRS. AUGUSTO LOPEZ-TORRES,
and
AUDUBON SOCIETY OF THE EVERGLADES

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PRELIMINARY STATEMENT

For purposes of the Brief and for consistency, the Respondents adopt the Petitioner's system of abbreviations, save for the following exceptions:

1. The Petitioner, Florida Department of Transportation, shall be referred to as "DOT" or the Petitioner.
2. Chapter 163.3161-3211, Florida Statutes (1985), the "Local Government Comprehensive Planning Act", shall be referred to as the "Comprehensive Planning Act".
3. Chapters 334, 335 and 339, Florida Statutes (1985) shall be referred to as the "State Transportation Code".

STATEMENT OF THE CASE

The Respondents accept the Petitioner's Statement of the Case.

STATEMENT OF 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 DOT 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 1A1A 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 grounds, construction of a proposed bridge on Second Avenue.

5. The local comprehensive plan, adopted by the commission in 1982 and still in 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 1A (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, justification for, the proposed bridge is not to improve 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)

In the Final Order, the Secretary of the DOT accepted the findings of fact of the hearing officer (based upon stipulation by the parties) 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 the Respondents. (R-303) Facts stipulated by the parties related to Respondents' Motion for Summary Recommended Order are not in dispute. There are ultimate facts regarding the impact of the bridge relocation which remain in dispute.

The legal issues presented by the questions certified by the District Court of Appeal, Fourth District to this Court are of great public interest. At issue is the efficacy of the statutory framework for comprehensive planning and growth management.

SUMMARY OF ARGUMENT

ISSUE I: HAS THE LEGISLATURE PREEMPTED MUNICIPALITIES FROM EXERCISING ANY CONTROL OVER THE ESTABLISHMENT OF STATE ROADS AND BRIDGES?

ARGUMENT:

(a) The Comprehensive Planning Act can be construed in pari materia with the State Transportation Code to give significant legal effect to both.

(b) It is an established axiom of statutory construction that an act should not be construed so as to render it purposeless and useless legislation.

(c) The DOT erroneously concludes that its legal powers to locate, build, operate and control state roads and bridges are exclusive.

(d) The DOT erroneously concludes that the legislature preempted municipalities from exercise of any control whatsoever over establishment and location of bridges on state roads.

ISSUE II: 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?

ARGUMENT:

(a) The DOT's proposed Boynton Beach Bridge, with approach road, is inconsistent with and therefore precluded by

the local comprehensive plan of OCEAN RIDGE.

(b) The proposed replacement bridge constitutes a "development" within the meaning of Sections 380.04(1) and 163.3164(5), Florida Statutes (1985).

(c) The general rule is that local government comprehensive plans prevail over the state transportation plan. In cases where there exists a showing of essential state need or benefit, a judicial test of balancing of interests would be appropriate to determine whether the state plan should override the local plan. No such showing exists in this case.

ISSUE III: WERE THE PROCEDURAL STANDARDS EMPLOYED IN THE CASE AT BAR SUFFICIENT TO JUSTIFY THE DOT'S DECISION ON THE MERITS?

ARGUMENT:

There is no dispute as to material facts related to Respondents' Motion for Summary Recommended Order. That motion initiated a legal process with procedural standards sufficient to justify entry of the Recommended Order by the Hearing Officer and entry of a Final Order by the DOT on the motion, which Final Order is the subject of this judicial review. However, DOT did not employ adequate procedural standards to justify a final decision on the merits.

ARGUMENT

ISSUE I

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

The Final Order of the Secretary of the DOT construes the Comprehensive Planning Act in a manner that renders it a purposeless and therefore useless piece of legislation in cases where DOT's determination to build a road or bridge would vitiate the goals of a community established for the well-being of its citizens. It is an axiom of statutory construction that the legislature would not enact a purposeless and therefore useless piece of legislation. Sharer v. Hotel Corporation of America, 144 So.2d 813 (Fla.1962). It is the judiciary's duty to uphold and give effect to all provisions of a legislative enactment, and to adopt any reasonable view that will do so. Tyson v. Lanier, 156 So.2d 833 (Fla.1963); State v. Zimmerman, 370 So.2d 1179 (4th DCA, 1979).

Statutes that relate to the same person or thing, to the same class of persons or things, or the same or a closely allied subject or object, are regarded as in pari materia. Such enactments should be construed together and compared with each other. Miami Dolphins Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla.1981). Alachua County v. Powers, 351 So.2d 32 (Fla. 1977).

With regard to planning law, the relationship between the Comprehensive Planning Act and the State Transportation Code is between comprehensive planning at the local government level (of which transportation is an important and legally required aspect) and functional planning at the state level for transportation by the DOT, the state transportation agency. The Comprehensive Planning Act requires OCEAN RIDGE to establish a plan for the community which takes into account a broad range of public interests and preferences for the development and character of the community. The Act does not prescribe a particular level of development or a particular community character. It allows OCEAN RIDGE a broad latitude in shaping its plan.

The ultimate purpose of each local government's plan under the Act is "...to guide and control future development" in the community. Section 163.3161(2), Florida Statutes (1985). Respondents respectfully submit that no single action of government affects the type, pattern and location of development and the character of a community more than the construction of roads and bridges. The DOT's position of preemption with respect to its responsibility for roads and bridges undermines and frustrates the responsibility and authority of local government for the evolution of the community under the Comprehensive Planning Act.

The Final Order of the DOT lists a series of provisions

from the State Transportation Code as authority for the conclusion that the legal powers possessed by the DOT to locate, build, operate and control state roads and bridges are exclusive and that the Florida Legislature has preempted local government from exercising control over the establishment and location of bridges on state roads.

The statutory references in the Final Order do clearly describe the responsibility of the DOT for transportation and transportation planning. Ironically, the cited statutory provision containing the strongest language of delegated powers, Section 334.11, Florida Statutes, was repealed by the Legislature in 1984.

The Comprehensive Planning Act at Section 163.3211, Florida Statutes (1985) contains a provision that is central to the decision in this case.

163.3211 Conflict with other statutes.-Where this act may be in conflict with any other provision or provisions of law relating to local governments having authority to regulate the development of land, the provisions of this act shall govern unless the provision of this act are met or exceeded by such other provision or provisions of law relating to local government including land development regulations adopted pursuant to chapter 125 or chapter 166. 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. (Emphasis added)

To the DOT this provision means, apparently, that local government comprehensive plans have no binding legal effect at all on the DOT in the exercise of its lawful responsibilities.

The Comprehensive Planning Act includes specific requirements on transportation, establishing transportation as an essential aspect of a local comprehensive plan. The plan must include a traffic circulation element consisting of the types, locations, and extent of existing and proposed major thoroughfares and transportation routes. Section 163.3177(6)(b) Florida Statutes (1985). The law also requires other specific plan elements including land use, conservation of natural resources, housing, and an element addressing sanitary sewer, solid waste, and water quality. Local government has the responsibility to weigh and balance various considerations in adopting a comprehensive plan addressing the required elements. Section 163.3177 Florida Statutes (1985).

The Act also provides a specific framework for the interaction between a particular municipality and government at the state level, including the DOT. Section 163.3184 Florida Statutes (1985). This section was amended and strengthened by the 1985 Legislature to insure consistency in comprehensive plans between local governments and at different levels of government. However, prior to amendment, the statute still required and provided an opportunity for DOT to review and comment upon local comprehensive plans as they impacted upon the lawful responsibility of DOT. There is no indication in the record that DOT ever reviewed or commented upon the Ocean Ridge plan. DOT has continued to assert that local comprehensive plans have no binding legal effect upon the agency.

Does it "withdraw or diminish any legal powers" of the DOT to require that the DOT exercise its legal powers within a comprehensive planning framework established by general law? Respondents urge that it does not, and that a proper judicial construction of section 163.3211, Florida Statutes (1985) can give full and significant legal effect to both the State Transportation Code and the Comprehensive Planning Act.

Section 334.044(1), Florida Statutes (1985) (a provision not cited by the DOT in support of its position) provides as follows:

334.044 Powers and duties of the department
The department 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 compatibility of all components, including multimodal facilities. (emphasis added)

Similar language is contained in the State Comprehensive Plan, Section 187.201(19) Florida Statutes (1985) entitled TRANSPORTATION which sets forth these "policies":

12. Avoid transportation improvements which encourage or subsidize increased development in coastal high-hazard areas or in identified environmentally sensitive areas such as wetlands, floodways, or productive marine areas.

13. Coordinate transportation improvements with state, local, and regional plans. (emphasis added)

14. Acquire advanced rights-of-way for transportation projects in designated transportation corridors consistent with state, regional, and local plans.

DOT's role as coordinator of transportation planning in the state is a responsibility different and distinct from the "plenary power" role claimed by the agency on the basis of a 1954 court decision, State of Florida v. Florida State Improvement Commission, 75 So.2d 1 (Fla.1954). Much has changed in Florida in the past thirty years and a change of major governmental significance is the establishment of the Comprehensive Planning Act. As coordinator of transportation planning in the state, DOT has a responsibility more subtle and difficult than simply dictating transportation decisions. Rather than ignoring local government plans, DOT is to work with communities to develop consensus.

In his Recommended Order, the Hearing Officer sets forth with emphasis the statutory provisions of the Comprehensive Planning Act. (R-281) The purpose of the Act is to "...utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development." Section 163.3161 Florida Statutes (1985). Note that the statute states as the purpose the strengthening of local government to guide and control future development. Nothing is

more significant than roads and bridges for determining the pattern of development. Under the Act, local government comprehensive plans have binding legal effect. After a local government adopts a comprehensive plan "...all development undertaken by ...governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted." Section 163.3194(1) Florida Statutes (1985).

At hearing, the DOT did not raise or argue the "withdraw or diminish legal powers" issue of Section 163.3211 Florida Statutes (1985). The DOT's Final Order relies on this argument to "gut" the Comprehensive Planning Act. However, that result is neither appropriate nor legally required. The Comprehensive Planning Act established a framework within which the full legal power and authority of the DOT may be exercised for the benefit of the citizens of Florida.

Section 163.3177 Florida Statutes (1985) requires that local comprehensive plans address transportation and contain a transportation element. Section 163.3184 Florida Statutes (1985) establishes a framework for coordination with government at the State level in the development and adoption of the comprehensive plan of a local government.

Clearly the Comprehensive Planning Act and the State Transportation Code can and ought to be read in pari materia to give significant legal effect of both. The Comprehensive Planning Act is not supplanted or repealed by the State

Transportation Code. The role of the DOT is not an exclusive preemption of local government authority, including local government transportation planning authority. Rather, the lawful responsibility of the state agency is to be carried out within the framework for comprehensive planning established by the Florida Legislature.

ISSUE II

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?

The DOT's proposed Boynton Beach Bridge, with approach road, is inconsistent with and, therefore, precluded by the local comprehensive plan of OCEAN RIDGE.

By statute all development, including that undertaken by state and local government, must be consistent with the comprehensive plan of a local government. In his Recommended Order, the Hearing Officer concludes, as a matter of law, that the replacement bridge would constitute a "development" under sections 380.04(1) and 163.3164(5), Florida Statutes (1985). The District Court of Appeal chose not to address this issue and certified the question to the Florida Supreme Court.

Quoting from the Recommended Order (R-282):

"Development is assigned the meaning given by section

380.04, which provides:

(1) The term "development" means the carrying out of any building activity or mining operation, the making of any material change in the use of appearance of any structure or land, or the dividing of land into three or more parcels.

(2) The following operation or uses shall not be taken for the purpose of this chapter to involve "development" as defined in this section:

(a) Work by a highway or road agency or railroad company for the maintenance or improvement of a road or railroad track, if the work is carried out on land within the boundaries of the right-of-way.

"Government agencies", as defined in the statute, include state agencies such as the DOT. Section 163.3164(8)(b), Fla. Stat.(1983). [Section 163.3164(9)(b) Florida Statutes (1985)]

The Hearing Officer further concluded:

"The proposed bridge, with approach road, is located, at least in part, within the boundaries of OCEAN RIDGE, which has adopted a local comprehensive plan pursuant to the Planning Act. That local plan, now in effect, contains policies, recommendations, and objectives which specifically and unequivocally oppose

construction of a bridge spanning the Intracoastal Waterway at Northeast Second Avenue. The proposed bridge, with approach road, is a "development" within the meaning of the Act. It is not exempted by Section 380.04(3)(a) because it does not equate to "maintenance" or "improvement" of an existing road or bridge. Although described as a replacement of an existing bridge, it is in actuality, an entirely new bridge which would be built in a new location where no bridge now exists and where the right-of-way has not yet been acquired. It is not an "improvement" to the existing bridge, and no one argues it is intended as an "improvement" to Northeast Second Avenue.

Any other conclusion on this point ignores the plain language of the applicable statutes."

To avoid the conclusion that the bridge constitutes a "development" under the Comprehensive Planning Act, DOT urges a radically diminished construction of "development" under the Comprehensive Planning Act. The DOT suggests that "development" should be construed to include only those activities defined in Section 380.04(1), Fla. Stat. (1985) which traditionally fall under the control of a municipality. (Initial Brief, at page 19, emphasis added)

It is respectfully submitted that the restrictive and bureaucratically self-serving interpretation urged by the DOT is without legal merit. The DOT argument is based essentially on what the Secretary describes as the "exclusive legal power" of DOT (R-303). State policy and law have materially changed since the 1954 decision in State of Florida v. Florida State Improvement Commission, 75 So.2d 1 (Fla.1954). This may have been the legal framework within which the state transportation agency was free to operate for many years, but clearly that is not the case today. In 1974, the Legislature enacted meaningful and significant planning legislation and the legal powers and responsibilities of state agencies, including DOT, must be exercised in a manner consistent with the Comprehensive Planning Act.

The current statewide law of general application provides that no public or private development shall be undertaken except in conformity with adopted Comprehensive Plans, section 163.3161(5), Florida Statutes (1985). Therefore, the general rule is that local government comprehensive plans prevail over the state transportation plan.

However, it is certainly conceivable that there may be instances in which a road or bridge prohibited by a certain local comprehensive plan is so essential to the welfare of the State that the decision to build such a road or bridge should prevail over a plan prohibition. Respondents have proposed a balancing

of interests test as the special rule for those extraordinary cases. As an exceptional case, the burden should be upon DOT to assert reliance upon the special rule. In this case, no such assertion was made by DOT before the Hearing Officer. DOT has rejected the special rule concept for a balancing of interests. Therefore, the Hearing Officer's ruling on the Motion for Summary Recommended Order was legally appropriate.

The opinion of the Fourth District in this case carefully evaluates DOT's extensive reports and analysis on the replacement of the bridge and establishes beyond the shadow of a doubt that the action here proposed for relocation of the bridge by DOT is not necessary or essential in any respect. The decision is at cross purposes with local preferences without any rationale to justify an override of the local plan based upon State need or welfare. Lopez-Torres et al. v. Department of Transportation, 488 So.2d 848 (4th D.C.A.1986).

ISSUE III

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

There is no dispute as to material facts related to Respondents' Motion for Summary Recommended Order. That motion initiated a legal process with procedural standards sufficient to justify entry of the Recommended Order by the Hearing Officer

and entry of a Final Order by DOT on the motion, which Final Order is the subject of this judicial review. However, DOT did not employ adequate procedural standards to justify a final decision on the merits. Respondents, LOPEZ-TORRES and AUDUBON, adopt the argument set forth in the Answer Brief of Respondent, OCEAN RIDGE, on this issue.

CONCLUSION

The statutory construction urged by the Respondents in this case is correct regarding the Comprehensive Planning Act and the State Transportation Code. The Legislature has not preempted municipalities from exercising any control over the establishment of state roads and bridges. To the contrary, the Legislature has not only imposed certain obligations upon local government to conduct rational and extensive planning activities, but also has provided local governments with a stronger ability to control and guide their futures in accordance with the preferences of their citizens. Roads and bridges are important tools that help achieve or obstruct a community's values and preferences.

DOT lacks the legal authority to route a state road bridge through or into a municipality in a corridor that specifically conflicts with the municipality's comprehensive

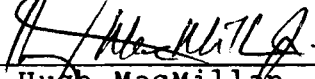
growth plan. Nothing in the record, including the facts undisputed in this case, would support a conclusion that this is a case in which a State override of a lawfully adopted local comprehensive plan is legally appropriate.

Procedural standards employed in the case at bar were not sufficient to justify a decision on the merits. However, the Recommended Order of the Hearing Officer is legally sufficient. No further evidentiary hearing is required in this matter and DOT should be required to enter a Final Order consistent with the response of this Court to the questions of law certified.

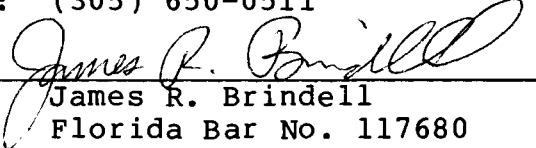
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents has been furnished by mail to Maxine F. Ferguson, Esq., and A. J. Spalla, Esq., Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, FL 32301; J. Michael Haygood, Esq., 1675 Palm Beach Lakes Blvd., Suite 905, Forum III, West Palm Beach, FL 33401; and James W. Vance, Esq., 1615 Forum Place, Suite 200, Barristers Building, West Palm Beach, FL 33401, this 31st day of October, 1986.

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