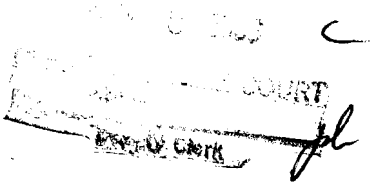
IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF TRANSPORTATION Petitioner, vs. DR. and MRS. AUGUSTO LOPEZ-TORRES, TOWN OF OCEAN RIDGE, and AUDUBON SOCIETY OF THE EVERGLADES, Respondents.	)	CASE NO. 69,035



ANSWER BRIEF OF RESPONDENT
TOWN OF OCEAN RIDGE

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INTRODUCTION

For purposes of reference in this brief, Respondent will utilize the same system of abbreviations and denominations employed in Petitioner's Initial Brief. (See the "Preliminary Statement" contained in the Initial Brief.)

STATEMENT OF THE CASE AND OF THE FACTS

Respondent generally accepts the DEPARTMENT's statement of the case and facts as accurate. However, because there are a few statements therein with which Respondent disagrees, and because Respondent believes this Court's consideration of the case will be facilitated by a more detailed statement of certain aspects of the case than the DEPARTMENT has offered, Respondent respectfully submits the following supplementary statements.

Respondent's primary disagreement is with the DEPARTMENT's assertion that there are no disputed issues of fact in this case, which is rather misleading. Although there is no real dispute concerning the facts actually found by the hearing officer (R. 279-280), other factual issues raised in this case have never been resolved at any level.

The Request for Administrative Hearing initially filed by Respondent had opposed the replacement of the existing bridge at the proposed new location (Northeast Second Avenue) on several grounds, including the adverse impacts on the environment and the quality of life which Respondent alleged would result from the proposed relocation of the bridge. (R. 23, 32-36, 77-78). By contrast, the Motion for Entry of Summary Recommended Order, and the hearing held in connection with such motion, addressed only a single issue of law -- whether the proposed replacement of the bridge at the new location was precluded by virtue of inconsistency with OCEAN RIDGE's comprehensive plan. (R. 37-75, 76, 276). Although the facts pertinent to the Motion for Summary Recommended Order were never disputed (R. 279, 282), the parties did disagree (and still do) on whether the replacement of the existing bridge at the proposed new location would create the adverse effects alleged by Respondent.

These factual issues have never been adequately resolved, since both the hearing officer and the DEPARTMENT attempted to resolve this case by legal principles which were deemed determinative when applied to the undisputed facts (although the legal principles

applied by the DEPARTMENT were totally inconsistent with those applied by the hearing officer). The hearing officer's Recommended Order was based on the view that the only relevant consideration in this case was the inconsistency between OCEAN RIDGE's comprehensive plan and the proposed relocation, and that such inconsistency precluded the relocation as a matter of law. (R. 276-284). On the other hand, the DEPARTMENT in its Final Order (R. 303-317) took an entirely different view of the applicable legal principles, concluding that OCEAN RIDGE's comprehensive plan was legally irrelevant (although admittedly inconsistent with the proposed relocation), since the DEPARTMENT deemed itself entrusted with the exclusive and unrestricted power to determine the location of all roads constituting part of the state highway system. (R. 303-308).

The Fourth District Court of Appeal adopted a somewhat intermediate view of the case, rejecting the absolutist positions of both the hearing officer and the DEPARTMENT, but still not deciding the factual issues involved in the case. Lopez-Torres v. Dep't of Transportation, 488 So.2d 848 (Fla. 4th DCA 1986) (A. 1-15). In the District Court's view, the OCEAN RIDGE

comprehensive plan was neither necessarily controlling nor irrelevant, and thus the DEPARTMENT was neither absolutely bound by that plan nor free to totally disregard it. While the District Court agreed that the DEPARTMENT had a wide degree of discretion in locating roadways, the court held that the DEPARTMENT was capable of abusing that discretion, and that whether it had done so in the instant case was a question of fact. 488 So.2d at 850. Since neither the hearing officer nor the DEPARTMENT had made any findings with respect to the facts against which the propriety of the DEPARTMENT's decision had to be judged, the District Court remanded for a complete evidentiary hearing.

Thus, the District Court also declined to address the factual issues presently disputed in this case. The DEPARTMENT's contention in its brief -- that the District Court "reevaluated the evidence and determined that the . . . decision to relocate the . . . bridge was clearly erroneous and . . . an abuse of discretion" (Initial Brief at p. 4) -- mischaracterizes the District Court's decision. The District Court did not rule upon any factual issues, but instead merely held that the DEPARTMENT's attempt to resolve those factual

issues without a sufficient evidentiary basis in the record was improper.

In applying the "right-for-the-wrong-reason" test, the District Court did not "reevaluate" the evidence and conclude that a decision in the Respondent's favor was necessary. To the contrary, the court merely held that even if the DEPARTMENT's internal files were considered to constitute an adequate record for purposes of judicial review, such files did not mandate a decision in the DEPARTMENT's favor, so that a remand was required in order that the hearing officer might make initial findings of fact in the manner contemplated by Section 120.57(1), Florida Statutes (1985).

SUMMARY OF THE ARGUMENT

The District Court correctly held that the DEPARTMENT's regulatory authority over state roads and bridges was not absolute, and that municipalities were entitled to exercise some control over the establishment of such roads and bridges. Although decisional law has recognized that the DEPARTMENT has principal authority and responsibility in the location of state highways, this Court has never recognized an

absolute power in the DEPARTMNET, but instead has stated that the DEPARTMENT must act within the limits of a properly-guided discretion. Current statutory law similarly indicates that the location of state roads and bridges is a matter of shared responsibility between the DEPARTMENT and local governmental entities. Although the statutes give principal responsibility to the DEPARTMENT, they also require that the DEPARTMENT "cooperate" and "coordinate" with local governments in the exercise of its powers. Thus, both statutory and decisional law support the District Court's determination that municipalities are not preempted from exercising any control whatsoever in this area.

Indeed, by enacting the Local Government Comprehensive Planning Act, Sections 163.3161-163.3215, Florida Statutes (1983), the legislature has given municipalities the power to completely prohibit the location of state roads and bridges in specific corridors of the municipality wherein the location of such transportation facilities is prohibited by a duly-enacted comprehensive plan. The Comprehensive Planning Act specifically requires that all "development" subsequent to the adoption of a comprehensive plan must be consistent with the

comprehensive plan. The Act expressly defines "developers" to include governmental agencies, and "development" to include action by governmental agencies. Moreover, the Act defines governmental agencies to include state agencies such as the DEPARTMENT. Thus, the statute expressly and literally requires the DEPARTMENT to act consistently with the terms of a previously adopted comprehensive plan, so that the DEPARTMENT may not locate a road or bridge in a corridor in direct conflict with such a plan.

It is therefore clear that a municipality's comprehensive plan is entitled to consideration in connection with the decision about where to locate a state road or bridge, and that the DEPARTMENT is otherwise required to act within the limits of proper discretion. Since the DEPARTMENT does not have absolute power in connection with locating roads and bridges, it was error for the DEPARTMENT to decide the instant case on the basis of such an assumed absolute power, and without any findings of fact against which the propriety of its action could be judged. Nor could the absence of such factual findings be cured by reference to the DEPARTMENT's internal files, since the contents of those files were susceptible to conflicting

inferences. Thus, the District Court properly required a remand to enable the hearing officer to make findings of fact in accordance with the Administrative Procedure Act.

ARGUMENT

I. THE LEGISLATURE HAS NOT PREEMPTED MUNICIPALITIES FROM EXERCISING ANY CONTROL OVER THE ESTABLISHMENT OF STATE ROADS AND BRIDGES.

The Fourth District Court of Appeal in its decision below held that the DEPARTMENT's power to plan, establish, and locate the state road system was not "absolute." Lopez-Torres v. Dep't of Transportation, 488 So.2d 848, 850 (Fla. 4th DCA 1986). However, the District Court certified that question to this Court, recognizing that it was one having great public importance. 488 So.2d at 854.

Respondent respectfully submits that the District Court correctly decided this issue, and that its refusal to hold that OCEAN RIDGE's comprehensive plan was legally irrelevant should be affirmed (although Respondent suggests that the District Court should have gone even further and held that the DEPARTMENT was absolutely bound by the comprehensive plan, as discussed in connection with the next issue). The

District Court's decision that the OCEAN RIDGE comprehensive plan was entitled to some weight in connection with the location of the new bridge is fully consistent with both current statutory law and existing decisional precedents.

As the District Court recognized, 488 So.2d at 850, previous decisions of this Court have held that the DEPARTMENT is vested with the principal authority to determine the location of state roads, and that municipalities have no controlling authority in such matters. State v. Florida State Improvement Comm'n, 75 So.2d 1 (Fla. 1954); Webb v. Hill, 75 So.2d 596 (Fla. 1954). However, these same cases further hold (as the District Court also recognized) that the DEPARTMENT's authority in this respect is not absolute, but rather is limited to the proper exercise of discretion, and subject to being overturned if abused.

Furthermore, the present statutory law in Florida also supports the District Court's view that a municipality may exercise control over the location of state roads and bridges existing within the municipal boundaries. Regardless of what may have been the extent of a municipality's powers in this respect at the time of this Court's decisions in Webb, supra, and

Florida State Improvement Commission, supra, it is clear that those municipal powers have been substantially broadened in recent years by the adoption of the Municipal Home Rule Powers Act, Sections 166.011-166.045, Florida Statutes (1985) and the Local Government Comprehensive Planning and Land Development Act, Sections 163.3161-163.3215, Florida Statutes (1985), as well as by certain amendments to the Florida Transportation Code.

Under the Municipal Home Rule Powers Act, municipalities

> shall have the . . . powers . . . to enable them to conduct municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

§ 166.021(1), Fla. Stat. (1985) (emphasis added). See also, § 166.021(2) and (3), Fla. Stat. (1985) (defining municipal purposes and recognizing municipalities' power to "enact legislation concerning any subject matter" upon which state legislature may act, with exception of certain matters which have been expressly denied to municipalities, by statutory preemption or constitutional prohibition).

The DEPARTMENT attempts to argue that the Florida Transportation Code evidences an implied preemption of

the subject of locating state roads in favor of the DEPARTMENT, to the exclusion of municipalities. (Initial Brief at pp. 10-17). However, the DEPARTMENT'S argument in this respect ignores the standard of express preemption employed in such cases, certain statutory provisions authorizing municipalities to exercise certain control over the location of roads and bridges, and the principles of statutory construction which dictate that statutes should be construed to be consistent with one another and in a fashion which will not render them meaningless or of no force or effect.

The DEPARTMENT's suggestion that the OCEAN RIDGE comprehensive plan can be completely ignored on an "implied preemption" rationale ignores the fact that the Florida Statutes only preclude a municipality from acting in areas which have been expressly preempted. Such an express preemption exists only where there is an inevitable inconsistency between a state statute and a local regulation. See, Bennett M. Lifter, Inc. v. Metropolitan Dade County, 482 So.2d 479, 483 (Fla. 3d DCA 1986). Where a local regulation does not require a person to take action forbidden by state law (or forbid him from acting as required by state law) there is insufficient conflict to hold that the local regulation

has been preempted. Id.; Pace v. Bd. of Adjustment, Town of Jupiter Island, ____So.2d____, 11 F.L.W. 1513 (Fla. 4th DCA, July 9, 1986).

Under this standard of preemption, it is evident that the legislature has not preempted municipalities from exercising any control over the establishment of state roads and bridges. Although Respondent concedes that there are several statutes (cited in the DEPARTMENT's initial brief) which indicate that the DEPARTMENT has primary authority in determining the location of state roads and bridges, these statutes do not demonstrate any inevitable inconsistency arising from a municipality's efforts to exert control over those portions of a municipality's territory where such a road or bridge may be located.

Indeed, several statutes specifically recognize that municipalities may become involved in the road-planning process, and attempt to eliminate any potential conflict by imposing a duty of cooperation upon all parties involved in that process. For example, Section 334.035, Florida Statutes (1985) provides, in part, that:

> The purpose of the Florida transportation Code is to establish the responsibilities of the state, the counties, and the municipalities in the planning

> and development of the transportation systems serving the people of the state and to assure the development of an integrated, balanced, statewide transportation system.

(Emphasis added.) Similarly, Section 334.044 provides that included among the DEPARTMENT's duties will be the duty "to cooperate with and assist local governments" in developing transportation systems, § 334.044(21), Fla. Stat. (1985), and to "coordinat[e] the planning" of the state transportation system so as to assure the compatibility of all its various components. § 334.044(1), Fla. Stat. (1985).

Thus, it can be seen that the Transportation Code itself contemplates that municipalities will often have a role in establishing and locating certain portions of the statewide transportation system, and the legislature has directed that a policy of cooperation and coordination between state and local government prevail in such instances. [It should also be noted in this connection that Section 334.11, Florida Statutes (1983), which previously contained strong "delegated powers" language supportive of the DEPARTMENT's claim of absolute authority in locating state roads, was repealed by the legislature in 1984.] Similarly, certain provisions in the Local Government Compre-

hensive Planning Act reflect a legislative recognition that local governments may have a role to play in connection with the planning of particular state roads or bridges. For example, Section 163.3161(4) provides that it is the intent of the statute to encourage and assure coordination between state and local levels of government in planning and development activities. Section 163.3171 requires local governments to adopt comprehensive plans for areas within their jurisdiction, and Section 163.3177(6)(b) requires that such plans contain

> A traffic circulation element consisting of the types, locations, and extent of existing and proposed major thoroughfares and transportation routes. . . .

Local comprehensive plans are also required to contain a "coordination element" to improve their compatibility with regional and state comprehensive plans, § 163.3177(4)(a), Fla. Stat. (1985), and the state comprehensive plan is likewise required to be compatible with local plans. § 163.3177(9)(h), Fla. Stat. (1985). See also, § 339.155(2)(e), Fla. Stat. (1985) (in developing statewide transportation plan, the DEPARTMENT is required to consider consistency with regional and local comprehensive plans); § 339.155(5), Fla. Stat. (1985) (requiring the DEPARTMENT to

institute planning process so that major transportation facilities will function as integral part of overall system); § 163.3204, Fla. Stat. (1985).

One means of achieving such coordination is by allowing state-government-level review of proposed local comprehensive plans prior to such plans being finally adopted into law. §§ 163.3184, 163.3204 Fla. Stat. (1985). However, once adopted, a local comprehensive plan is to be given controlling effect with regard to all subsequent development in the area subject to the comprehensive plan. §§ 163.3194, 163.3201, Fla. Stat. (1985).

More will be said about the Comprehensive Planning Act in connection with Respondent's discussion of the issue next following. However, the point here is that insofar as various statutes recognize the possibility that local governments may regulate road building in a manner requiring cooperation with state-level agencies, such statutes undermine the preemption argument upon which the DEPARTMENT relies in support of its alleged absolute and exclusive authority to determine the location of the bridge involved in this case. The DEPARTMENT's attempt to characterize the statutory grants of authority to local governments to participate

in the road-location process as pertaining only to the lowest level of roads in a stratified hierarchy, is contradicted by the statutory references to cooperation and coordination, since such concepts would be irrelevant if the legislature intended only to authorize each level of government to operate without restriction in its particular sphere of influence.

The DEPARTMENT's argument in favor of its absolute and unbridled discretion would require that this Court grant excessive weight to the statutes on which the DEPARTMENT relies in support of its contention, while completely disregarding those contrary statutes which indicate that municipalities and other local governmental entities have a role to play in the establishment of state roads and bridges. This Court should decline the DEPARTMENT's invitation to thus overemphasize certain statutes while ignoring others. Instead, the Court should apply the familiar principles which dictate that all statutes should be construed so as to have a purpose and effect, where possible, Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962); Tyson v. Lanier, 156 So.2d 833 (Fla. 1963), and that statutes relating to the same persons or things, or classes thereof, should be regarded as in pari materia

and construed together. Miami Dolphins Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981); Alachua County v. Powers, 351 So.2d 32 (Fla. 1977). Application of such principles to the instant case requires that recognition be given to all the various statutes pertaining to road location, and that the DEPARTMENT's preemption argument accordingly be rejected.

II. THE DEPARTMENT DOES NOT HAVE 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.

While the Fourth District Court of Appeal was correct in rejecting the DEPARTMENT's claim of absolute power in connection with the decision of where to relocate the bridge, and in holding that OCEAN RIDGE's comprehensive plan was entitled to some weight in connection with that determination, Respondent submits that the District Court nevertheless did not go quite far enough, and erred in failing to accord to the comprehensive plan as much weight as it deserved. Respondent respectfully submits that the correct rule of law to be applied in this case is essentially that

which was adopted by the hearing officer, i.e., that OCEAN RIDGE's comprehensive plan is entitled to controlling weight, and precludes the proposed relocation of the bridge as a matter of law, due to inconsistencies between that proposed relocation and the terms of the comprehensive plan.

The hearing officer's reasoning on this point is set forth in the Recommended Order, (R. 276-284) where the hearing officer, after making factual findings to the effect that the proposed relocation of the bridge would be inconsistent with OCEAN RIDGE's comprehensive plan (R. 279-280), opined:

> 2. In 1975, the Legislature enacted the Local Government Comprehensive Planning Act (Planning Act), §§163.3161-163.3211, Florida Statutes (1983). Section 163.3161, specifies the intent and purposes of the statute, which include:
>
> > (2) In conformity with and in furtherance of, the Florida Environmental Land and Water Management Act of 1972, Chapter 380, it is the purpose of this act 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.
> >
> > (3) It is the intent of this act that its adoption is necessary so that local governments can

preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions. Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; prevent the overcrowding of land and avoid undue concentration of population, facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.

* * *

(5) It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.

* * *

(7) The provisions of this act in their interpretation and application are declared to be the min-

> imum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state. (e.s.)

Under this law, local government comprehensive plans have binding legal effect. After a local government adopts a comprehensive plan under this statute, "all development undertaken by . . . governmental agencies in regard to land covered by such plan or element [of the plan] shall be consistent with such plan or element as adopted." § 163.3194(1), Fla. Stat. (1983).

"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 or appearance of any structure or land, or the dividing of land into three or more parcels.
>
> * * *
>
> (3) The following operations 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

t h e b o u n d a r i e s o f t h e right-of-way.

"Government agencies," as defined in the statute, include state agencies such as the Department. § 163.3164(8)(b), Fla. Stat. (1983).

3. Application of the Planning Act compels the granting of petitioners' "Motion for Summary Recommended Order." The facts necessary to rule on the motion are undisputed and, except for portions of the local comprehensive plan, are contained in the "Statement of Facts" filed by the Department.

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.

* * *

No bridge or road exists at the proposed Northeast Second Avenue site; and the bridge, (with approach road) cannot be built without first acquiring a new

> right-of-way. Hence, the bridge (with approach road) cannot be considered an "improvement" to an existing road or bridge within meaning of the Section 380.04(3)(a) exemption.
>
> The project is subject to the self-enforcing mechanism of the Planning Act. The bridge, as proposed, is clearly inconsistent with the controlling local comprehensive plan. Accordingly, the "Motion for Summary Recommended Order" is granted and the Department should be foreclosed from proceeding with the project.

(R. 281-284). The logic of the hearing officer's literal interpretation of the Comprehensive Planning Act is readily apparent. (Indeed, an additional provision of the Act which further supports the hearing officer's view, although not cited by him, is Section 163.3164(4), which expressly includes governmental agencies within the definition of "developers" subject to comprehensive plans.) Moreover, the persuasiveness of the "plain meaning" approach used by the hearing officer is strengthened even further when it is recognized that the legislature, while amending certain portions of the Comprehensive Planning Act in 1985, did not alter the Act in any way that would affect the correctness of the hearing officer's construction of the Act.

The DEPARTMENT does not appear to dispute the logic or literal accuracy of the hearing officer's construction of the Comprehensive Planning Act, but instead contends that OCEAN RIDGE's comprehensive plan cannot be deemed controlling, since such a ruling would be inconsistent with the DEPARTMENT's alleged "absolute" and "exclusive" power to establish and locate state roads and bridges. In this connection, the DEPARTMENT principally relies upon Sections 163.3161(2), 163.3211 and 163.3161(4) as indicating that the Comprehensive Planning Act was not intended to alter the "traditional" allocation of road-establishing power between the DEPARTMENT and local governmental entities.

However, as pointed out above, the DEPARTMENT's claim of an entitlement to the exclusive and absolute right is not supported by existing case law or the current statutes of this state. Even in the absence of the Comprehensive Planning Act, municipalities would have the right to exert some voice in the location of state roads and bridges within their jurisdiction, a process in which they are required to cooperate with the DEPARTMENT. Thus, the DEPARTMENT's reliance on particular portions of the Comprehensive Planning Act as indicative of a limited purpose behind the Act is

misplaced, since municipalities would have the right to participate in the road-location process even in the absence of the Comprehensive Planning Act.

The Comprehensive Planning Act was admittedly not intended to create new powers in municipal governments, nor does it have this effect. Instead, the Act merely expands upon and strengthens a municipality's pre-existing power to participate in the road-locating process by providing that a comprehensive plan, once adopted, will control subsequent development within the municipality. § 163.3194, Fla. Stat. (1985). It should be noted that the Act neither alters the cooperative nature of this process nor gives exclusive power to locate roads to local governments. Instead, the Act provides for evaluation and review of proposed local comprehensive plans by state-level agencies prior to the adoption of such local plans. § 163.3184, Fla. Stat. (1985). See also, § 163.3204, Fla. Stat. (1985). Thus, the requirement for cooperation and coordination between the DEPARTMENT and local governments survives the adoption of the Act, although such cooperation must occur within the framework of the Act.

However, in suggesting that a state agency cannot be constrained by a local comprehensive plan, once

adopted, the DEPARTMENT ignores the plain language of the statute, which specifically includes state agencies within the definition of "governmental agencies," § 163.3164(9)(b), Fla. Stat. (1985), and explicitly states that governmental agencies cannot undertake development in a manner inconsistent with a comprehensive plan. § 163.3194, Fla. Stat. (1985). To the extent of any conflict between Chapter 163 and the provisions of the Transportation Code on which the DEPARTMENT relies, Chapter 163 must control. § 163.3211, Fla. Stat. (1985). Respondent submits, however, that there is in fact no such conflict, since the DEPARTMENT's powers to regulate the location of state roads and bridges (the existence of such powers are not denied) can be fully exercised consistently with, and within the procedural framework of, the Comprehensive Planning Act. There is no necessary inconsistency between saying that municipalities have the power to prohibit the location of state roads or bridges within certain portions or corridors of the municipality, while at the same time reserving to the DEPARTMENT the responsibility for determining the precise location of the road or bridge from among those

which remain available, consistent with the municipal comprehensive plan.

Still, in the instant case, where the DEPARTMENT failed to exercise its power to influence the contents of OCEAN RIDGE's comprehensive plan, that plan, once adopted, must be accorded the weight given it by the Act. Thus, the District Court of Appeal should have adopted the view espoused by the hearing officer, and held that the proposed bridge relocation was precluded as a matter of law by virtue of inconsistency with the plan (although the DEPARTMENT remained primarily responsible for deciding where the bridge should be routed, from those areas remaining available).

In closing its discussion on this issue, Respondent would note that the contention expressed in the Amicus Curiae brief of the City of Boynton Beach (pp. 18-19) regarding the asserted ineffectiveness of the OCEAN RIDGE plan because of its alleged nontimely adoption, is without merit. The legislature, as part of its 1985 amendments to the Comprehensive Planning Act, extended the deadlines for adoption of local comprehensive plans, § 163.3167(2), Fla. Stat. (1985), and also validated those plans which might have previously been invalid by virtue of untimeliness. § 163.3167(6),

Fla. Stat. (1985). Thus, the OCEAN RIDGE comprehensive plan involved in this case is valid, and is entitled to the substantial weight accorded it by statute.

III. THE PROCEDURAL STANDARDS EMPLOYED IN THE CASE AT BAR ARE NOT SUFFICIENT TO JUSTIFY THE DEPARTMENT'S DECISION ON THE MERITS.

Respondent believes it is helpful to briefly characterize the basis of the District Court's decision below prior to addressing the procedural issue certified by the District Court, insofar as the DEPARTMENT has misstated both the nature of this issue and the holding below.

Both the hearing officer and the DEPARTMENT had held that the case sub judice was subject to being decided on the basis of the agreed-upon facts [which were "found" by the hearing officer in the Recommended Order (R. 279-280)], since both viewed this case as turning primarily on a question of law. Thus, the hearing officer ruled (in accordance with Respondent's position) that the inconsistency between the proposed bridge relocation and the OCEAN RIDGE comprehensive plan was alone a sufficient ground for barring the relocation. Since, according to this view, it was beyond the DEPARTMENT's power to order the relocation

in any case, it was unnecessary to address the question of whether the facts would have supported such a relocation under a discretionary standard.

The DEPARTMENT, on the other hand, took an almost diametrically opposed view of the case, but still viewed it as involving a question of law. According to the Final Order rendered by the DEPARTMENT, its plenary and absolute power to establish and locate state roads entitled it to proceed with the proposed relocation regardless of the facts of this case. Since the DEPARTMENT felt that consideration of the facts was not necessary in order to uphold its decision to relocate the bridge, no such consideration was attempted.

The District Court, on the other hand, viewed the result in this case as depending on the facts involved, since the DEPARTMENT was characterized as having a discretionary authority to locate the bridge, a discretion which was capable of being abused depending on the particular facts involved. Essentially, the District Court agreed with the DEPARTMENT as far as holding that the DEPARTMENT had the principal authority to locate the bridge and that the DEPARTMENT was not conclusively bound by the OCEAN RIDGE comprehensive plan. However, the District Court disagreed with the

DEPARTMENT's claim that the DEPARTMENT possessed absolute and unbridled power.

Since, in the District Court's view, the correctness of the decision to relocate the bridge was to be determined under an abuse-of-discretion standard, and since the facts upon which the exercise of the DEPARTMENT's discretion depended had never been "found," the District Court held that a remand was required so that the hearing officer could make factual findings in accordance with Section 120.57(1), Florida Statutes (1985). Before ordering such a remand, the District Court briefly examined the "record" (to the extent that it existed--in the form of the DEPARTMENT's own internal files) for the purpose of determining whether the failure to make factual findings constituted reversible error, and concluded that it did, insofar as the informal record was susceptible to conflicting inferences and findings of fact and therefore did not mandate a ruling in the DEPARTMENT's favor. The District Court did not "reweigh the evidence," as the DEPARTMENT suggests, but instead merely held that there were facts which would support a decision either for or against the DEPARTMENT, so that a remand was required in order that the facts might be determined in accord-

ance with the scheme established by the Administrative Procedure Act.

When the District Court's decision is viewed in the proper factual and procedural context (and assuming the District Court's view regarding the discretionary nature of the DEPARTMENT's powers is accepted), it is clear that the District Court was correct in holding that the fact-finding procedures employed in the instant case failed to comply with the requirements of the Administrative Procedure Act.

The proposed relocation of the bridge in this case clearly constituted "agency action" within the meaning of the Administrative Procedure Act, Section 120.52(2), Florida Statutes (1985), and Respondent qualified as a "party" within the meaning of Section 120.52(11), Florida Statutes (1985). Thus, Respondent was entitled to a Section 120.57(1) hearing, with the procedural protections guaranteed thereby (including the right to submit evidence, to cross-examine witnesses, and to submit proposed findings, conclusions and exceptions to any recommended order). Respondent's right to a proper hearing cannot be held to have been defeated by the fact that the DEPARTMENT had previously conducted informal hearings, to which Respondent was not made

a party and which had been completed prior to the filing of the Request for Hearing which initiated the instant proceedings. (R. 23).

The DEPARTMENT does not dispute that the proceedings below failed to comply with Section 120.57(1), but instead advances several arguments regarding why the statutory procedure could not or need not have been complied with. First, the DEPARTMENT suggests that Respondent "invited" any error in the failure to make any factual findings by filing its Motion for Summary Recommended Order. Clearly, this contention is without merit. Respondent had agreed to stipulate to certain facts in connection with its motion, which was based upon a particular legal theory (the predominance of OCEAN RIDGE's comprehensive plan). This stipulation to certain facts rendered all other facts irrelevant, and thus Respondent cannot be deemed to have stipulated to the existence of other facts which became relevant only when it was determined that the DEPARTMENT's authority to locate the bridge was subject to an abuse-of-discretion standard.

In an analogous context, it has been held that even when both sides in a civil case move for an order of summary judgment pursuant to Rule 1.510, Florida

Rules of Civil Procedure, asserting the nonexistence of any material facts, such an "agreement" regarding the nonexistence of any factual dispute does not justify the entry of a summary judgment where disagreements over critical facts actually do exist. Francis v. General Motors Corp., 287 So.2d 146 (Fla. 3d DCA 1973), cert. denied, 293 So.2d 716 (Fla. 1974). Similarly, in the instant case, Respondent's willingness to seek a Summary Recommended Order on the basis of a theory that the OCEAN RIDGE comprehensive plan was controlling (and the existence of certain "undisputed" facts relevant to such a theory), cannot be deemed an "invitation" to the DEPARTMENT to dispense with any factual determination whatsoever, on the theory that the DEPARTMENT had absolute power to locate the bridge wherever it desired, regardless of the facts bearing on the reasonableness of such a decision.

The other theory on which the DEPARTMENT primarily seeks to justify the failure to make any factual findings rests on the premise that the DEPARTMENT was statutorily required to render a decision of some sort upon being presented with the hearing officer's Recommended Order, and that in light of the hearing officer's failure to make any factual findings, the

DEPARTMENT had no choice but to render a decision as a matter of law. However, the DEPARTMENT's protestations of an inability to remand the case to the hearing officer cannot serve to justify the failure to accord Respondent its statutory right to have the facts in this case determined by the hearing officer.

Other agencies subject to the Administrative Procedure Act have previously raised arguments similar to that raised here by the DEPARTMENT, in an attempt to avoid the statutory requirement that agencies accept factual findings by hearing officers where supported by competent substantial evidence. Thus, it has been asserted that where a hearing officer fails to make factual findings due to a legal view of the case which would render such findings irrelevant, and where the agency properly rejects the hearing officer's erroneous legal conclusions, thus making such factual findings necessary, the agency should be free to itself determine the disputed facts rather than remand to the hearing officer. However, the courts have consistently rejected such agency attempts to bypass the statutory allocation of the fact-finding function, holding that the agency in such cases should remand the case to the hearing officer, even though the factual void may have

been created by the hearing officer's erroneous legal conclusions in the first place. Cohn v. Dep't of Professional Regulation, 477 So.2d 1039 (Fla. 3d DCA 1985); Gentile v. Dep't of Professional Regulation, 448 So.2d 1087 (Fla. 1st DCA 1984); cf., Turlington v. Ferris, ___ So.2d ___, 11 F.L.W. 2090 (Fla. 1st DCA, Oct. 2, 1986).

Thus, in the instant case, the hearing officer's belief that the dispute could be resolved on the basis of the inconsistency with the comprehensive plan alone cannot serve to dispense with the necessity of having the hearing officer now decide whether the facts support the DEPARTMENT's exercise of its discretionary authority, in light of the District Court's determination that the DEPARTMENT's authority is to be judged by such a discretionary standard.

As its final line of argument, the DEPARTMENT appears to assert that it did not have to comply with the Administrative Procedure Act at all, since the instant dispute involves "policy considerations" rather than factual disputes. The flaw in this argument is that although policy considerations may indeed be involved in this case (to the extent that the DEPARTMENT can dictate the location of the bridge,

subject to review only under an abuse-of-discretion standard), there are also unresolved questions concerning the facts against which the propriety of the DEPARTMENT's actions must be judged.

The Administrative Procedure Act specifically allows an agency to reverse a hearing officer's conclusions of law. § 120.57(1)(b)(9), Fla. Stat. (1985). There also is some case authority which suggests that the substantial-evidence rule does not apply to factual issues which are infused with policy considerations. McDonald v. Dep't of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). Thus, the DEPARTMENT's contention that its decision on where to relocate the bridge should not be subject to "second-guessing" has some superficial appeal.

However, the District Court's remand for finding of further facts does not involve an invitation to engage in such "second-guessing." The District Court acknowledged that the decision on where to locate the bridge belonged to the DEPARTMENT, subject only to an abuse-of-discretion standard of review. Nevertheless, the District Court was not able to conclude based on the factual record before it, that the DEPARTMENT had not abused its discretion. The District Court believed

(and rightly so), that it was necessary that there be some findings on certain facts (such as the costs of the proposed relocation in economic, ecologic, and environmental terms, the alternatives available, and perhaps the consideration that had been given to OCEAN RIDGE's expressed desires) before it could be determined whether the DEPARTMENT had abused its discretion. Thus, it is apparent that the fact-finding ordered by the District Court was intended only to provide a factual reference point against which to measure the DEPARTMENT's exercise of its discretion, and was not intended to appropriate that discretion to the hearing officer, the District Court, or anyone else.

In short, the District Court correctly held that the procedures employed by the DEPARTMENT in this case woefully failed to satisfy its obligations under the Administrative Procedure Act. To allow agencies to engage in such procedures would effectively eliminate the protections the Act affords citizens against administrative arbitrariness, a result which this Court should not tolerate.

CONCLUSION

For the foregoing reasons, this Court should hold that as a matter of law the comprehensive plan adopted by OCEAN RIDGE precluded the proposed relocation of the bridge, and remand with instructions to enter an order consistent with the hearing officer's Recommended Order. In the alternative, this Court should affirm the decision of the District Court of Appeal, and hold that the OCEAN RIDGE comprehensive plan was entitled to at least some consideration in connection with the location of the bridge, and that the procedures employed by the DEPARTMENT in this case were not adequate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished by mail to: MAXINE F. FERGUSON, ESQ. and A.J.

SPALLA, ESQ., Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, Florida 32301; JAMES W. VANCE, ESQ., James W. Vance, P.A., 1615 Forum Place, Suite 200, Barristers Building, West Palm Beach, Florida 33401; J. MICHAEL HAYGOOD, Haygood & Williams, P.A., 1675 Palm Beach Lakes Boulevard, Suite 905, West Palm Beach, Florida 33401; HUGH MacMILLAN, JR., ESQ., Hewitt & MacMillan, P.A., 4440 PGA Blvd., Suite 201, Palm Beach Gardens, FL 33410; and JAMES BRINDELL, Gunster, Yoakley, Criser & Stewart, P.A., 777 S. Flagler Dr., Suite 500, West Palm Beach, Florida 33401, this 6th day of November, 1986.

Resp Br
Ex of Ocean Ridge

NDOLPH
or Respondent
Town of Ocean Ridge