SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 69,835

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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.

REPLY BRIEF OF PETITIONER DEPARTMENT OF TRANSPORTATION

MAXINE F. FERGUSON
Appellate Attorney
A. J. SPALLA
General Counsel
Department of Transportation
Haydon Burns Building, MS 58
605 Suwannee Street
Tallahassee, Florida 32301
904/488-6212

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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 AND FACTS

The Department stands by the Statement of the Case and Statement of the Facts as set forth in its Initial Brief.

SUMMARY OF THE ARGUMENT

The Transportation Code, as an express delegation to the Department of the authority to locate, designate, construct and maintain the State Highway System, is an express preemption of such powers from local government. The Transportation Code's broad policy statements of cooperation and coordination between the Department and local governments do not authorize municipal control over the establishment of state roads.

Traditionally, the State Highway System has never been within a local government's jurisdiction and the Local Government Comprehensive Planning and Land Development Regulation Act does not alter the situation. Reading the Act to allow Ocean Ridge to locate a state road within its boundaries would be in direct conflict with §335.04(1)(a) which requires the Department to classify roads based upon function not location.

Respondents fail to show how the proceedings in the instant case require remand for a further evidentiary hearing. Nor do Respondents establish the elements necessary for determination of the instant case under the Administrative Procedures Act.

ARGUMENT

POINT I

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

Contrary to Respondents' contention that the Department's power is implied, the power to locate and construct roads within the State Highway System is an express grant of Legislative authority. The Department maintains throughout its Initial Brief that the Transportation Code expressly delegates to the Department the power to locate, designate, construct and maintain the State Highway System. (Department's Initial Brief, pp. 7-10 and cited statutes.) Webster's New International Dictionary, (2d ed., Unabridged, 1953) defines "express" as "Directly and distinctly stated; expressed, not merely implied or left to inference; as, an express commandment; hence definite; clear; explicit; unmistakable; not dubious or ambiguous; as express consent; express commands." Consequently, the Legislature's grant of authority over the State Highway System to the Department is a "definite; clear; explicit; unmistakable" preemption of the control of all roads within the State Highway System in favor of the Department to the exclusion of the municipalities or any other local governmental entity.

Bennett M. Lefter, Inc. v. Metropolitan Dade County, 482 So.2d 479, 483 (Fla. 3rd DCA 1986) relied upon by Respondent Ocean Ridge for the proposition that an express preemption exists where

there is inevitable inconsistency between a state statute and a local regulation further evinces that the Transportation Code is an express preemption of the control of the State Highway System to the Department. The present case is a prime specimen of inevitable inconsistency. For Respondent to argue otherwise is to completely disregard the facts of the instant case.

Nor does Pace v. Board of Adjustment, Town of Jupiter Island, 492 So.2d 412 (Fla. 4th DCA 1986) support Respondents' argument. In Pace, the District Court held that preemption exists when there are conflicts in statutory requirements, but not when there are conflicts in policy considerations. Applying this principle to the instant cause supports express preemption since §§334.044(11)(13); 335.02(1); 335.04(1)(a); and 337.29(1), Fla. Stat. (1985) are not policy statements but express delegations to the Department of the power to plan, designate, erect and maintain the State Highway System.

Respondents muddy the issues by alleging that the Transportation Code's broad policy statements of cooperation and coordination of the state transportation system lends support to Ocean Ridge's right to locate State Road 804. This reasoning is fallacious in that the instant cause involves the location of a road within the State Highway System, authority over which is expressly delegated to the Department. §335.02(1), Fla. Stat. (1985). Even if the policy statements of the Transportation Code were read as urged by Respondent, the specific language of §335.02

would prevail over the general policy statements cited by Respondent. Adams v. Culver, 111 So.2d 665 (Fla. 1959).

Respondents fail to set forth any authority recognizing a municipality's right to dictate the location of state roads. Consequently it is clear from statutory and case law, as detailed in the Department's Initial Brief, that prior to the enactment of the Local Government Comprehensive Planning and Land Development Regulation Act municipalities possessed no authority over the designation, planning, construction, erection or maintenance of the State Road 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.

Once it is determined that municipalities had no jurisdiction over the location of state roads prior to the enactment of the Local Government Comprehensive Planning and Land Development Regulation Act (hereinafter referred to as the "Act") (codified at §163.3161 thru §163.3215, Fla. Stat.), the issue in the instant cause narrows to whether the Act is a grant of such preemptive power to the municipalities.

Respondents conclude the under §§163.3164(9)(b) and 163.3194, Fla. Stat. (1985) of the Act, the Department, as a governmental agency, is forbidden to construct any development which is inconsistent with a local government's comprehensive plan. Therefore, under Respondent's theory, the Act would be a grant of power to the local governments over all roads within their boundaries. In essence, Respondents urge this Court to give more weight to an amorphous, inferred grant of power to local government than to statutes specifically addressing the subject which in plain words expressly grant authority to the Department. Section 335.02(1) states:

> 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...

To allow Ocean Ridge to locate State Road 804 within its boundaries would be to allow Ocean Ridge to classify a road by location. Such would be in direct conflict with §335.04(1)(a) which grants the Department the authority to classify all roads based upon function not location.

Additionally, the implication read into the Act by Respondents is in direct contravention of the purpose of the Act. Section 163.3161(2) states in pertinent part:

> ...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 comprehension planning program to guide and control future development. (emphasis added)

Although conceding that the Act was not intended to grant new powers, Respondent Ocean Ridge argues that the Act is merely expanding the local governments "cooperation" role in locating state roads. However, since prior to the Act municipalities had no binding authority as to the location of state roads, the crux of Respondent's argument is that the Act creates a new grant of power to the municipalities since the Department would be bound by a municipality's comprehensive plan.

Thus, Respondents' construction of the Act would require this Court to rewrite the Act eliminating the word "existing", and transforming the Department's duty to cooperate into a duty to obey. Such is not the role of this Court especially when to do so would in effect repeal the specific grants of authority enumerated in the Transportation Code. The Legislature is not only presumed

to know the meaning of words but also to pass statutes with knowledge of prior existing law. New laws are not presumed to affect repeal of a law absent the expressed intention to do so. Woodgate Development v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977).

The Department concedes that as to local matters within Ocean Ridge's jurisdiction, the comprehensive plan of Ocean Ridge controls. However, the State Highway System has never been within Ocean Ridge's jurisdiction and the Act does not alter the situation. The designation, planning, construction, and maintenance of the State Highway System falls within the jurisdiction of the Department.

It is interesting to note that Respondents ignore the farcical realities of their argument by failing to address the role Boynton Beach's Comprehensive Plan is to play in the instant cause. Under Respondents' interpretation of the Act, the Department must maintain the bridge at its present location; yet in doing so, the Department would be in conflict with Boynton Beach's Comprehensive Plan which was enacted prior to Ocean Ridge's Comprehensive Plan. To put the Department in such a position would jeopardize the Legislative mandate that the Department development an integrated, balanced, statewide transportation system.

Furthermore, it should be pointed out that the Department does not purport to possess "absolute and unbridled power" in locating state roads. The Department is in agreement with the

District Court that the standard of review in the instant cause is whether the Department's actions constitute an abuse of discretion. Consequently, the Department's decision to locate a road within the State Highway System is within its plenary powers and may be overturned only upon a showing of abuse of discretion. Respondents' disagreement with the wisdom of the Department's decision to relocate the bridge does not constitute an abuse of discretion. See Pirman v. Florida State Improvement Commission, 78 So.2d 718 (Fla. 1955).

POINT III

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

Respondents allege that the Department attempted to avoid the acceptance of the hearing officer's findings of fact by refusing to remand the instant cause for an evidentiary hearing. In support of this argument Respondent Ocean Ridge cites Cohn v. Department of Professional Regulation, 477 So.2d 1039 (Fla. 3rd DCA 1985), and Gentile v. Department of Professional Regulation, 448 So.2d 1087 (Fla. 1st DCA 1984). In these cases, however, it was the district court who remanded the case for further proceedings pursuant to the specific dictates of §120.68, Fla. Stat. (1985). Respondents fail to cite any statutory provision or case law which authorizes the Department to remand the case once a recommended order has been entered. See Florida Department of Transportation v. J.W.C., Inc., 396 So.2d 778 (Fla. 1st DCA 1981). Consequently, the Department's actions below were in conformity with the Administrative Procedures Act.

Additionally, Respondents view the APA as the panacea for all situations which involve a state agency. As set forth in the Initial Brief, the intent of the APA was to "make uniform the rulemaking and adjudicative procedures used by administrative agencies of this state". §120.72(1)(a), Fla. Stat. (1985). Respondents fail to say how the instant case falls within the rulemaking and adjudicative procedures of the Department. Nor do

Respondents illuminate how their interests are determined or substantially effected by a decision to locate a state road when Florida law clearly provides that the location of roads is to serve the general public not a particular individual or particular part of a community. State v. Florida State Improvement Commission, 75 So.2d 2 (Fla. 1954); Pirman, supra; Central and Southern Florida Flood Control District v. Scott, 169 So.2d 368 (Fla. 2nd DCA 1964).

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,

MAXINE F. FERGUSON
Appellate Attorney
A. J. SPALLA
General Counsel
Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32301
904488-6212

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on this 1st day of December, 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.

MAXINE F. FERGUSON