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SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 69,035

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DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

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

Respondents.

INITIAL BRIEF OF PETITIONER DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

For purposes of this brief, the following shall apply:

Petitioner, Department of Transportation, shall be referred to as the "DEPARTMENT";

Respondents, Dr. and Mrs. Augusto Lopez-Torres, shall be referred to as "LOPEZ-TORRES";

Respondent, TOWN OF OCEAN RIDGE, shall be referred to as "OCEAN RIDGE";

Respondent, AUDUBON SOCIETY OF THE EVERGLADES, shall be referred to as "AUDUBON SOCIETY";

Respondents, LOPEZ-TORRES, OCEAN RIDGE, and AUDUBON SOCIETY, shall be referred to collectively as "Respondents".

"R" refers to Record on Appeal followed by appropriate page number; and

"A" refers to the Appendix accompanying this Brief.

STATEMENT OF THE CASE

On March 26, 1984, LOPEZ-TORRES, filed a Request for Administrative Hearing with the DEPARTMENT which asserted that as owners of certain real property LOPEZ-TORRES were adversely affected by the DEPARTMENT's decision to construct a bridge in Boynton Beach, Florida. (R: 23) The DEPARTMENT transferred the case to the Division of Administrative Hearings (R: 24) and a hearing was scheduled for August 30-31, 1984. (R: 32) The issues to be addressed were "whether respondents proposed construction of a new bridge in Boynton Beach, Florida will destroy the quality of the residential property of petitioner and destroy environmentally sensitive property immediately adjacent to petitioner's residence". (R: 32)

By order dated July 3, 1984, OCEAN RIDGE was permitted to intervene, claiming that the construction of the new bridge in Boynton Beach would destroy the quality of life in OCEAN RIDGE, destroy environmentally sensitive property adjacent to OCEAN RIDGE, and adversely affect certain property owned by OCEAN RIDGE. (R: 33, 36) Also, over the DEPARTMENT's objections, (R: 79-80), the AUDOBON SOCIETY'S petition to intervene was granted on August 31, 1984. (R: 85)

On August 20, 1984, LOPEZ-TORRES filed a Motion for Summary Recommended Order prohibiting the DEPARTMENT from undertaking any development inconsistent with the Comprehensive Plan of OCEAN RIDGE. (R: 37-75) By stipulation, the parties agreed that the August 30-31, 1984 hearing would address only the Motion for Entry of Summary Recommended Order made upon an issue of law. (R: 76)

At the hearing held August 30, 1984, no evidence was adduced; however, the Hearing Officer ordered the parties to submit, within ten days, a written description of the bridge project, any additional portions of OCEAN RIDGE'S Comprehensive Plan and additional memoranda of law. (R: 18-21) Counsel for LOPEZ-TORRES suggested the DEPARTMENT draft the requested description of the project. (R: 21) Accordingly, the DEPARTMENT submitted a Statement of Facts outlining the Boynton Beach Bridge Project with attached exhibits supporting such facts, (R: 92-275) to which no objection was made by Respondents.

The Recommended Order of the Hearing Officer ruled in favor of Respondents concluding that the DEPARTMENT's construction of the Boynton Beach Bridge was inconsistent with and therefore precluded by OCEAN RIDGE'S Comprehensive Plan. (R: 276-284) Prior to the entry of a final order, the DEPARTMENT received numerous ex parte communications which were made a part of the record pursuant to §120.66, Fla. Stat. (1983). (R: 287-302) Included in such communications were letters from

the President of the Greater Boynton Beach Chamber of Commerce and the City Manager of Boynton Beach. (R: 289; 296-8)

After reviewing the record,the Secretary of the Department entered a Final Order which adopted the findings of fact set forth in the Recommended Order, made the additional finding that the Comprehensive Plan of the Town of Boynton Beach provides for the relocation of the bridge, and rejected the Hearing Officer's conclusions of law. (R: 303-317)

Notice of Appeal of the Final Order was filed by LOPEZ-TORRES, OCEAN RIDGE and the AUDUBON SOCIETY in the District Court of Appeal, Fourth District. (R: 321) The issues before the Fourth District were: 1) whether the Comprehensive Planning Act can be construed in pari materia with the State Transportation Code to give significant legal effect to both; 2) whether the DEPARTMENT's proposed Boynton Beach Bridge, with approach road, is inconsistent with and therefore precluded by the local Comprehensive Plan of the Town of Ocean Ridge; and, 3) whether balancing of interests is the appropriate legal test in cases such as this where there exists a conflict between transportation decisions and plans of state and local governmental entities. LOPEZ-TORRES, OCEAN RIDGE and THE AUDUBON SOCIETY stated in their Initial Brief below that the facts were not in dispute.

Without addressing the issues set forth by the parties, the Fourth District reversed the Final Order and remanded for a

full evidentiary hearing pursuant to §120.57(1), Fla. Stat. (A: 1-11) The grounds for the Fourth District's reversal were that: 1) the Respondents were denied due process since they never received a full hearing on the merits; and, 2) by applying the "right-for-the-wrong-reason" test, the court reevaluated the evidence and determined that the DEPARTMENT's decision to relocate the Boynton Beach bridge was clearly erroneous and constituted an abuse of discretion. (A: 1-11) Additionally, the Fourth District certified three questions to this Court, which are renumbered for the purposes of this Brief as follows: (A: 11-12)

1. Has the Legislature preempted municipalities from exercising any control over the establishment of state roads and bridges?

2. 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?

3. Were the procedural standards employed in the case at bar sufficient to justify the DOT's decision on the merits?

Judge Anstead filed a dissent stating that there was no demonstration that the DEPARTMENT acted outside of its authority, nor had the DEPARTMENT "failed to comply with the relevant statutory scheme authorizing it to plan for and construct the bridge in question." (A: 13-15)

The Court accepted jurisdiction based upon the DEPARTMENT's Notice to Invoke Discretionary Jurisdiction dated July 9, 1986.

STATEMENT OF THE FACTS

The City of Boynton Beach lies on the west side of the Intracoastal Waterway in Palm Beach County, Florida. Directly to the east, across the Intracoastal Waterway, lies the Town of Ocean Ridge. The two municipalities are joined, in part, by an antiquated, two-lane, 49-year-old bascule bridge spanning the Intracoastal Waterway at Ocean Avenue. (R: 165, 167, 174)

In August of 1977, the DEPARTMENT and Federal Highway Administration (FHWA) published a Final Negative Declaration (FND) for the replacement of the existing bridge with a new four lane bridge on State Road 804 (Northeast Second Avenue). (R: 165) Presently, traffic exiting from I-95 proceeds east down Northeast Second Avenue to US 1 where in order to reach A1A in Ocean Ridge, traffic must jog to the South 700 feet; turn left onto Ocean Avenue, and then proceed east across the Intracoastal Waterway via the existing two-lane bridge. (R: 169) The proposed bridge on Northeast Second Avenue would eliminate this jog by allowing traffic to proceed directly across the Intracoastal Waterway via a new four-lane bridge. (R: 169)

Prior to the publication of the FND, the DEPARTMENT held a Highway Corridor Location and Design Hearing in accordance with the Federal Aid Highway Act, 23 U.S.C. 101 and §334.211, Fla. Stat. (1975). (R: 96-162) At the hearing, the Town Manager of Ocean Ridge and residents of both Ocean Ridge and Boynton Beach expressed support for the reconstruction of the bridge at its

existing location. Other residents of both Ocean Ridge and Boynton Beach expressed support for the relocation of the bridge to Northeast Second Avenue. (R: 96-162)

Since June, 1976, OCEAN RIDGE has opposed the relocation of the bridge to Northeast Second Avenue and in 1982 adopted a local comprehensive plan which in part contains a recommendation to "continue to oppose construction of the Second Avenue bridge in an effort to discourage increased traffic congestion and safety hazards in the Town." (R: 60)

On the other hand, the City of Boynton Beach has long supported the construction of the bridge at the new Northeast Second Avenue location. In 1975, the City Council of Boynton Beach passed Resolution No. 75-SS which states in part:

> That the Department of Transportation of the State of Florida be and is hereby requested to take immediate action to provide for a new high-silhouette bridge over the Intracoastal Waterway, continuing the approach to the bridge eastward from the juncture of U.S. Highway #1 and State Road #804 to A1A as aforesaid, in the City of Boynton Beach.

(R: 228-9) In 1977, Boynton Beach adopted a local comprehensive plan which calls for the relocation of the Ocean Avenue bridge to Northeast Second Avenue. (R: 296-298) Additionally, the relocation of the bridge to Northeast Second Avenue would be consistent with Palm Beach County's comprehensive plan. (R: 298)

In August, 1983, after continual local controversy over the bridge, the DEPARTMENT undertook a study to determine whether

a replacement bridge could be designed and built at the Ocean Avenue location. (R: 93-94) The final result of the study was a Value Engineering Report dated March, 1984 (R: 266-274) which concluded that although a four-lane bridge could feasibly be built on the existing alignment, in view of all the circumstances and compromises in engineering necessary to do so, the study recommended that the bridge be relocated to Northeast Second Avenue. After reviewing the Value Engineering report, the Secretary of the Department by memo dated March 16, 1984, reaffirmed the DEPARTMENT's decision to relocate the bridge to Boynton Beach Boulevard (formerly Northeast Second Avenue). (R: 275)

SUMMARY OF THE ARGUMENT

Historically, municipalities in Florida possessed no authority to exercise control over roads and bridges within the State Highway State, even though such roads extended into or through their incorporated areas. The enactment of the "Municipal Home Rule Powers Act" does not alter a municipality's lack of authority over the State Highway System because the Transportation Code, by specifying the responsibilities of the DEPARTMENT, counties, and municiaplities, clearly establishes a stratified structure of control under which the DEPARTMENT has the plenary power to designate, plan, construct and maintain the State Road System. Thus the Transporatation Code preempts municipal regulation of roads and bridges within the State Highway System.

A careful reading of the Local Government Comprehensive Planning and Land Developemnt Act (hereinafter referred to as the "Act") in pari materia with the Transportation Code reflects that the Act does not divest the DEPARTMENT of its plenary power to designate, plan, construct and maintain the State Highway System. Furthermore, the purpose of the Act is to "utilize and strengthen the existing role" of the local government entity, not create new areas of municipal authority.

No hearing on the merits was held in the instant cause since Respondent, LOPEZ-TORRES filed a Motion for Summary Recommended Order and all parties stipulated that the facts were

not in dispute. Thus the doctrine of invited err precludes remand. Additionally, at this point in the proceedings, an evidentiary hearing would be a senseless and useless formality.

The DEPARTMENT's determination to relocate the Boynton Beach bridge is not reviewable under the APA because such determination was an investigative proceeding which did not legally determine any substantial interests of the Respondents. Without any allegations that the DEPARTMENT's actions were illegal, unauthorized or failed to follow the procedural requirements set forth in the Code, remand of the instant cause would result in the hearing officer improperly substituting his judgment for that of the DEPARTMENT which is vested by law with the authority to designate, plan, construct and maintain highways and bridges within the State Highway System.

ARGUMENT

POINT I

THE TRANSPORTATION CODE PREEMPTS MUNICIPALITIES FROM EXERCISING ANY CONTROL OVER THE ESTABLISHMENT OF STATE ROADS AND BRIDGES.

The "Municipal Home Rule Powers Act" was passed by the Florida Legislature in 1973 and is codified at §166.011 thru §166.045, Fla. Stat. (1985). Although granting municipalities the power to "enact legislation concerning any subject matter upon which the state Legislature may act," the Legislature limited this broad grant by the exceptions set forth in §166.021(3)(a)-(d). Specifically subsection c excepts from municipal control "(a)ny subject expressly preempted to state or county government by the constitution or by general law." This exception is known as the preemption doctrine and is a fundamental principle of municipal law since municipalities, as creatures of the legislature, are inferior in status and subordinate to the laws of the state. 5 McQuillan, Municipal Corporations, §15.20 p. 73 (3rd ed. 1981). In Tribune Co. v. Canella, 458 So.2d 1075, 1077, (Fla. 1984) this Court recognized the preemption doctrine in agreeing with the dissent below that:

> Under (the preemption) doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme...

Consequently, whether a particular field has been precluded from local regulation requires an analysis of the relevant state statutes and of the facts and circumstances under which the statutes were intended to operate. 6 McQuillan, supra at §21.34, p. 250-1, sets forth the following questions as pertinent in analyzing whether a particular field has been preempted by the state:

> Does the ordinance conflict with state law; is the state law, expressly or implied, to be exclusive; does the subject matter reflect a need for uniformity; is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal to the accomplishment and execution of the full purposes and objectives of the legislature. In some instances, the very nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessity to serve the state's purpose or interest.

In the instant cause, the relevant state statutes are those known as the Florida Transportation Code (hereinafter referred to as the "Code") (Chapters 334-339, 341, 348, and 349 and ss. 332.003-332.007, 351.35, 351.36, 351.37, and 861.011). §334.01, Fla. Stat. (1985). The Code provides for a comprehensive statewide transportation system under the supervision and control of the Department of Transportation. In pertinent parts, it provides as follows:

CHAPTER 334 TRANSPORTATION ADMINISTRATION

§334.03 Definitions of words and phrases. -

(3) "City street system." - The city street system of each municipality consists of all local roads within that municipality,

and all collector roads inside that municipality, which are not in the county road system.

* * * * *

(6) "County road system." - The county road system of each county consists of all collector roads in the unincorporated areas and all extensions of such collector roads into and through any incorporated areas, all local roads in the unincorporated areas, and all urban minor arterial roads not in the State Highway System.

* * * * *

(19) "State Highway System." - The State Highway System consists of the following:

(a) The interstate system;
(b) All rural arterial routes and their extentions into and through urban areas;
(c) All urban principal arterial routes; and
(d) Those urban minor arterial routes on the existing primary road system as of July 1, 1977, with the addition of segments of such routes which lie between and connect those parts of the routes previously included in the primary system and which are necessary to provide continuity to the system...

* * * * *

(21) "State Road." - All streets, roads, highways, and other public ways open to travel by the public generally and dedicated to the public use, according to law or by prescription, and designated by the department, as provided by law, as parts of the State Highway System.

* * *

§334.035 Purpose of transportation code. - 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. This code is necessary for the protection of the public safety and general welfare and for the preservation of all transportation facilities in the state...

* * * * *

§334.044 Powers and duties of 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 multi-modal facilities.

* * * * *

(6) To acquire, by the exercise of the power of eminent domain as provided by law, all property or property rights, whether public or private, which it may determine are necessary to the performance of its duties and the execution of its powers.

* * * * *

(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 to construct, maintain, and operate such facilities.

* * * * *

(21) To cooperate with and assist local governments in the development of a statewide transportation system and in the development of the individual components of the system.

* * * * *

§334.046 Department program objectives. -

(1)(b) To meet the annual need for resurfacing of the State Highway System, including repair and replacement of bridges on the system...

* * * * *

CHAPTER 335 STATE HIGHWAY SYSTEM

§335.01 Designation and systematization of public roads. -

(1) All roads which are open and available for use by the public and dedicated to the public use, according to law of by prescription, are hereby declared to be, and are established as public roads.

(2) Public roads shall be divided into four systems:

(a) The State Highway System;
(b) The State Park Road System;
(c) The county road system; and
(d) The city street system.

* * * * *

§335.02(1) 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...

* * * * *

§335.04 Functional classification of roads; designation of state and local responsibilities. -

(1)(a) The department has the responsibility of data collection for planning and functional classification purposes and shall evaluate and functionally classify all the public roads in the state. Each road shall be assigned to the appropriate public road system.

§335.09 Uniform erection and maintenance of traffic control devises. -

The department shall erect and maintain a uniform system of signs, signals, markings, and other traffic control devices...on the State Highway System...

* * * * *

§335.10 Regulation of vehicles operating on, certain uses of, and certain traffic on State Highway System; civil liability for damage to system road. -

(1) The department shall prescribe regulations for vehicles operating on the State Highway System.
(2) The department shall prohibit any use of, and any traffic on the State Highway System that might damage or destroy the same.

* * * * *

CHAPTER 336 COUNTY ROAD SYSTEM

§336.02 Responsibility for county road system. -

The commissioners are invested with the general superintendence and control of the county roads and structures within their respective counties, and they may establish new roads and change and discontinue old roads and keep the roads in good repair in the manner herein provided...

* * * * *

CHAPTER 337 CONTRACTING; ACQUISITION, DISPOSAL, AND USE OF PROPERTY

§337.11(1) The department shall have authority to enter into contracts for the construction and maintenance of all roads designated as part of the State Highway System and the State Park Road System or of any roads placed under its supervision by law...

* * * * *

§337.29(1) Title to all roads designated in the State Highway System or State Park Road System shall be in the state, unless otherwise provided herein.

Thus, the Code creates a carefully stratified structure of control over the location, designation, construction and maintenance of the highways, roads and streets throughout

Florida. It specifies the respective responsibilities of the state, acting through the Department, and each of the levels of local government - county and municipality.

As the Code reflects, it is the role of the Department to locate, designate, construct and maintain the State Highway System. The counties, on the other hand, have the general supervision and control of the county roads within their respective counties. Thus, by elimination, the only roads over which the municipalities may have jurisdiction are those within the city street system, which by definition are not within either the county or state systems.

That the Legislature preempted municipalities from exercising any control over the establishment of state roads and bridges within the State Highway System was further made clear by this Court in Webb v. Hill, 75 So.2d 596 (Fla. 1954):

> The board 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 Road Department by the Legislature.

Id. at 599. The enactment of the "Municipal Home Rule Powers Act" does not alter the Department's authority to locate, designate, construct and maintain the State Highway System as evinced by the express language of the Code.

When faced with a similar issue, although between county and city, the Illinois courts held that a city had no power to stop the enlargement of a county road even though such road ran through the city. City of Highland Park v. County of Cook, 344 N.E. 2d 665 (Ill. App. 1975). As noted by the court:

> Any other result would produce chaos and to permit any municipality of over 500 persons to prevent an improvement to an existing County highway where, as here, it is being performed by a County with all necessary approvals from the State would violate and jeopardize the systematic structured approach to the designations, construction and maintenance of the State Highway Code.

Id. at 672.

To conclude, it is obvious that the Legislature intended a demarcation between the State Highway System and the county and municipal road systems. It is also apparent in enacting the Code that the Legislature intended that the Department have jurisdiction over those highways designated as part of the State Highway System regardless of whether such highways are outside or inside municipalities. The very nature of the pervasive regulatory scheme found in the Code demands that the exclusive regulation of the State Highway System lie with the Department in order to achieve the development of an integrated, balanced, statewide transportation system.

POINT II

THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT DOES NOT DIVEST THE DEPARTMENT's AUTHORITY TO ROUTE A STATE ROAD BRIDGE THROUGH OR INTO A MUNICIPALITY.

As discussed above, the Legislature in enacting the Code granted the Department the plenary and exclusive power to designate, plan, construct and maintain the State Highway System. Local governments, on the other hand, are required to develope and adhere to comprehensive planning programs pursuant to the Local Government Comprehensive Planning and Land Development Act (hereinafter referred to as the "Act") (codified at §163.3161 thru §163.3215, Fla. Stat.). §163.3161(1) Fla. Stat. (1985). The issue presented in the instant cause is the relationship between the Department's statewide planning of the State Highway System, in particular State Road 804, and the comprehensive planning activities of OCEAN RIDGE. A careful reading of the Act in pari materia with the Code reflects that the Act does not divest the DEPARTMENT of its plenary power to plan and construct the State Highway System.

Of primary importance in interpreting a statute is the purpose for which it was enacted. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). The Legislature states the purpose of the Act in §163.3161(2):

> In conformity with and in furtherance of, the purpose 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 power of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development. (emphasis added)

Respondents interpret the Act as overriding the DEPARTMENT's planning authority over the State Highway System, relying in particular on §163.3161(5), Fla. Stat. (1985) which states, in part, 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." Construing this phrase of the Act as prohibiting the planning and construction of a state road or bridge when inconsistent with a local comprehensive act, would not "utilize and strengthen the existing role, processes, and powers" of a municipality, but would confer on municipalities a power never before possessed by a local government in Florida. (See Point I above) Clearly, such an enlargement of municipal powers should not derive from the implication of one phrase of the Act especially when such implication does not further the stated purpose of the Act.

Rather the phrase "public or private development" should be construed to include only those activities defined in §380.04(1), Fla. Stat. (1985) which traditionally fall under the control of a municipality. Such interpretation fulfills the express purpose of the Act and allows the DEPARTMENT to discharge

its duty to locate, designate, construct and maintain the State Highway System as mandated in §335.02(1), Fla. Stat. (1985). Furthermore, this interpretation does not render the Act a useless piece of legislation, but merely allows for a continuation of a logical hierarchy of authority for transportation planning.

Additional provisions in the Act also make it clear that local governments when adopting comprehensive plans are subservient to laws that pertain to State transportation planning functions and power. This proposition is most evident in §163.3211, Fla. Stat. (1985) which provides in part:

> ...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.

Section 163.3161(4), Fla. Stat. (1985) closely follows this principle and provides:

> It is the intent of this act to encourage and assure cooperation between and among municipalities and counties and to encourage and assure coordination 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. (emphasis supplied)

Moreover, §163.3177(4)(a), Fla. Stat. (1985) provides that a major objective of the local comprehensive plan is coordination with the plans of adjacent municipalities, the county, adjacent counties and the state. That section

additionally provides that the local comprehensive plan must include a statement of the relationship of the "proposed development of the area to the comprehensive plans of adjacent municipalities, the county...and to the state comprehensive plan..."

These sections from the Act interlock with provisions of the Code. First, it should be reemphasized that the DEPARTMENT is the chief planner of the State Transportation System. §334.044(1) and (13), Fla. Stat. (1985). In this capacity, the DEPARTMENT must develop a statewide transportation plan in coordination with "affected state agencies, regional planning agencies, metropolitan planning organizations, other local governmental entities, and private business." §339.155(2) and (3), Fla. Stat. (1985). Further, §339.155(2), Fla. Stat. (1985) provides in part:

> In developing the Florida Transportation Plan, the department shall take into account:
>
> (a) Future as well as present needs;
>
> (b) All possible alternate modes of transportation;
>
> (c) The joint use of transportation corridors and major transportation facilities for alternate transportation and community uses;
>
> (d) The integration of any proposed system into all other types of transportation facilities in the community;
>
> (e) Consistency with regional comprehensive plans and local government comprehensive

plans so as to contribute to the management of orderly and coordinated community development, and

(f) The total environment of the community and region including land use, entrepreneurial decisions, population, traffic patterns, traffic control features, ecology, stormwater management plans, pollution effects, aesthetics, safety, and social and community values.

Also, in developing the State plan, the DEPARTMENT is required to institute a systematic planning process "so that any major transportation facility is so planned that it will function as an integral part of the overall plan for local, regional, and state development." §339.155(5), Fla. Stat. (1985). (emphasis supplied) The process provided in this section shall:

(a) Provide the necessary framework to guide transportation planning in the state; consistent with the state comprehensive plan...

(b) Identify statewide and local transportation needs and issues by documenting transportation system conditions and projecting future mobility demands. In identifying such needs and issues, consideration shall be given to the condition of existing facilities and and services, as well as to new facilities and services.

(c) Apply appropriate methods to evaluate transportation facilities and services. Such transportation facilities and services shall be planned in a manner to achieve an effective balance of modes of transportation which are consistent with state transportation needs and issues.

* * *

(e) Require the department to solicit and consider recommendations from the general

public and governmental entities.

* * *

(g) Monitor ongoing planning and project implementation by the department and other governmental entities to determine compliance with, and the effectiveness of, the Florida Transportation Plan. (emphasis supplied)

Note that these sections require the Department to take all of the factors "into account" and to "consider" them. This statute does not require the Department to be bound by any one factor. The statute also requires consideration of regional comprehensive plans as well as local ones.

Furthermore, the dominant theme of §339.155, Fla. Stat. (1985) is the preeminence of the State Transportation Plan such that local transportation plans shall be developed consistent with that plan to the maximum extent feasible. §339.155 4(c), Fla. Stat. (1985). Consistent with this theme is §339.155(4)(b), Fla. Stat. (1985) which is especially applicable. This subsection provides:

> Upon request by local governmental entities, the department may in its discretion develop and design arterial and collector streets... which are consistent with the plans of the department for major transportation facilities. The department may render to local government entities or their planning agencies such technical assistance and services as are necessary so that local plans and facilities are coordinated with the plans and facilities of the department. (emphasis supplied)

The record fully establishes that the DEPARTMENT was in compliance with §339.155, Fla. Stat. (1985). When the DEPARTMENT was doing the bulk of its planning for the relocation of the Boynton Beach Bridge back in 1977 it was working closely with the local officials of the Palm Beach County Area. (R; 180) In fact, a Highway Corridor Location and Design hearing was held on this matter on February 9, 1977 at which officials of the Town of Ocean Ridge participated. Then, in August, 1977, the DEPARTMENT issued a Final Negative Declaration of the Boynton Beach Bridge which discusses the criteria mentioned in §339.155(2) and (5), Fla. Stat. (1985).

Meanwhile, at the time of the design hearing, the DEPARTMENT was consistent with the only local transportation plan in existence, namely the "West Palm Beach Urban Area Transportation Study" adopted by the MPO of Palm Beach County. (R: 168, 264, 297, 298) In October, 1982, after the planning stage, OCEAN RIDGE adopted their comprehensive plan calling for the construction of the bridge at the existing location. This was totally inconsistent with all other comprehensive plans in effect.

The relevant statutes from the Act and the Code all urge that the various local, county, regional and state agencies cooperate and coordinate their transportation planning with each other as much as possible. Yet, in the instant case the location of the Boynton Beach Bridge has been the source of a bitter 20

year political feud between rivaling communities on either side of the Intercoastal Waterway who have interests that are diametrically opposed to one another. The statutory authority that has previously been discussed resolves this dilemna of local conflict and stalemate by establishing a hierarchy of authority in transportation planning vesting the ultimate power over who controls designation, planning, construction and maintenance of the state highway system with the DEPARTMENT. Accord State v. Florida State Improvement Commission, 75 So.2d 1 (Fla. 1954). See also Department of Transportation v. Hanes, 448 So.2d 1130 (Fla. 1st DCA 1984) where the court interpreted §334.11, 334.03(7), 335.04(4) and 334.211 2(a)(f), Fla. Stat. (1983) as deeming the DEPARTMENT exclusively liable for the design, maintenance and operation of a stormwater drainage system on a state road in Alachua County, Florida. The court so ruled even though Alachua County was a party to the action. What is interesting is that the latter statute construed, §334.211 2(a)(f), Fla. Stat. (1983) the predecessor statute to §339.155, Fla. Stat. (1985), both of which require coordination in transportation planning between the DEPARTMENT and local governmental entities. Also, in holding the DEPARTMENT exclusively liable, the court by way of footnote 4 of the opinion recognized the DEPARTMENT's position that the above cited statutory provisions from the Code are "a grant of exclusive control of its roadways." Hanes, supra at 1132 (emphasis supplied)

If the Court determines that the Act cannot be read in pari materia with the Code because of conflict between the two, it is clear that the latter must prevail. Section 339.155 is the most specific Florida statute that deals with transportation planning. A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. Adams v. Culver, 111 So.2d 665 (Fla. 1959). The Act is definitely the more general statute when it comes to transportation planning. Therefore, the Code, being the more specific, should control.

POINT III

THE PROCEDURAL STANDARDS EMPLOYED IN THE INSTANT CAUSE ARE SUFFICIENT TO AFFIRM THE DEPARTMENT's DETERMINATION TO RELOCATE THE SUBJECT BRIDGE.

A. The Respondents were afforded due process pursuant to the APA.

Initially it should be noted that the Fourth District's finding that no record was before the hearing officer is incorrect. A review of the record reveals that what the Fourth District categorizes as the DEPARTMENT's "internal files" were actually submitted to the hearing officer prior to entry of his recommended order as exhibits attached to the stipulated Statement of Facts which was prepared by the DEPARTMENT at the request of the Respondents. Furthermore, all the parties agreed that the facts were not in dispute.

By agreeing with the Department that there were no genuine issues of material fact, Respondents agreed to allow the hearing officer to rule on its Motion for Summary Recommended Order by applying the law to the facts as stipulated; thus the doctrine of invited error precludes remand to the hearing officer for further fact finding. See Hunter v. Employers Mutual Liability Insurance Company of Wisconsin, 427 So.2d 199 (Fla. 2nd 1982). Additionally, once the hearing officer filed his recommended order with the Department, §120.59, Fla. Stat. (1985) dictates that the Department issue a final order within 90 days. The authority of the Department once it received the recommended

order is set forth in §120.57(1)(b) 9, Fla. Stat. (1985). As noted in Florida Department of Transportation v. J.W.C., Inc., 396 So.2d 778, 783 (Fla. 1st DCA 1981) the following alternatives are provided:

> (1) The agency may adopt the recommended order as the agency's final order; or (2) the agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the order...

There is no provision in the statutes or rules of procedure authorizing or permitting the Department to remand the case to the hearing officer for further evidentiary hearings.

The failure to hold a hearing on the merits in the instant case is not violative of due process. Due process does not require that a party be given a hearing on the merits in a civil matter; rather, due process requires that complaining parties be given a meaningful opportunity to be heard. Millstream Corp. v. Dade County, 340 So.2d 1276 (Fla. 3rd DCA 1977) citing Boddie v. Connecticut, 401 U.S. 371 (1971). In the instant cause, no hearing on the merits was afforded because the Respondent filed a Motion for Summary Recommended Order and stipulated that the facts were not in dispute. Thus, remanding the instant cause for an evidentiary hearing would be a senseless and useless formality since the hearing officer had before him the Statement of Facts, along with the attached exhibits. Due process does not require a hearing if such is a senseless and useless formality. N.L.R.B. v. Air Control Products of St. Petersburg, Inc., 335 F.2d 245 (5th Cir. 1964).

As noted by Judge Anstead in the dissent below, remanding the instant cause, in essence, is requiring the DEPARTMENT to start anew the entire statutory planning scheme because Respondents disagree with the wisdom of the Department's final decision to relocate the bridge. Neither the procedures of Chapter 120 nor due process require that the instant cause be remanded. Also, as noted below, the issues to be resolved on remand are not within the ambit of a §120.57 hearing nor susceptible of judicial review.

B. The issues presented in the instant cause are not suitable for determination under the APA.

The DEPARTMENT's determination to relocate the Boynton Beach bridge has traditionally been an action committed to the agency's discretion and the Legislature in enacting the APA did not intend to alter that tradition. The determination of where to locate and what to build in the way of public improvements has always presented controversy. In Florida State Improvement Commission, supra, at 4, this Court stated:

> 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. It is true with reference to court houses, schools, playgrounds, parks, and particularly, with reference to roads and bridges. The primary purpose of building roads and bridges is to serve the general public rather than a particular individual or a particular part

of a community.

The Respondent's Request for Administrative Hearing, (R: 23) and Petition for Intervention (R: 33-34; 77-78) state the following grounds for entry into the APA.

1 the Department's decision to relocate the bridge will have the effect of destroying the quality of the residential property of Respondent LOPEZ-TORRES;

2. the Department's decision to relocate the bridge will have been destructive to environmentally sensitive property immediately adjacent to LOPEZ-TORRES' property and adjacent to the corporate limits of the Respondent OCEAN RIDGE;

3. the Department's decision to relocate the bridge will have the effect of destroying the quality of life in Ocean Ridge, and;

4. the Department's decision to relocate the bridge will result in the destruction of mangroves and the lowering of water quality resulting in interference with the enjoyment of those waters and mangroves by the members of the Respondent, AUDUBON SOCIETY.

However, none of these claims meet the requirements for entry into the APA for several reasons.

First, the legislative intent in enacting Chapter 120 was to "make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state". §120.72(1)(a), Fla. Stat. (1985). The DEPARTMENT's decision to relocate a bridge is not rulemaking, nor is it an adjudicative proceeding; rather the DEPARTMENT made an investigation of the facts to be applied within the parameters of the Code and the applicable

Federal regulations concerning the location of a bridge within the state highway system. Such investigations by administrative agencies or officials are considered to be informal proceedings to obtain information to govern future agency actions and not as proceedings in which action is taken against anyone. An investigatory proceeding is not adversarial but ex parte in nature, and its purpose is to discover and produce evidence. See e.g. Township of Cedar Grove v. Sheridan, 507 A.2d 304 (N.J. 1985).

Secondly, in accord with the above, §120.57, Fla. Stat. (1985) applies only in "proceedings, in which the substantial interests of a party are determined by an agency." (Emphasis added) The decision of where to locate a bridge is not agency action that legally determines any substantial interest of the Respondents. Accord 1975 Op. Att'y Gen. Fla. 75-78 (March 6, 1975). Respondents have no more of a right to have a public bridge located in any particular area than anyone else. The fact that some of the Respondents own property which may be affected once a decision is made is not dispositive. Those rights are not the subject of a §120.57 hearing, but rather the subject of condemnation proceedings which follow. Respondents have no right to have property excepted from the DEPARTMENT's power of eminent domain simply because Respondents disagree with the relocation of the Boynton Beach Bridge.

Additionally, in conformity with the above reasoning, Respondents have failed to show how their interests are substantially affected. Although each Respondent alleges certain interests as being adversely affected, Florida law clearly provides that individual interests in one route or another is not a matter to be considered controlling. Pirman v. Florida State Improvement Commission, 78 So.2d 718 (Fla. 1955), cert. denied 349 U.S. 756 (1955); Florida State Improvement Commission, supra; Sibley v. Volusia County, 147 Fla. 256, 2 So.2d 578 (1941). Rather in the location, designation, construction and maintenance of the State Highway System, the DEPARTMENT must make an independent determination as to what is appropriate for "serving the people of the state and to assure the development of an integrated, balanced statewide transportation system." (emphasis added) §334.,035, Fla. Stat. (1985). Respondents were afforded an opportunity to express their opinions on the proposed relocation of the Boynton Beach Bridge at public hearings. The fact that the Department reached a conclusion adverse to the Respondents' is not sufficient proof of harm or prejudice nor a determination of Respondents interests sufficient for Respondents to having standing to challenge the DEPARTMENT's decision in a §120.57 proceeding.

C. Remand of the instant cause would require the hearing officer and the courts to improperly substitute their judgment for that of the DEPARTMENT where the DEPARTMENT is acting within its delegated authority.

The gravamen of the Respondents' complaints is nothing more than an expression by the Respondents of their dissatisfaction with the actions of the Department and an attempt by them to compel the Department to maintain the bridge in its present condition. Remand of the instant cause would require the hearing officer, and the courts, to substitute their judgment for that of the duly constituted authority who is vested by law with the authority to designate, plan, construct and maintain highways and bridges within the State Highway System.

In an attempt to avoid a possible future appeal, the Fourth District analyzed the instant cause on the basis of a right-for-the-wrong-reason test. (A: 4) In doing so, the Fourth District readily assumed the function of reevaluating the evidence and disapproving the relocation of the bridge. However, the law in Florida is well settled that a court may not substitute its judgment and discretion for that of an agency acting within its authority to locate and relocate highways. Pirman, supra; Florida State Improvement Commission, supra; Central and Southern Florida Flood Control District v. Scott, 169 So.2d 368 (Fla. 2nd DCA 1964).

In, Florida State Improvement Commission, supra at 3, this Court, in addressing the validation of a bond issue for maintenance and repair of a bridge, stated:

> 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 Constitution 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. (emphasis added)

In another analogous case, Scott, supra, residents of an unincorporated town filed suit for a mandatory injunction to prevent the Central and Southern Florida Flood Central District and the Lee County Commissioners from relocating a bridge. In holding that the appellants failed to state a cause of action, the Second District Court of Appeal stated:

> The duty and responsibility of weighing the injury thus occasioned against the public convenience in travel is vested in the State Road Department as to the state highway system and the Board of County Commissioners as to county roads, and their exercise of these governmental functions is limited only be the lawful exercise of their discretion. If the actions of governmental agencies do not exceed their lawful authority, the courts should not substitute their judgment for that of the governmental agencies. (cites omitted) (emphasis added)

Id. at 371.

Thus it is quite clear that a mere difference of judgment over the merits of a particular administrative action as a means of achieving a legislative objective, when the legislature has delegated the authority to make and act upon

such determination to the agency, is not judicially reviewable. As Justice Frankfurter noted in his concurring opinion in Driscoll v. Edison Light and Power Company, 307 U.S. 104, 122 (1939), such type of determination "does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment".

In the instant cause, as discussed above in Point I, the Legislature intended to vest the DEPARTMENT with broad discretion in designating, planning, constructing and maintaining the State Highway System. Judicial regulation of the Department's decisions in this area can only undermine the legislative determination that the DEPARTMENT have the freedom given by the Code to fulfill its obligations in a manner consistent with its views of what is required to assure the development of an integrated, balanced statewide transportation system sufficient to meet the needs of all the people of Florida.

Consequently, the Fourth District was in no position to assess and to weigh the numerous technical and sundry considerations the DEPARTMENT addressed in fulfilling its statutory duty. Rather the role of the court is to determine the extent of the DEPARTMENT's delegated authority and then determine whether the DEPARTMENT has acted within that authority. There is nothing in the Respondents' complaints nor in the record on appeal, nor has the District Court cited any rules of law to

support any contention that the actions of the DEPARTMENT were illegal, unauthorized or failed to follow the procedural requirements set forth in the Code.

It is obvious that the Fourth District is attempting to impose its personal preferences for the location of the subject bridge on the DEPARTMENT by conducting its own jaundiced inquisition into the data contained in the record on appeal. Of particular note is the Fourth Districts questioning and rejecting of the DEPARTMENT's decision to construct a 25-foot-high bascule drawbridge. (A: 10) No "legal education and lawyers' learning" renders an appellate court judge competent to substitute his judgment on the design of a bridge for that of highly-trained professional engineers.

Additionally, in its opinion the Fourth District selectively lists what it categorizes as "excerpts" from the record which do not support the construction of the replacement bridge at the new location. These "excerpts" are actually conclusions of the court and not only depict an improper reweighing of the evidence, but are misleading and in some instances not supported by the record. For instance, "excerpt" (2) states as follows:

> In November of 1983, the DOT's own value engineering department submitted a report recommending that the replacement bridge be constructed at the existing location.

This excerpt is deceptively misleading because the Fourth District failed to mention that such study was merely a

"preliminary investigation" which resulted in the Department of Value Engineering performing a "quantitative value engineering study". (R: 268) This "quantitative value engineering study" was completed in March of 1984 and is part of the Record on Appeal. (R: 267-273) The recommendation of this study was that although it was feasible to construct a four-lane bridge on the existing alignment, "...due to the aforementioned accumulation of performance compromises which offset the apparent $5.3 million cost savings, we recommend that a four lane bridge on the NE 2nd Avenue alignment is preferred over a four lane bridge on the existing alignment". (R: 270) (emphasis added)

Additionally, the District Court's "excerpt" (3) that a new four lane bridge cannot be justified at either location is not supported by the record on appeal. In fact the Value Engineering Report of March, 1984, expressly states:

> ...The bridges over the Intercoastal Waterway at SR 802, 806 and 808 are already four lanes. The SR 804 bridge over the Intercoastal Waterway will eventually be required to be four lanes given the uniform pattern of growth.

(R: 271) The study further states that "(i)t would be an imprudent investment of tax dollars to build a two lane bridge that would be structurally sound in 30 years, but functionally obsolete..." (R: 272; A: 16)

Although the opinion of the Fourth District is rife with examples of the court's improper substitution of its judgment for that of the DEPARTMENT's, the spatial requirements of the

DEPARTMENT's brief requires the above argument to be merely exemplary and not exclusive. However, such sampling clearly establishes the overreaching of the District Court.

By remanding the instant cause, the Fourth District is directing the hearing officer to engage in the same improper substitution of judgment, with the added insight that the Fourth District prefers the bridge to remain at the existing location. A hearing officer is in no better a position than an appellate judge and may not substitute his judgment on the location and design of a bridge for that of the DEPARTMENT's highly trained professional engineers acting within their delegated authority.

CONCLUSION

Based upon the foregoing arguments, the DEPARTMENT requests that the decision of the Fourth District be quashed and the case remanded with directions to reinstate the Final Order of the DEPARTMENT.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on this 17th day of September, 1986 to HUGH MacMILLAN, JR., ESQUIRE, 4440 P.G.A. Boulevard, Palm Beach Gardens, Florida 33410; JOHN C. RANDOLPH, ESQUIRE, Post Office Drawer "M", West Palm Beach, Florida 33402; JAMES R. BRINDELL, ESQUIRE, Post Office Box 71, Palm Beach, Florida 33480; J. MICHAEL HAYGOOD, ESQUIRE, 1675 Palm Beach Lakes Boulevard, Suite 905, Forum III, West Palm Beach, Florida 33401; and JAMES W. VANCE, ESQUIRE, 1615 Forum Place, Suite 200, Barristers Building, West Palm Beach, Florida 33401.

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