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IN THE SUPREME COURT OF FLORIDA

JAMES D. YOUNG, SR.
and OLIVIA A. YOUNG,

Appellants,

vs. CASE NO. 76,911

STATE OF FLORIDA, DEPARTMENT
OF COMMUNITY AFFAIRS, and
the FLORIDA LAND and WATER
ADJUDICATORY COMMISSION,

Appellees.

______________________________/

On Discretionary Review of a Decision of the
Third District Court of Appeal
Certifying a Question of Great Public Importance
Third DCA Case No. 89-00661

ANSWER BRIEF OF APPELLEE DEPARTMENT OF COMMUNITY AFFAIRS

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STATEMENT OF THE CASE AND OF THE FACTS

The Department disagrees with Appellants' statement of the case and facts because it is incomplete in the following respects:

Most of Monroe County, including Appellants' property, is within the Florida Keys Area of Critical State Concern. Sections 380.05 and 380.0552, Florida Statutes (1987); Ch. 28-29, F.A.C. (R. 3)[1] The Department of Community Affairs (herein "DCA"), as state land planning agency, has the duty and responsibility for the general supervision and enforcement of the provisions of Chapter 380 and rules and regulations promulgated thereunder. Section 380.032, Florida Statutes (1987).

Appellants sought permits to clear land in Monroe County and to develop their land as a plant nursery. (R. 14-16) The use (the plant nursery) is not challenged. The extent of the proposed land clearing is. (R. 3)

Appellants indicate that this case arose when DCA notified Monroe County that the subject land clearing permits were being appealed to the Florida Land and Water Adjudicatory Commission (herein "FLWAC") (Initial Brief, p. 1). Actually, the appeal was initiated by filing a notice of appeal and petition with FLWAC, and serving copies of the pleadings on Appellants, Monroe County,

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[1] Appellants admit that all privately-owned property in Monroe County is a designated area of critical state concern. (R. 20, Para. 2)

and others identified on the certificates of service on those pleadings. (R. 1-2, 3-18)

FLWAC referred the matter to the Division of Administrative Hearings for assignment of a hearing officer (R. 26) and scheduling of a de novo hearing under Chapter 120, Florida Statutes. Section 380.07(3), Florida Statutes (1987). Pursuant to notice (R. 187), final hearing commenced on November 30, 1988. (R. 187) Appellants refused to participate. (R. 290-291). As a result, the Hearing Officer recommended to FLWAC that permission to develop be denied. (R. 221-227) In urging FLWAC to reject the recommendation, Appellants' counsel explained the refusal to participate as follows:

> I wanted to go forward. I showed up with witnesses. I submitted a prehearing stipulation. They knew I was ready to go. I just wasn't ready to go first. I don't have the burden of proof.

(R. 261).

In its Final Order, FLWAC denied Appellants permission to develop, not because DCA filed a notice of appeal, as Appellants suggest (Initial Brief, p. 4), but because no evidence was presented by Appellants to affirmatively show that they are entitled to develop under the Monroe County land development regulations. (R. 264)

Appellants' appeal of FLWAC's final order was not successful. However, the Third District Court of Appeal certified a question of great public importance. While purporting to quote the certified question (Initial Brief, p. 1),

Appellants have changed the last few words. The matter was phrased by the District Court as follows:

> We certify that the court has passed upon a question of great public importance by holding that, in an appeal by the state land planning agency pursuant to section 380.07, Florida Statutes (1987), the burden of persuasion, and the burden of going forward, rested on the applicant for the permit.

(R. 278-279).

SUMMARY OF ARGUMENT

The Department does not agree with the district court's assessment that this case presents a question of great public importance.

The substantive issue in this case is whether the Florida Land and Water Adjudicatory Commission should allow Appellants to develop land under land clearing permits issued by the local government in the Florida Keys Area of Critical State Concern. To reach this determination, a full evidentiary hearing was scheduled, as required by statute, to insure that Appellants' rights were fully protected, and to insure that they would have ample opportunity for prehearing discovery and for presentation of all evidence available to them in support of their entitlement to the permits.

According to Appellants' counsel, Appellants had prepared their case, appeared at the final hearing with their witnesses, and were prepared to proceed. Because they disagreed with the allocation of the burden of proof, Appellants defied the Hearing Officer's instructions to proceed first, and adamantly refused to participate in the proceedings scheduled for their benefit. If they prevail in this appeal on a question of law, they will have won a small victory, for they will still not have permission to develop, and the parties will be back to square one. They will have succeeded, however, in prolonging a resolution of the case for several years, when Appellants' factual evidence could have

been and certainly should have been presented at the final hearing scheduled on November 30, 1988. Generally, points on appeal are preserved by raising objections in the lower tribunal while still proceeding with hearing or trial, not by packing up and going home. Under the circumstances, Appellants should be deemed to have waived their right to further consideration either before this Court or before the lower tribunal.

This case arises under the unique regulatory provisions in Chapter 380, Florida Statutes, relating to areas of critical state concern. Usually, local governments are solely responsible for setting planning goals, adopting land use regulations, and making permitting decisions. That is not the case in areas of critical state concern. In critical areas, a large measure of control is transferred from local governments to the State of Florida. The purpose of the designation is to preserve and protect resources of statewide importance which local governments may not be fully equipped to deal with alone. The planning goals are fixed by the State, not the local governments. The comprehensive plan and land development regulations adopted by a local government become effective only if approved by the State; and the State itself may amend the regulations without local government consent or participation. Section 380.0552(9), Florida Statutes. All applications for building permits, and the building permits themselves, must be delivered to the state land planning agency for review.

If challenged, permitting decisions in critical areas are

considered by the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission (FLWAC). If its jurisdiction is invoked, FLWAC, not the local government, is then responsible for deciding whether to grant permission to develop land, with or without conditions.

The "appeal" proceedings before FLWAC are required to be conducted under the provisions of Chapter 120, Florida Statutes. Section 120.57 prescribes the procedures to be utilized for decisions which affect substantial interests, and requires a full evidentiary hearing where disputed issues of fact exist. Chapter 120 contains no provision for an appeal in the narrow sense of the word but contemplates a full de novo proceeding. It is an original proceeding designed to assist FLWAC in formulating final agency action. The proceedings are not limited to a review of local government action.

Florida case law generally, and decisions in FLWAC proceedings in particular, hold that the applicant for a permit has the burden of proof in all stages of the proceedings. The reason is simple. He or she seeks affirmative relief, namely, permission to develop land pursuant to a lawful permit.

Appellants argue that the land clearing permits issued to them by Monroe County are entitled to a presumption of correctness; and that therefore under Section 380.07, Florida Statutes, FLWAC should have upheld them if their issuance was fairly debatable. This argument, if adopted, is contrary to the applicable statutory provisions and would hamper the State's

ability to protect and preserve resources of statewide significance. Additionally, this position is not justified under the facts of this case.

Regulations adopted by a municipality's governing body are generally presumed to be correct, in deference to that body's legislative function. Appellants point to provisions of the growth management act, Chapter 163, which support this view.

In this case, no one is challenging the Monroe County land development regulations. DCA is attempting to enforce them, so Appellants' argument in this regard is something of a red herring. Even if the argument had some merit in other contexts, it is not applicable to local government enactments in areas of critical state concern since they require state agency approval before they become effective. The critical area statutes do not contain a proviso that these local enactments are to be sustained or approved if they are fairly debatable. If the Legislature had intended that this standard apply in areas of critical state concern, it could easily have said so as it did in Chapter 163.

Since regulations adopted by a local government in an area of critical state concern are not entitled to a presumption of correctness, it makes no sense to suggest that such a presumption attaches to a mere permitting decision.

Appellants imply in their Initial Brief that the land clearing permits were issued by the Monroe County Board of County Commissioners after much local consideration and public input. They rely heavily on selected provisions of the Monroe County

land development regulations, none of which are in the record on appeal. DCA's objections to this recitation are set out in its pending Motion to Strike and will not be restated here.

Appellants' pleadings filed below suggest that the permits were issued by the County building department after a year of inaction and some discussions with County employees. Even if a presumption of correctness might conceivably attach to permitting decisions by the Board of County Commissioners (and DCA urges that under Chapter 380 it does not), it would certainly not be applicable to an administrative act by a County employee.

ARGUMENT

IN A DE NOVO PROCEEDING BEFORE THE FLORIDA LAND AND WATER ADJUDICATORY COMMISSION, THE BURDEN OF PROVING ENTITLEMENT TO BUILDING PERMITS IS PROPERLY ON THE PERSONS WHO SEEK THE PERMITS.

"Burden of proof" implies both the burden of going forward and the burden of persuasion.

Determining the order in which evidence is presented is within the sound discretion of the Hearing Officer. She was clearly acting within her discretion in directing that Appellants proceed first. See General Development Corporation v. Florida Land and Water Adjudicatory Commission, 368 So.2d 1323 (Fla. 1st DCA 1979), finding no error in the requirement that GDC present its case first to facilitate an orderly presentation of evidence. Appellants refused to comply with the Hearing Officer's instructions for no good reason other than they just did not want to. Such defiance of a proper and lawful order of the Hearing Officer should not be condoned. Appellants should not be entitled to continue litigating this case and possibly obtain a second hearing after refusing that opportunity the first time around. Appellants justify their appalling conduct by disputing the allocation of the burden of persuasion as well as their spurious objection to the burden of going forward.

The issue raised by the certified question is whether a person who seeks permission to develop real property in an area

of critical state concern bears the burden of proving entitlement to building permits, when the issuance of such permits by the local government is considered in a de novo proceeding before the Florida Land and Water Adjudicatory Commission under Section 380.07, Florida Statutes (1987).

A. Chapter 380, Florida Statutes, establishes a unique process for review and approval of land use regulations and permitting decisions in areas of critical state concern.

Legislation under Chapter 380, Florida Statutes, regarding areas of critical state concern contains unique regulatory measures. An understanding of this legislation is important in resolving this appeal.

Appellants are not quite correct in asserting that, under Chapter 380, Florida Statutes, local governments retain control of land use decisions. In areas of critical state concern, local governments are responsible for the initial decisions relating to land development regulations and building permits, but they do not have final authority in these decisions. Significant regulatory control and supervision is vested in the State of Florida because of the regional or statewide interests to be protected in such areas. No land use plan or regulation becomes effective unless expressly approved by administrative rule by the Department of Community Affairs, as state land planning agency, and no permit may be acted upon until the Department reviews it for compliance with state and local regulatory criteria. Sections 380.0552(9) and 380.07, Florida Statutes (1987); Rule

9J-1, F.A.C..

Appellants misapprehend the nature and extent of the state's involvement and authority in areas of critical state concern. They assert that the purpose of the legislation is to strengthen local government. While augmenting the ability of local governments to manage unique and precious resources in places like the Florida Keys is addressed in Chapter 380, the larger purpose is to protect those resources, recognizing that local governments may not be able to accomplish that action alone.

The purpose of Chapter 380, the Florida Environmental Land and Water Management Act of 1972, is generally for the state to establish land and water management policies to guide and coordinate local decisions relating to growth and development in Florida. Section 380.021, Florida Statutes (1987).

In furtherance of this general purpose, areas of the state may be designated as areas of critical state concern if they include or impact upon natural, environmental, historical, or archeological resources of regional or statewide interest. Section 380.05(2), Florida Statutes (1987). In this regard, Section 380.05(2) provides, in pertinent part:

> (2) An area of critical state concern may be designated only for:
>
> (a) An area containing, or having a significant impact upon, environmental or natural resources of statewide importance, including, but not limited to state or federal parks, forests, wildlife refuges, wilderness areas, aquatic preserves, major rivers and estuaries, state environmentally endangered lands, Outstanding Florida Waters, and aquifer recharge areas, the uncontrolled

private or public development of which would cause substantial deterioration of such resources. Specific criteria which shall be considered in designating an area under this paragraph include:

1. Whether the economic value of the area, as determined by the type, variety, distribution, relative scarcity, and condition of the environmental or natural resources within the area, is of substantial regional or statewide importance.

2. Whether the ecological value of the area, as determined by the physical and biological components of the environmental system, is of substantial regional or statewide importance.

3. Whether the area is a designated critical habitat for any state or federally designated threatened or endangered plant or animal species.

4. Whether the area is inherently susceptible to substantial development due to its geographic location or natural aesthetics.

5. Whether any existing or planned substantial development within the area will directly, significantly, and deleteriously affect any or all of the environmental or natural resources of the area which are of regional or statewide importance.

The Florida Keys were designated an area of critical state concern in 1979. Chapter 79-73, Laws of Florida. This designation was ratified by the Legislature in 1986, and was not removed in the 1990 review of the designation required by statute. Section 380.0552, Florida Statutes (1986); Chapter 86-170, Laws of Florida; Section 380.0552(4), Florida Statutes (1990). In ratifying the designation in 1986, the Legislature authorized the expenditure of more than $11 million in and for

Monroe County that one year alone. Ch. 86-170, ss. 6-8. Laws of Florida. This commitment underscores the significance of the resources in the Florida Keys to the entire State of Florida.

Section 380.0552, Florida Statutes (1987), the Florida Keys Area Protection Act, expresses legislative purpose as follows:

> (2) LEGISLATIVE INTENT.--It is hereby declared that the intent of the Legislature is:
>
> (a) To establish a land use management system that protects the natural environment of the Florida Keys.
>
> (b) To establish a land use management system that conserves and promotes the community character of the Florida Keys.
>
> (c) To establish a land use management system that promotes orderly and balanced growth in accordance with the capacity of available and planned public facilities and services.
>
> (d) To provide for affordable housing in close proximity to places of employment in the Florida Keys.
>
> (e) To establish a land use management system that promotes and supports a diverse and sound economic base.
>
> (f) To protect the constitutional rights of property owners to own, use, and dispose of their real property.
>
> (g) To promote coordination and efficiency among governmental agencies with permitting jurisdiction over land use activities in the Florida Keys.

Most development permits in the Florida Keys, and certainly permits to clear land such as those involved in this case, directly impact upon the ability of the state to protect the natural resources and environment of the Keys in furtherance of

the legislative will.

The land use planning principles for the Florida Keys, known as the Principles for Guiding Development, were determined by the State of Florida, not by the various local governments within the Florida Keys. Section 380.05(1)(a)-(c), Florida Statutes; former Chapter 27F-8, F.A.C.; now Section 380.0552(7), Florida Statutes (1990). One of eleven principles for guiding development with which regulatory efforts must comply is the goal of strengthening local government capabilities for managing land use and development within their jurisdictions. Section 380.0552(7)(a), Florida Statutes (1987). That goal has not been achieved in the nearly twelve years since the Florida Keys were designated an area of critical state concern, as evidenced by the fact that the designation has not been removed. See Section 380.0552(4), Florida Statutes (1990).

As an added measure of regulatory control in the implementation and enforcement of the state-approved critical area regulations, all development orders issued by local governments in the Florida Keys, along with all supporting documentation, must be rendered to DCA for review. Section 380.07(2), Florida Statutes (1987); Chapter 9J-1, F.A.C. Within 45 days after a development order is rendered (i.e., mailed or delivered to the Department of Community Affairs, Rule 9J-1, F.A.C.), the DCA, the owner, the developer, or the appropriate regional planning council may appeal the order to the Florida Land and Water Adjudicatory Commission (FLWAC). If its

jurisdiction is invoked, FLWAC is required to hold a hearing pursuant to the provisions of Chapter 120, Florida Statutes, and to thereafter issue its own decision granting or denying permission to develop, with or without conditions, pursuant to the standards of Chapter 380. Section 380.07(2)-(4), Florida Statutes (1987); Section 380.08(3), Florida Statutes (1990).

It is in the context of this unique and comprehensive regulatory scheme that this appeal arises.

B. An appeal to the Florida Land and Water Adjudicatory Commission is not an "appeal" in the narrow, judicial sense but is an original proceeding to formulate final agency action.

Appellants misunderstand the nature and extent of FLWAC's jurisdiction in a Section 380.07 "appeal."

Appellants argue that, in issuing the subject permits, Monroe County is the "agency" which took "final agency action," as those terms are used in Chapter 120, Florida Statutes, the Administrative Procedures Act. They argue that, as a result, FLWAC merely reviews the County's action, and the burden is on DCA as the challenger. This argument is without merit.

A local government is not an "agency" subject to the Administrative Procedures Act, unless it has been expressly made subject to the Act by general or special law or existing judicial decisions. Sweetwater Utility Corp. v. Hillsborough County, 314 So.2d 194 (Fla. 2d DCA 1975); Board of County Commissioners v. Casa Development, Ltd., 332 So.2d 651 (Fla. 2d DCA 1976). There

is no legislative act or judicial decision subjecting Monroe County to the procedural requirements of Chapter 120. FLWAC is the agency with final order authority under Chapter 380, Florida Statutes. Fairfield Communities v. Florida Land and Water Adjudicatory Commission, 522 So.2d 1012 (Fla. 1st DCA 1988). Furthermore, FLWAC's jurisdiction is not limited merely to appellate review.

In Transgulf Pipeline Company/Department of Community Affairs v. Board of County Commissioners of Gadsden County, 438 So.2d 876 (Fla. 1st DCA 1984), rev. denied 449 So.2d 264 (Fla. 1984), the County challenged the facial constitutionality of Section 380.07(3), Florida Statutes (1981). This provision was the same in 1987 when the Third District opinion in this case was rendered and remains the same today. In describing the appeals authorized under Section 380.07, the Court held:

> [I]t is not necessary to interpret the word "appeals," as used in section 380.07(3), in its most narrow, technical sense. To do so would render that section illogical since the first sentence of section 380.07(3) mandates a hearing pursuant to Chapter 120, and Chapter 120 makes no provision for an "appeal" in the technical sense. We think that the legislature intended to use this term in its broadest, non-technical sense, i.e., to mean merely an application to a higher authority.

Id. at 878. The record in such a proceeding is not analogous to a narrow judicial record considered on appeal. The hearing officer is not confined to the record before the local government, if any, but is free to determine what evidence shall be admitted. Section 120.57, Florida Statutes; Rule 42-2.008(4),

F.A.C. The hearing is therefore properly termed and commenced as a full de novo proceeding, which is intended to formulate final agency action, not to review action taken earlier. Florida Department of Transportation v. J. W. C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981); Fairfield Communities v. Florida Land and Water Adjudicatory Commission, supra ("Section 380.07 contemplates that FLWAC will conduct a de novo evidentiary hearing pursuant to Section 120.57.") In such a proceeding, FLWAC hears the matter as the forum of original and not appellate jurisdiction. Black's Law Dictionary, 5th Ed. It makes its own, independent decision of whether development approval should be granted to the person seeking a permit, and its decision becomes final agency action subject to judicial review under Section 120.68, Florida Statutes.

C. An applicant for a development permit bears the burden of proving entitlement to the permit through all stages of the proceedings.

It is axiomatic that an applicant for a permit bears the ultimate burden of proving entitlement to the permit through all stages of the proceedings, of whatever nature, until final agency action has been taken. Florida Department of Transportation v. J. W. C., supra. This is because the applicant asserts the affirmative of the issue, namely, entitlement to the permit.

Proceedings before FLWAC, once its jurisdiction is invoked, become a crucial stage of the proceedings to determine whether

permits should be issued in areas of critical state concern.

In J. W. C. Co., supra, the Department of Environmental Regulation issued a letter of intent to issue a permit to DOT to construct a complex source of air pollution. J. W. C. Co. and other property owners objected and requested a hearing. The court determined that, if the applicant has first provided to the hearing officer credible evidence of his entitlement to the permit, the objecting property owners are then and only then required to identify the areas of controversy and go forward with evidence to prove their assertions. Id. at 789. In other words, even though the applicant initially satisfied DER that it was entitled to the permit, when that decision was questioned the applicant, not the challenger, was obliged to again try to demonstrate entitlement to the permit at the Section 120.57 evidentiary hearing. Accord, Harbor Estates v. Department of Environmental Regulation, 12 FALR 2393 (FDER 1990); see also Florida Administrative Practice, Third Ed., ss. 4.24-4.26 (1990).

This general rule was specifically reaffirmed by this Court in Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083. There, the denial of development authorization for a development-of-regional-impact (DRI) was appealed by the developer to FLWAC under Section 380.07, Florida Statutes. This Court found that, under the DRI statutes, the burden was on the State to show that a proposed DRI will have an adverse impact, and the burden then shifts to the developer to demonstrate that its proposed curative measures are

adequate. However, in so holding, this Court did not disturb the district court's recognition of the long established rule that a property owner has the initial burden of demonstrating compliance with standards adopted under the police power, and specifically stated that, "We do not ignore or alter the established rule of administrative law that one seeking relief carries the burden of proof." Id. at 1379; Estuary Properties v. Graham, 381 So. 2d 1126, 1136 (Fla. 1st DCA 1979), rev'd. on other grounds, Graham v. Estuary Properties, supra. The relief sought by Appellants in the case is permission to clear land in an area of critical state concern.

In areas of critical state concern, the Legislature has determined that the state's interests are always implicated where land use decisions are involved. The applicable statutory provisions preserve the long established rule and squarely place the burden of proof on the one seeking development approval by providing that "[n]o person shall undertake any development within any area of critical state concern except in accordance with this chapter." Section 380.05(16), Florida Statutes (1987). It is not incumbent upon the State to show the negative -- nonconformance with Chapter 380 and regulations adopted thereunder -- unless some initial showing of entitlement is first made by the persons seeking permission to develop.

DOAH hearing officers and FLWAC have consistently held that, in administrative proceedings under Section 380.07, Florida Statutes, the burden of proof is on the one seeking permission to

develop, and this holding has been affirmed on appeal to the judicial branch. Department of Community Affairs v. Monroe County, et al., DOAH Case Nos. 83-3704, 84-0360, 84-0361, and 84-0362 (Final Order entered June 10, 1985); Department of Community Affairs v. Bartecki, et al., DOAH Case No. 84-1198 (Final Order entered September 24, 1985), rev'd on other grounds, 498 So.2d 972 (Fla. 1st DCA 1986); In Re: Notice of Administrative Appeal of Costain Florida, Inc., 12 FALR 1847, 1876 (FLWAC 1990); Harbor Course Club, Inc. v. Department of Community Affairs, 510 So.2d 915 (Fla. 3d DCA 1987).

Harbor Course Club, supra, is directly on point. There, property owners sought an after-the-fact land clearing permit from Monroe County. The permit was issued by Monroe County and rendered to DCA for review. DCA invoked FLWAC's jurisdiction under Section 380.07, Florida Statutes, to determine whether development approval should be granted. The hearing officer concluded that the property owners had to demonstrate that their permit application complied with Chapter 380, Florida Statutes, and with the comprehensive plan and land development regulations for the Florida Keys Area of Critical State Concern. Id. at 919. He further held that "[t]he Respondents . . . have the burden of proof in this de novo proceeding since they are seeking a permit to clear land in Monroe County." Id. at 917-918. The hearing officer's conclusions were adopted as final agency action by the Florida Land and Water Adjudicatory Commission and were affirmed on appeal to the Third District Court of Appeal. See also

General Development Corporation v. Florida Land and Water Adjudicatory Commission, 368 So.2d 1323 (Fla. 1st DCA 1979).

In this case, Appellants appeared at the final hearing with their witnesses, allegedly ready to establish their case. (R. 261) Had they bothered to do so, this case probably would have been over long before now. Once there, however, they defiantly refused to either present their case first or recognize established case law placing upon them the initial burden of some showing of entitlement to the land clearing permits. In the absence of any showing of entitlement to the permits, FLWAC had no alternative but to deny permission to develop.

D. The land clearing permits issued by Monroe County are not entitled to a presumption of correctness or review under the "fairly debatable" standard.

In arguing that the subject permits are presumptively valid, Appellants rely largely on case law recognizing such a presumption for regulations adopted by a local government. This body of law does not govern in a Section 380.07 proceeding to determine whether a building permit should be issued.

Appellants also rely on Manatee County v. Estech General Chemicals Corporation, 402 So.2d 1251 (Fla. 2d DCA 1981), in arguing that the subject land clearing permits are presumptively correct. In Manatee County, a development-of-regional-impact case, the Court opined that Section 380.07, Florida Statutes, shifted the review of local land use decisions from the circuit

courts to the Florida Land and Water Adjudicatory Commission. Among other grounds for appeal, Manatee County and Sarasota County argued that even if FLWAC had jurisdiction to review Manatee County's decision, its order should still be reversed because it failed to use the proper standard in reviewing that decision. The local governments urged that the decision of the Manatee County Commission should have been affirmed by FLWAC as being fairly debatable. The Court declined to rule on this issue, in part because a de novo proceeding had been requested, but expressed "serious doubts about this argument." Id., at 1256.

Appellants point out that under the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Florida Statutes, land use regulations adopted by local governments appear to carry a presumption of correctness, citing Section 163.3212(5)(b), Florida Statutes. (Appellants' Initial Brief, p. 26) There are a variety of reasons why reference to this Act does not support Appellants' argument that the subject permits are presumptively correct.

First, this case is not governed by Chapter 163, Florida Statutes. Monroe County's comprehensive plan and land development regulations were adopted under Chapter 380, and this case arises under that chapter's provisions. Sections 380.0552 and 380.07, Florida Statutes; see also specific authority and law implemented under Chapters 9J-14 and 28-29, F.A.C., approving the Monroe County comprehensive plan and land development

regulations.

Second, the cited statute relates to land development regulations, not the issuance of building permits. This case involves building permits.

Reference to Chapter 163 is useful, however. Its provisions, coupled with reference to Chapter 380 and well-settled principles of statutory construction, support the Department's argument that there is no presumption of correctness attributable to either the land development regulations or the permitting decisions of Monroe County in the Florida Keys Area of Critical State Concern.

Section 163.3213(5)(b), Florida Statutes, specifically provides that "the adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan." The Florida Keys Area Protection Act, Section 380.0552, Florida Statutes, does not contain this proviso. Had the Legislature intended that the fairly debatable standard apply in evaluating land development regulations adopted by a local government in the Florida Keys Area of Critical State Concern, it could easily have said so. 49 Fla. Jur. 2d, STATUTES, s. 133; Florida State Racing Commission v. Bourquardez, 42 So.2d 87 (Fla. 1949); St. George Island, Ltd. v. Rudd, 547 So.2d 958 (Fla. 1st DCA 1989).

Chapter 163 provides that "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." Section 163.3211, Florida Statutes. Chapter 380's critical area provisions, and the powers and responsibilities of DCA under those provisions, were existing law when the growth management act was adopted in 1985.

The following year, 1986, the Legislature ratified the designation of the Florida Keys as an area of critical state concern with all of the state oversight and control that designation entails. Section 380.0552(3), Florida Statutes (1986). At the same time, the Legislature emphasized the continuing vitality of its critical area legislation by amending Chapter 163 to add a provision that a comprehensive plan adopted by a local government in an area of critical state concern does not become effective until approved under the provisions of Chapter 380. Chapter 86-191, s. 9, Laws of Florida; Section 163.3184(14), Florida Statutes. These Acts must be construed in harmony with each other. Graham v. Edwards, 472 So.2d 803 (Fla. 3d DCA 1985), review denied, 482 So.2d 348 (Fla. 1986); Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986), review denied, 504 So.2d 767 (Fla. 1987).

Finally, in ratifying the critical area designation for the Florida Keys, the Legislature specifically provided that the appeal procedures under Section 380.07, Florida Statutes, shall apply in challenges to permitting decisions. Section 380.0552(5), Florida Statutes (1986). The Legislature is

presumed to have known the earlier judicial interpretations of that provision, including those related the de novo nature of the proceedings and allocation of the burden of proof. Bridges v. Williamson, 449 So.2d 400 (Fla. 2d DCA 1984).

It is clear that no presumption of correctness applies to land development regulations adopted in the Florida Keys Area of Critical State Concern. No such presumption could apply under legislation that requires state agency approval through rulemaking before the regulations may take effect. Certainly, then, no such presumption attaches to a mere permitting decision.

DCA maintains that, under Chapter 380, no permitting decision is presumptively correct. Furthermore, the issuance of a development order (building permit) does not necessarily involve a legislative or quasi-legislative act to which the presumption might attach. In their Initial Brief, Appellants imply that the subject land clearing permits were issued by the Board of County Commissioners after much local consideration and public input. In stark contrast, in their pleadings Appellants describe a process consisting of a year of inaction, conversations with various County employees, and the issuance of the permits apparently by the County building department. (R. 8-10, 209-215) Conspicuously absent is any mention in those pleadings of public hearings or action by the County Commission, the local legislative body.

An applicant who meets the criteria in the regulations is entitled to a permit. No discretion is involved. Absent the

exercise of discretion, an act is merely administrative, to which no presumption of correctness attaches. See, e.g., City of Lauderdale Lakes v. Corn, 427 So.2d 239 (Fla. 4th DCA 1983), holding that, where the applicant meets the criteria in the regulations, approval of a plat or site plan is an administrative function rather than the exercise of legislative prerogative.

In a de novo proceeding under Section 380.07, Florida Statutes, issuance of a building permit should never be entitled to a presumption of correctness. That is especially true in the State's designated areas of critical state concern where the effort is directed to the preservation and protection of natural and other resources of regional or statewide importance.

CONCLUSION

An applicant for a permit has the burden of establishing his entitlement to the permit through all stages of the permit process. This principle is clearly established in Florida case law, and was appropriately followed by the Hearing Officer, the Florida Land and Water Adjudicatory Commission, and the Third District Court of Appeal. This Honorable Court is urged to reaffirm this principle in answering the certified question.

The Court is also urged to find that Appellants waived their right to any further consideration by their refusal to participate in any way in the final hearing more than two years ago.

DATED this 22nd day of January, 1991.

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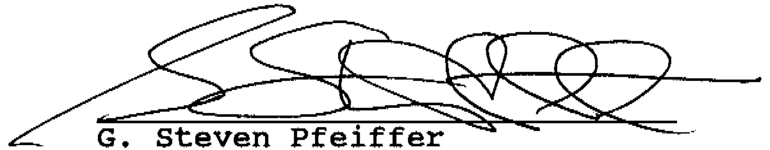
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by U.S. Mail to David Paul Horan, Esquire, 608 Whitehead Street, Key West, FL 33040, and by interagency mail to David Maloney, Esquire, Governor's Legal Office, The Capitol, Suite 209, Tallahassee, FL 32399-0001, this 22nd day of January, 1991.



G. Steven Pfeiffer