IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS
AND FLORIDA LAND AND WATER
ADJUDICATORY COMMISSION

Respondents.

CASE NO. 76,911

ANSWER BRIEF OF
FLORIDA LAND AND WATER ADJUDICATORY COMMISSION

On discretionary review of a decision of the Third District Court of Appeal.

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INTRODUCTION

This brief is filed by the Florida Land and Water Adjudicatory Commission, (the "Commission"). The Petitioners, James D. Young and Olivia Young, will be referred to as "Petitioners" or the "Youngs." The Commission's Co-respondent, the Department of Community Affairs, will be referred to as the "Department" or "DCA."

The Youngs have invoked the discretionary jurisdiction of this court to review Young v. State of Florida, Department of Community Affairs and Florida Land and Water Adjudicatory Commission, 567 So.2d 2 (Fla. 3rd DCA 1990) because the Third District Court of Appeal certified the decision to have passed on a question of great public importance 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 going forward, rested on the applicant for the permit.
>
> Id. at 3.

While the certified question is undoubtedly important to the Youngs and to the Department, the Commission does not believe that it is a question, involving as it does procedural issues of burden of proof and of going forward, of great public importance. The Commission therefore requests the Court to deny discretionary review of the Third District Court of Appeal's decision.

Furthermore, the Commission objects to the phrasing of the question on p. 1 of the Youngs' brief:

> In an appeal of a development permit by the state land planning agency pursuant to Section 380.07, Florida Statutes (1987), is the burden of persuasion and the burden of going forward on the **holder** of the development permit? (e.s.)

The Petitioners have misquoted the Third District's question when appearing to quote it. Most importantly, as will be developed in the argument section of this brief the court did not refer to the "holder" of the permit in its question. It referred to the "applicant" for the permit.

Finally, this brief adopts the brief filed by the Department in this court to the extent not inconsistent with this brief. In particular, the Commission adopts the Department's explanation of the context in which this case arises: appeal of development orders in the Florida Keys Area of Critical State Concern, one of this state's most sensitive and precious environmental resources.

STATEMENT OF THE CASE AND FACTS

In 1985, James D. Young, Sr., and Olivia A. Young applied to the Building Department of Monroe County, Florida, (the "County") for the issuance of three land clearing permits. The requested permits would allow for the clearing of all vegetation on the Petitioners' property on Big Pine Key in Monroe County for the purpose of raising nursery stock plants. On March 14, 1988, the County issued the permits. On February 28, 1989, following an appeal to the Florida Land and Water Adjudicatory Commission by the Department of Community Affairs, the Commission denied development approval. (R.1-17, R. 264-268).

On March 22, 1989, the Petitioners appealed to the Third District Count of Appeal the decision of the Commission. On June 19, 1990, the Third District Court of Appeal rendered an order affirming the final order of the Commission. On October 16, 1990, the Third District Court of Appeal certified to this Court that it had passed upon a question of great public importance. On October 30, 1990, Petitioners filed notice to invoke the discretionary jurisdiction of this Court. This review of this Court follows:[1]

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[1] Reference to the record on appeal will be as follows: "R.___." References to Petitioners' brief before this Court will be by way of "Brief, at p.____."

The Action of Monroe County

Petitioners are the owners of a parcel of property on Big Pine Key in Monroe County, Florida. In 1985, Petitioners applied to the County for three land clearing permits and, on March 14, 1988, the County issued the permits/development orders. Permits No. 8810000446, 8810000449, and 881000450 allowed for land clearing on the Petitioners' property for the purpose of raising nursery stock (R. 3-17).

Action of the Commission

On April 29, 1988, pursuant to section 380.07, Florida Statutes, DCA timely filed with the Commission its notice of appeal of the development orders issued on March 14, 1988. (R. 102). Section 380.07 provides for the appeal of development orders issued in any area of critical state concern within 45 days of issuance. DCA's appeal asserted the development orders violated environmental standards and requirements of sections 9-801, 9-802, 9-803, 9-804, 9-808, 9-809, 9-810, and 9-811 of the Monroe County Land Development Regulations.

The Commission referred this matter to the Division of Administrative Hearings ("DOAH") for a de novo hearing, and on November 30, 1988, this matter was heard by Hearing Officer Linda M. Rigot in Key West, Florida. At the commencement of the final hearing, Petitioners argued that DCA had the burden to show that the permit issued to the Petitioners was illegal. The hearing office rejected this argument. Upon failing to obtain a ruling that DCA carried the burden of proof, Petitioners announced their

refusal to participate further in the proceeding. (Brief, at p. 2). Petitioners failed to present any evidence in this cause. (R. 222; Brief, at p. 2). On December 21, 1988, the hearing officer entered a recommended order denying the Petitioners' land clearing permits on the basis that the Petitioners failed to carry the burden of proof at the hearing. (R. 221).

On February 28, 1989, the Florida Land and Water Adjudicatory Commission entered a final order adopting the hearing officer's recommended order and denying the Petitioners' applications for Monroe County Land Clearing Permits No. 8810000446, 8810000449, and 8810000450. (R. 264-268). The Commission held that the permit applicant bears the ultimate burden of proof in an appeal under section 380.07. The Commission further held that, because the Petitioners failed to participate at the hearing, they failed to satisfy their ultimate burden of proof. (R. 264-268).

Action of the Third District Court of Appeal

On February 28, 1990, the Petitioners filed an appeal to the Third District Court of Appeal of the final order of the Commission. The Petitioners asserted that the Commission erred by placing the burden of persuasion and the burden of going forward on the permit applicant even though the applicant did not bring the section 380.07 appeal to the Commission. On June 1991, 1990, the Third District Court of Appeal, citing Florida Dept. of Transportation v. J.W.C. Co., 396 So.2d 778 (Fla. 1st DCA 1981), affirmed the order of the Commission holding "that an applicant

for a license or permit carries the ultimate burden of persuasion of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency."

On June 29, 1990, the Petitioner filed a Motion for Rehearing, Motion for Rehearing En Banc and suggestion for certification. On October 16, 1990, the Third District Court of Appeal denied Petitioners' motion for rehearing and motion for rehearing en banc but certified that it 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. On October 30, 1990, the Petitioners filed notice to invoke the discretionary jurisdiction of this Court. This review followed.

SUMMARY OF ARGUMENT

This appeal centers around the burden of proof in a section 380.07 appeal to the Commission. Section 380.07, Florida Statutes, provides a mechanism for certain individuals or agencies to appeal the issuance of a local development order to the Commission. While the statute clearly uses the term "appeal," courts have repeatedly interpreted section 380.07(2) to mean that Commission action, taken after accepting evidence, conducting a de novo hearing, and rendering a decision issuing or denying the challenged permit is "final agency action." The Commission is not limited to reviewing the record of the local hearing below.

Several district courts of appeal have reviewed cases applying section 380.07 or similar agency appeal processes and have found that where a permit has been challenged, regardless of the challenger, the permit applicant bears the ultimate burden of persuasion through all proceedings including final agency action. The courts have interpreted an appeal to the Commission as leading to final agency action.

The Appellant in this matter applied for and received a permits from Monroe County. Although the Department of Community Affairs appealed the issuance of the permits to the Commission, the permit applicant bears the ultimate burden of proof of entitlement to the permit. The permit applicant failed to present any evidence or testimony before the Commission at the formal hearing. Because the Appellant failed to carry the burden

of proof and failed to develop a record to preserve the issues for review to this Court, the Commission had no choice but to deny the permits.

ARGUMENT

APPELLANT, AS THE APPLICANT FOR A CHAPTER 380 PERMIT, BEARS THE BURDEN OF PROOF BEFORE THE FLORIDA LAND AND WATER ADJUDICATORY COMMISSION IN A SECTION 380.07 PROCEEDING.

The thrust of this appeal concerns where the burden of proof falls in a section 380.07 action before the Commission. The Appellants spent the majority of their brief arguing that the issuance of land clearing permits by Monroe County constitutes final agency action and that one who challenges a permit bears the ultimate burden to prove that the permits were illegally issued. (Brief, at pp. 6-7, 9-12). The Appellants fail to recognize the difference between a "judicial appeal" and a section 380.07 appeal, fail to acknowledge case law directly addressing this issue in similar administrative appeals, and--bottom line--failed to present a "prima facie" case of entitlement to the permits, which would have preserved this matter for further review.

Section 380.07(2), Florida Statutes (1987) provides that:

> Whenever any local government issues any development order in any area of critical state concern...copies of such orders as prescribed by rule...shall be transmitted to the state land planning agency, the regional planning agency, and the owner or developer of the property affected by such order. Within 45 days after the order is rendered, the owner, the developer, an appropriate regional planning agency...or the state land planning agency may appeal the order to the

Florida Land and Water Adjudicatory Commission.

The term "appeal" mentioned in section 380.07(2) should not be interpreted in its most narrow technical sense. To do so would render that section illogical because 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. Instead, the First District Court of Appeal has interpreted the term in its broadest, non-technical sense, to mean merely an application to a higher authority. Transgulf Pipeline Co. v. Board of County Comm'rs, 438 So.2d 876, 878 (Fla. 1st DCA 1983), rev. denied. 449 So.2d 264 (Fla. 1984).

Transgulf, which involved a section 380.07 appeal of local development order to the Commission, is similar to this appeal. The First District Court of Appeal found that in a section 380.07 appeal, the Commission was not limited to a review of the local government hearing and that the hearing officer had the ability to conduct a de novo hearing pursuant to section 120.57, Florida Statutes. The court upheld the constitutionality of a de novo "appellate" review. Id.

The Appellants in this case assert that the issuance of permits by Monroe County constitutes final agency action and that the party who appeals the county's action in a section 380.07 appeal bears the burden of proof on appeal. (Brief, at pp. 3, 5, 9, and 11). The county's action, however, is not final agency action, and until final agency action takes place, the burden of proof in a section 380.07 appeal rests with the party requesting

the permit. Because DCA filed a timely appeal to the Commission, the Commission assumed the role as the agency responsible for final action.

The administrative review authorized by section 380.07 is de novo in nature. It allows the presentation of evidence and argument and requires a hearing in accordance with chapter 120. After the chapter 120 hearing, the Commission issues an order granting or denying permission to develop pursuant to the standards of chapter 380. The Commission's role is not similar to that of an appellate court; its function is "not to review action taken earlier" but to independently decide whether the appealed local development order meets applicable standards of chapter 380 and "to formulate final agency action." Florida Department of Transp. v. J.W.C. Co., 396 So.2d 778, 787 (Fla. 1st DCA 1981). The Appellants retained the burden to prove entitlement to the permit in issue through all proceedings until final action was taken by the agency. The Appellants failed to present any evidence at the final hearing, thereby failing to carry their burden of persuasion. (Brief, at p. 2).

The Florida Supreme Court and several district court of appeal decisions reviewing similar administrative appeals are directly on point and dispositive of this case. See Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981); Harbor Course Club v. Department of Community Affairs, 510 So.2d 915 (Fla. 3rd DCA 1987); Florida Dept. of Transp. v. J.W.C., Co., 396 So.2d 778 (Fla. 1st DCA

1981); General Dev. Corp. v. Florida Land & Water Adjudicatory Commission, 368 So.2d 1323 (Fla. 1st DCA 1979).

In Florida Dept. of Transp. v. J.W.C. Co., DER issued a notice of intent to issue a construction pollution permit to the Department of Transportation. A third party challenged the proposed action, and an administrative hearing was conducted. While only DOT presented evidence, the hearing officer recommended, and DER adopted, an order denying the permit. DOT appealed to the First District Court of Appeal, alleging that the hearing officer erroneously placed the burden of proof upon DOT at the formal hearing. J.W.C., 396 So.2d at 781.

The appellate court, finding DOT's position to be faulty, held that the proceeding leading up to the DER notice was preliminary in nature and that DOT retains the burden of proof of entitlement to the permit. The court implied that, where a de novo proceeding is requested, the preliminary action does not become final. The Court reasoned that the purpose of a de novo proceeding is not to review action taken earlier or preliminarily, but to finalize the action. The Court emphasized that there is no presumption of correctness in the preliminary proceeding and that the applicant retains the burden to prove entitlement to a permit throughout the proceeding. Id. at 789.

In sum, the court in J.W.C. clearly stated that the burden of persuasion remains with the permit applicant throughout all proceedings:

> We view it as fundamental that an applicant for a license or permit carries the "ultimate

> burden of persuasion" of entitlement through all proceedings, of whatever nature, until such time as final agency action has been taken by the agency.

Id. at 787. (Emphasis added).

The J.W.C. court relied on an earlier Commission case, General Development Corp. v. Florida Land and Water Adjudicatory Comm'n, 386 So.2d 1323 (Fla. 1st DCA 1979), in finding that the hearing officer did not err in requiring the developer to present its case first in an appeal under section 380.07, since it would facilitate an orderly presentation of evidence. General Development is significant to this appeal for two reasons. First, General Development recognized that the Commission, pursuant to section 830.07, takes final agency action. Second, the court in General Development, as in J.W.C., found it appropriate to compel the permit applicant to first move forward with his case on a section 380.07 appeal to the Commission. General Development, 368 So.2d at 1326.

While the Appellants suggest that case law compels DCA to bear the burden at the section 380.07 de novo hearing, the Appellants failed to cite one case for the benefit of this Court. Both J.W.C. and General Development, however, are directly on point with this appeal and hold that the hearing officer does not err in requiring the permit to first present a prima facie case before the agency. In J.W.C., the court stated:

> as a practical matter...we can conceive of no more orderly way for a formal hearing to be conducted than to have the applicant (who has the ultimate burden of persuasion) first present a "prima facie case." The hearing

> officer is not required to commence hearing the petitioning objector's evidence in such a proceeding with a blank record. We think it essential, both for the benefit of the hearing officer and the petitioning objectors (to say nothing of the agency, and the appellate court) to have on record a basic foundation of evidence pertaining to the application so that the issues can be understood.

396 So.2d at 788.

J.W.C. and General Development were followed by Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981). Graham involved a section 380.07 appeal to the Commission resulting from a denial of a development order permitting a development of regional impact. In Graham, the Florida Supreme Court, reversing the First District Court of Appeal, held that although the state has the burden to demonstrate the adverse impact resulting from the requested permit, the permit applicant bears the ultimate burden of persuasion. This Court reasoned that "we do not ignore or alter the established rule of administrative law that one seeking relief carries the burden of proof." Graham, 399 So.2d at 1379.

It is the Appellants who are seeking the land clearing permits and who bear the burden to prove entitlement. The Appellants failed to present any evidence or testimony at the de novo hearing and failed to make a prima facie case of entitlement. Had the Appellants made a prima facie case of entitlement, the burden would have then shifted to the state to show that the proposed development would have had an adverse impact. As in J.W.C. and General Development, however, the

permit applicant must move forward with a showing of entitlement of the permit before the state is obligated to put on a demonstration of harm. The Appellants opted not to participate in the de novo hearing and therefore never met their burden of persuasion.

In 1987, the Third District had the opportunity to review a case similar to the instant case in Harbor Course Club v. Department of Community Affairs, 510 So.2d 915 (Fla. 3rd DCA 1987). The Court affirmed a final order of the Commission which stated that it is the permit applicant who bears the burden of proof in a section 380.07 appeal. The facts of Harbor Course Club are on all fours with the instant case and involved an application to Monroe County for a permit to clear 3.6 acres of tropical hardwood hammock for a golf driving range in Key Largo, Florida. Harbor Course Club, like the Appellants in the instant case, received permission from Monroe County to clear the vegetation from its land. DCA filed a timely appeal with the Commission, pursuant to section 380.07, alleging that their permit violated the Monroe County Comprehensive Plan. Id. Even though DCA initiated the appeal to the Commission, the hearing officer concluded and the Court affirmed that "Harbor Course Club...[had] the burden of proof in [the] de novo proceeding since they [were] seeking a permit to clear land in Monroe County...." Id. at 917. It was Harbor Club who had to prove entitlement to their permit on appeal to the Commission.

Harbor Course Club is persuasive and controlling of this

appeal for several reasons. One, the decision relies on the holdings in Transgulf and J.W.C. and reaffirmed that it is the permit applicant who bears the burden of proof of entitlement to a chapter 380 permit. Second, the facts of Harbor Course Club are synonymous with the instant case and stand for the proposition that a permit from Monroe County is not final agency action, and that irrespective of who filed the appeal to the Commission, the permit applicant bears the burden of proof of entitlement. Because the Appellants failed to put on any testimony or evidence before the appeal to the Commission, the Appellants failed to meet their burden of proof and therefore, this appeal must fail.

The holdings in J.W.C., General Development, Graham, and Harbor Course Club are not isolated decisions. The Commission, through its own language and the adoption of recommended orders, has consistently held that the permit applicant bears the ultimate burden of persuasion in an appeal under section 380.07 to demonstrate entitlement to the permit as issue. While DCA has the burden to identify the areas of controversy and to allege factual deficiencies of the applicants' proposed permit, the ultimate burden of persuasion rests with the applicant to establish entitlement to the permit.

Based on the foregoing, the Appellants retained the ultimate burden to prove entitlement to the land clearing permits. By failing to participate at the hearing before the Commission, the Appellants unilaterally foreclosed both the opportunity to

present a preliminary showing sufficient to make out a prima facie case and the opportunity to satisfy their ultimate burden of persuasion. The Appellants' refusal to act was fatal to their own cause and, ultimately, this appeal.

Furthermore, while the appellants unfairly chastise the Commission and the hearing officer for failing to apply common sense, the Appellants committed a greater offense by failing to heed judicial principles and well-stated case law. The Appellants failed to adhere to the burden of persuasion as defined in J.W.C., General Development, Graham, Harbor Course Club, and countless prior final orders of the Commission. By failing to put forward a prima facie case, the Appellants left the Commission with no alternative but to deny the land clearing permits.

CONCLUSION

The court should use its discretion in this case to deny review since the case is not one of great public importance. If the court reviews the decision of the Third District Court of Appeal, the decision should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the below listed persons on January 23, 1991.

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