SUPREME COURT OF THE STATE OF FLORIDA

GENE BROWN, d/b/a LEISURE PROPERTIES, LTD. and LEISURE PROPERTIES, LTD., a Florida limited partnership,

Petitioner,

vs.

APALACHEE REGIONAL PLANNING COUNCIL

Respondent.
_____/

Supreme Court
Case No. 74,531

INITIAL BRIEF OF PETITIONERS

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WHETHER THE POWER TO SET AND COLLECT FEES FOR DEVELOPMENT OF REGIONAL IMPACT APPLICATION AND REVIEW COSTS, AS EXERCISED PURSUANT TO RULE 29L-2.02, WAS PROPERLY DELEGATED TO THE APALACHEE REGIONAL PLANNING COUNCIL BY THE FLORIDA LEGISLATURE.

STATEMENT OF THE CASE AND FACTS

On or about October 21, 1986, Respondent filed a Complaint in the Second Judicial Circuit Court in and for Leon County, Florida, demanding judgment against Petitioners in the amount of $14,856.74 plus interest. The essential facts are alleged in the Complaint and are as follows:

In or about October, 1984, Petitioners submitted to Respondent an application for review of a substantial deviation from a development of regional impact order concerning a development owned by Petitioners at St. George Island, Franklin County, Florida. At that time Petitioners paid Respondent a fee deposit in the amount of $4,000.00. Respondent, in accordance with the provisions of law, reviewed Petitioners' application. Thereafter, in accordance with Rule 29L-2.02, Respondent charged Petitioners with one hundred percent (1000) of the costs of reviewing Petitioners' application up to $10,000.00, and eighty percent (80%) of said costs for that portion over $10,000.00. The resulting amount due was $14,856.74.

Petitioners filed an Amended Answer and Counter-claim seeking reimbursement of the $4,000.00 fee deposit paid to Respondent. At final hearing, the parties stipulated that Petitioners' and Respondent's entitlement to the amounts claimed hinged upon, and the sole issue to be decided, was the constitutionality of the Statutory Authorities for the adoption of Rule 29L-2.02.

The trial court found in its Final Judgment of October 24, 1988, that said Statutes, with respect to any authority to

determine and assess fees, were unconstitutionally vague and uncertain, and thus, that Rule 29-L2.02 was an unlawful delegation of legislative authority. The trial court ordered Respondent to reimburse Petitioners' fee deposit of $4,000.00.

An appeal was taken to the First District Court of Appeal, which rendered an opinion on July 13, 1989 reversing the judgment of the trial court. In its opinion, the First District Court of Appeal certified a question of great public interest to this Court. Thereafter, Petitioners filed a timely notice to invoke discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

The Florida Constitution requires a separation of powers between and among the legislative, executive and judicial branches. The legislative branch cannot delegate its power to the executive branch unless such delegation is accompanied by legally sufficient standards, guidelines and limitations. In this case, the legislature attempted to delegate its taxing power to the executive branch under a statute authorizing the extraction of taxes "when appropriate," with no standards, guidelines or limitations whatsoever. Because this attempted delegation of legislative power to tax is unconstitutional as a violation of the separation of powers doctrine embodied in the Florida Constitution, the rules promulgated pursuant to such delegation are invalid and the decision of the First District Court of Appeal should be reversed.

ARGUMENT

Article 11, Section 3 of the Florida Constitution provides as follows:

> Branches of government--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

In a long and unwaivering line of cases, the courts of Florida have uniformly held that statutes granting power to administrative agencies must clearly set forth adequate standards to guide the agencies in the execution of the powers delegated. Askew v. Cross Key Waterways, 372, So.2d 913 (Fla. 1978); D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977); Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1977); Sarasota County v. Barp, 302 So.2d 737 (Fla. 1974); Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968). As pointed out by this Court in Askew, supra, "[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the law giver rather than the administrator of the law." Id. at 918-19.

Although the courts of Florida have allowed some rather general statutory standards and guidelines to pass constitutional muster in non-tax cases, this has not been true when dealing with

the extraction of a tax. Article IX, Section 3 of the Florida Constitution provides that: "no tax shall be levied except in pursuance of law." As stated by this Court in Bradford v. Stoutamire 38 So.2d 684 (Fla. 1948) at 685:

> It is a well known rule that fee statutes are to be strictly construed and none allowed except where clearly provided by law.

See also: State v. Fussell, 24 So.2d 804 (Fla. 1946); Security Finance Co. v. Gentry, 109 So. 220 (Fla. 1926).

In the case at bar, there are no guidelines or standards "clearly provided by law." Bradford, supra at 685. Indeed, the legislature failed to provide any standards, guidelines or limitations whatsoever. Instead, the entire statutory authority for the extraction of the tax in this case is set forth in section 186.505(12) (formerly Section 160) of the Florida Statutes which provides that all regional planning councils shall have the power "to fix and collect membership dues, rents, or fees when appropriate." (emphasis added).

The statute provides absolutely no standards, guidelines or limitations for use by the agency in determining what is or is not "appropriate." The agency is given no guidance whatsoever as to who should pay the fees, when the fees should be paid, how much the fees should be, whether there should be any limit on the fees, what the fees can or cannot be used for, how the fees should be paid or collected, whether the agency can charge all or

only part of its general overhead as a "cost" or fee to be reimbursed, as well as a multitude of other policy or legislative-type decisions that must be made when the government is extracting a mandatory tax from its citizens. Indeed, there are no limitations at all in the statute and the agency can charge and collect any type of "fee" it deems "appropriate" in its unbridled discretion. See Dickinson v. State, 227 So.2d 36 (Fla. 1969).

Luckily for Petitioners, the Respondent had more than one DRI to review during the time that Petitioners' DRI review was underway. Otherwise, Respondent could have been charged with all of Petitioners' overhead expenses, including "fringe benefits," instead of just some unknown portion of the overhead as shown by the statement attached to Petitioners' complaint. The simple point is that there is no statutory limit on the tax. If the statute is constitutional, the tax or "fee" could have legally been $500,000 or more without violating the rule that requires extraction of a fee equal to 80% to 100% of Petitioners' direct and indirect costs, including fringe benefits and attorneys' fees. The courts of Florida have held as unconstitutional many statutes which provided more standards and more guidelines than Section 186.505(12), which has no standards or guidelines other than the "when appropriate" reference. For example, in Conner v. Joe Hatton, Inc., 203 So.2d 154 (Fla.

1967), this Court was called upon to decide the constitutionality of Section 573.21 of the Florida Statutes which provided that the Commissioner of Agriculture should collect certain fees:

> . . .'for the purpose of providing funds to defray the necessary expenses incurred by the Commissioner in the formulation, issuance, administration and enforcement of any marketing order,' to levy and assess upon every person engaged in the production, distribution or handling of . . . sweet corn within his state, and directly affected by any marketing order issued pursuant to this law, . . . such person's pro rata share of the necessary expenses incident thereto. The 'rate of assessment' is required to be 'per container or some other equitable basis.'

This statute at least provided:

(1) the purpose of the fee or what it would be used for, i.e., it would be used to defray necessary expenses for marketing orders;

(2) who would pay the fee, i.e., it would be charged to every person engaged in the production, distribution or handling of sweet corn in the state who was also directly affected by any marketing order issued pursuant to other detailed provisions of the Act;

(3) how the fee would be allocated vis-a-vis the agency's costs, i.e., it had to be the pro rata share of the necessary expenses; and

(4) the rate of assessment of the fee, i.e., it had to be on a per container or some other equitable basis.

Notwithstanding these specific guidelines and standards, this Court held Section 573.21 to be unconstitutional as an excessive and unlawful delegation of legislative power because the standards and guidelines were not sufficient. This Court pointed out the Department of Agriculture still had the power to determine: (1) the amount of money to be raised by the tax; (2) the amount of the tax to be levied; and (3) the basis upon which the tax burden would be distributed among those required to pay. Id. at 155. In the instant case, Respondent has all those powers and many more--all without the restraints and limitations set forth in the statute under review in Conner. If that statute was unconstitutional as an illegal delegation of legislative power, how can Respondent seriously contend that Section 186.505(12) is valid and enforceable as the basis for extracting a tax from Petitioners?

This Court, in affirming two opinions from the First District Court of Appeal, has already held part of Chapter 380 unconstitutional for the very same reason set forth by Judge Gary in the trial court below, i.e., that the statute was not enacted with "minimal standards and guidelines ascertainable by reference to the enactment establishing the program." Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla. 1978). And once again, as in Conner, the statute held unconstitutional by this Court was far more specific in terms of standards and guidelines than the statute under review in the instant case. In Askew, this Court was called upon to decide whether Section 380.05(2), which specified the criteria for establishing areas of critical state concern, was constitutionally defective for failure to include sufficient guidelines and standards. Section 380.05(2) provided as follows:

> (2) An area of critical state concern may be designated only for:
>
> (a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.
>
> (b) An area significally affected by or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.
>
> (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

In addition to these specific guidelines, the statute under review in Askew contained many specific procedural protections to insure that all concerned parties would have sufficient notice and opportunity to be heard before any decision could be made.

Notwithstanding the specific standards, guidelines and procedural protections contained in the statutory framework under review in Askew, this Court nevertheless unanimously affirmed two decisions of the First District Court of Appeal holding that the statute was unconstitutionally vague and indefinite. Imagine how easy that decision would have been if the statute had simply given the Administration Commission the power to declare areas of critical state concern "where appropriate." That would have been just as sufficient as the tax extraction statute under review in this cause.

There are many Florida cases holding statutes unconstitutional as an unlawful delegation of legislative power, including several dealing with growth management and environmental protection. For example, in Barg, supra, this Court invalidated an act which utilized the terms "undue or unreasonable" dredging or filling and "unreasonable" destruction of natural vegetation in a manner which would be "harmful or significantly contribute" to air and water pollution, even though these terms did provide at least some guidelines and standards. Once again, this Court held a statute unconstitutional as an

unlawful delegation of legislative power, even though the delegation was more specific and definitive than the "when appropriate" provision of the statute under review here.

In Lewis v. Bank of Pasco County, 346 So.2d 53, 55 (Fla. 1976), this Court reviewed a statute which authorized the release of certain bank records to the public "with the consent of the department." The Department of Banking and Finance was given no limitations or guidelines to regulate these releases. The statute authorizing release was held unconstitutional as an unlawful delegation of legislative power. The Lewis case demonstrates the insufficiency of the phrase "when appropriate." What is "appropriate" is a fundamental legislative policy decision, not an administrative function. The question of fees, including how much, from whom, and when to pay are all policy decisions. How a state agency's operations are to be funded is a decision of the legislature, not the agency itself. It is simply not constitutionally permissible for an executive agency to collect and spend a taxpayer's money with no legislative limitations. In Lewis, supra, at 55-56, this Court summarized the law as follows:

> This Court had held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated that the

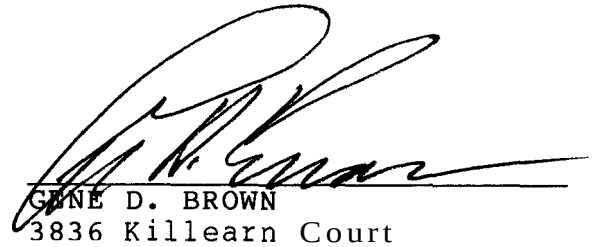
> administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.

Who knows what is appropriate? This gives the executive branch no guidance in administering the law, and it gives the judicial branch no guidance in interpreting the law. Accordingly, the law must fall as an unconstitutional delegation of legislative power. If the legislature could abdicate its authority and responsibility simply by an enactment directing the executive branch to do whatever it deems "appropriate," including the extraction of whatever taxes it deems "appropriate," the statute books would be thin and uncomplicated--but we would have a government of men, not of law. Yet that is precisely what the legislature tried to do in its enactment of Section 186.505(12). It basically tells the Respondent and other regional planning agencies to go carry out the law, spend whatever you need and collect whatever fees or taxes you think are "appropriate" in your sole discretion, but don't bother us with the details. This may be expedient, and it may have worked until now because of the good will and reasonbleness of the individuals involved, but it is certainly not constitutionally permissible under the law of Florida. If "when appropriate" is a proper standard for delegation of legislative power, then practically any broad policy delegation would be permissible, and the separation of

powers doctrine set forth in Article 11, Section 3 of the Florida Constitution would be rendered meaningless.

CONCLUSION

For the reasons set forth above, the decision of the First District Court of Appeal below should be reversed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Linda Loomis Shelley and Tommy E. Roberts, Jr. of Dixon, Blanton & Shelley, P. O. Box 12808, Tallahassee, FL 32317; Arthur C. Wallberg, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, FL 32399-1050; Ralph Artigliere and Charles T. Canady, of Lane, Trohn, Clarke, Bertrand & Williams, P.A., P. O. Box 3, Lakeland, FL 33802-0003; Samuel S. Goren of Josias & Goren, P.A., 3399 East Commercial Blvd., Suite 200, Fort Lauderdale, FL 33308; and Roger G. Saberson, 110 E. Atlantic Avenue, Delray Beach, FL 33444, by U. S. Mail this 7th day of September, 1989.'

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