IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CASE NO. 76,911

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

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent,

ON CERTIFICATION OF A QUESTION OF
GREAT PUBLIC IMPORTANCE
FROM THE THIRD DISTRICT COURT OF APPEALS

PETITIONERS' REPLY BRIEF

BY: DAVID PAUL HORAN
DAVID PAUL HORAN
& ASSOCIATES, P.A.
608 Whitehead Street
Key West, Florida 33040
Telephone: (305) 294-4585

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

STATE CONSTITUTION:

OTHER:

PRELIMINARY STATEMENT

For purposes of reference, the Respondent DEPARTMENT OF COMMUNITY AFFAIRS [the DEPARTMENT] Answer Brief will be referred to as (DB-) followed by the page of the Brief referenced. The FLORIDA LAND AND WATER ADJUDICATORY COMMISSION [the COMMISSION] Answer Brief will be referred to as (CB-).

EXCEPTIONS TAKEN TO POINTS RAISED IN THE ANSWER BRIEFS

First, a little humor. The DEPARTMENT goes so far in their Answer Brief to state that the Administrative Hearing scheduled for the DEPARTMENT's appeal of the YOUNGS' permits was to "benefit" the YOUNGS! The DEPARTMENT states that the YOUNGS:

> . . . adamantly refused to participate in the proceedings scheduled for their benefit. (emphasis added) (DB-4)

This is a little like saying Kuwait failed to attack Iraq in response to the war which Sadam Hussein scheduled for Kuwait's benefit. The YOUNGS and Kuwait were happy where they were - they were at peace - the DEPARTMENT and Iraq initiated the attacks and it was not to "benefit" either the YOUNGS or Kuwait!

The DEPARTMENT states that the "Appellants [YOUNGS] refused to participate". (DB-2) Yet, it was announced by the YOUNGS attorney that the YOUNGS were waiting to respond to the DEPARTMENT's argument and evidence. *See*, YOUNG'S Opening Statement (R-246-253)

The DEPARTMENT states that . . . "no evidence was presented by Appellants to affirmatively show that they are entitled to develop under the Monroe County Land Development Regulations." (DB-2) Monroe County issued the permits three (3) years after the application was made and the fee paid. The Monroe County Permits appear

in the administrative record on April 29, 1988 (R-11-13) as attachments to the DEPARTMENT's Notice of Appeal (R-3). The DEPARTMENT requested that the permits be "reversed", yet the Hearing Officer stated at the November 30, 1988 hearing:

> At this point they [YOUNGS] do not have a permit, they do not have anything to go forward . . .(emphasis added) (R-254)

The mistake made by the Hearing Officer was to determine that the filing of the DEPARTMENT's Notice of Appeal, without more, had already invalidated and rescinded the YOUNGS' Monroe County Permits.

The DEPARTMENT alleges that:

> 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". (DB-5)

The YOUNGS pointed out that forcing them to go forward with the burden of proof and persuasion was basic . . . "procedural due process fundamental error". (R-250) If a citizen comes into a United States Court as a Defendant, Respondent or Appellee and is told that he or she is in possession of an illegal permits (R-3-4), that have already been invalidated by the opposing party, then the correct response is, "Says who, and on what basis?" It is all together reasonable and proper to wait on the Plaintiff/Petitioner/ Appellant to proceed!

The DEPARTMENT states the COMMISSION proceedings . . . "require(s) a full evidentiary hearing where disputed issues of fact exist". (DB-6) The question then becomes what "disputed issues of fact" existed regarding the YOUNGS issued and paid for permits? Isn't it reasonable to require the party asserting error and requesting reversal of an issued development order to show a prima face case that there is a disputed issue of fact?

The DEPARTMENT alleges that local regulation [legislation] is . . . "not entitled to a presumption of correctness". (DB-7) The DEPARTMENT seems to be relying on Sections 380.0552(9) and 163.3184(14) of the Florida Statutes which provides that local legislation does not become "effective" until approved under Chapter 380. (DB-24) It should be noted that having an administrative "veto" of local legislation has not survived a separation of powers constitutional challenge. To postulate that there is no presumptive validity of local legislation and that the DEPARTMENT is free to arbitrarily "veto" local legislative acts without carrying any burden of proof would make the DEPARTMENT the "law giver". The DEPARTMENT's argument completely overlooks the legislative provisions for administrative review of land development regulations set forth in Section 163.3213 of the Florida Statutes (1987). In both subsections 5(a) and 5(b), it is mandated 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. §163.3213(5)(a) and (b) Fla. Stat.

The constitutional challenge to an arbitrary administrative "veto" should be left to a later day.

In the COMMISSION's Brief they allege:

> The requested permits would allow for clearing of all vegetation on the Petitioners' property . . . (CB-3)

Yet the permits - not "requested" permits - make extensive provision for large buffer strips - protection of vegetation and transplantation of certain types of trees. (R-11) By being so obviously wrong on this specific fact, the COMMISSION may have tried to get away from the fact that the proceeding in this Court is "generic", not specific. It concerns all appeals to the COMMISSION of local development orders no matter whether they are legislative, quasi-legislative, or administrative in origin! The DEPARTMENT and COMMISSION would have the actual issuance of the local development order play no part in the appeal. In the DEPARTMENTS' and COMMISSIONS' view, the development orders of local government aren't even advisory no matter what amount of public testimony or local legislative deliberation was involved in their origination. (CB-7)

SUMMARY OF ARGUMENT

> GENERIC: RELATING TO OR CHARACTERISTIC OF A WHOLE GROUP OR CLASS; GENERAL, AS OPPOSED TO SPECIFIC OR SPECIAL.
>
> BLACKS LAW DICTIONARY
> Fifth Edition

Under the Committee Notes of the 1980 Amendment to Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure, it states:

> Subsection (a)(2)(A)(v) substitutes the phrase "great public importance" for "great public interest" in the predecessor constitution and rule, the change was to recognize the fact that some legal issues may have "great public importance" but may not be sufficiently known by the public to have "great public interest".

Wouldn't it be a shame for the public participants in local public hearings to be told that regardless of their position - regardless of their presentations - regardless of who they elect of defeat at the polls - local government actions mean nothing! What kind of public input and participation could be expected if the public knew that some attorney in Tallahassee could, by signing a discretionary Notice of Appeal, start the zoning - re-zoning - plat approval - variance permitting process all over again? Using the DEPARTMENT's and COMMISSION's arguments, a developer could save all of his arguments for the Section 380.07 Florida Statutes Appeal. Common sense tells us that there is simply no way to get the public to come and testify (all over again) before

the COMMISSION's Hearing Officer. There is a fundamental due process procedural error in placing the burden of proof on the holder of the issued development permit. The decision on this "generic" question importance concerns the appeal of all development permits under Section 380.07 of the Florida Statutes (1987).

ARGUMENT

Counsel for the YOUNGS urged the COMMISSION to use . . . "its God-given common sense . . . the Petitioner -- not the Respondents -- bear the ultimate burden of persuasion" . . . in the appeal. (R-265) This certified question of "great public importance" is generic, it concerns all Section 380.07 of the Florida Statutes Appeals of all "development orders".

The certified question relates to the whole group or class of Section 380.07 of the Florida Statutes (1987) appeals, not just the appeal of the YOUNGS' three (3) land clearing permits. This Court has an absolutely perfect administrative and judicial record to decide this certified question. There are (and were) no facts (disputed or otherwise) to "clutter up" the decision. The Legislature did not make any distinction between development orders which involve local legislative functions (such as zoning, rezoning or variances) and development orders that involve administrative determinations (such as building permits, certifications, etc.).

The Legislature defined "development order" as any order on a development permit application. *See* §380.031-(3), Fla. Stat. (1987). Based on the definition of "development order", the Section 380.07 appeal is on any order granting, denying, or granting with conditions any application for . . .

> . . . any building permit, zoning permit, plat approval, or rezoning, certification, variance or other action having the effect of permitting development. *See*, 380.031(4) Florida Statutes.

The DEPARTMENT and COMMISSION do not want this Court to consider the full scope of the "generic" certified question. What they want is a broad decision, on a non-existent set of facts, that states:

> In any Section 380.07 Florida Statutes (1987) appeal the burden of persuasion and the burden of going forward is on the holder of the development order or on local government.

Other than the fact that Monroe County did issue the development permits to the YOUNGS there are no facts - no testimony - no documentary evidence that would justify "reversing" the development orders. (R-6)

In the First District's 1983 decision in Transgulf Pipeline Company/Dept. of Community Affairs v. Board of County Com'rs of Gadsten County, 438 So.2d 876 (Fla. 1st DCA 1983), **rev. den.**, 449 So.2d 264 (1983), the Court pointed out that the decision on whether to conduct the

hearing "de novo", as opposed to classic appellate review, is not the DEPARTMENT's, the COMMISSION's or the Hearing Officers decision. The decision is really whether to admit certain other evidence in the Section 120.57 hearing. Transgulf Pipeline, 438 So.2d at 879.

In the DEPARTMENT's Answer Brief, page 14, it is pointed out that . . . "all development orders issued by local government in the Florida Keys, along with all supporting documentation, must be rendered to DCA for review. Section 380.07(2) Fla. Stat.; Chapter 9J-1, F.A.C." If grounds to attack and overturn the local development order do not appear in the . . . "supporting documentation". . . ., then the DEPARTMENT can submit "new" or "other" evidence in the Section 120.57 of the Florida Statutes (1987) appeal proceeding. This is exactly the type of procedure first envisioned by the DEPARTMENT in it's April 29, 1988 Petition. (R-3) The DEPARTMENT requested the right to submit "new" or "other" evidence de novo;

> . . . so that the Department may present expert testimony and evidence to establish the facts asserted in its Petition; and B) that the Monroe County Development Order[s] to the extent that it approves development as described herein that is illegal and violative of the provisions of the Monroe County Land Development Regulations and Comprehensive Plan, be reversed". . . (emphasis added) (R-6)

The Legislature mandated that the COMMISSION encourage submission of appeals on the local government record made below. § 380.07(3), Fla. Stat. (1987). There was no local government record even mentioned by the DEPARTMENT in submitting the Appeal. (R-3) In spite of having asserted that the development orders were . . . "illegal and violative of the provisions of the MCLDRs and Comprehensive Plan", the DEPARTMENT submitted no . . . "expert testimony and evidence to establish the fact asserted in its Petition". (R-6)

It should be noted that in it's Petition, the DEPARTMENT sought to "reverse" the development orders. (R-6) The ability to appeal and "reverse" a development order issued by local government is more akin to a license revocation than any other type of proceeding. What is being sought or alleged by the Petitioner in a Section 380.07 Florida Statutes Appeal is that the development order should be altered or "reversed" in some way. (R-6) Even where the agency itself issues a permit or license and later seeks to alter or revoke it, the burden is on the agency to prove the allegations in it's administrative petition. *See*, Associated Home Health Agency, Inc. v. State Department of Health and Rehabilitative Service, 453 So.2d 104 (Fla. 1st DCA 1984).

There is no question that the COMMISSION (or it's Hearing Officer) may permit new evidence and new testi-

mony in order to allow the Petitioner/Appellant to meet it's burden. In a Section 380.07 Florida Statutes (1987) Appeal, the DEPARTMENT could meet it's burden simply by showing that a local development order has been issued and if not reversed, it would allow a totally prohibited use of certain land. God-given common sense tells us that no Petitioner can successfully challenge and reverse a local development order without some testimony or some evidence that the order is inconsistent with the Local Land Development Regulations and Comprehensive Plan. *See*, § 163.3213(5)(a) and (b), Fla. Stat. (1987).

Separation of Powers

Twelve (12) years ago, on November 22nd, 1978, this Court rendered it's decision in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). This decision upheld the Court of Appeals invalidation of Section 380.05(1) of the Florida Statutes (1975) on the constitutional basis of the separation of powers of government. The Court pointed out that Article II, Section 3 of the Florida Constitution, contrary to the United States Constitution:

> . . . Does by it's second sentence contain an express limitation upon the exercise by a member of one branch, of any powers appertaining to either of the other branches of government.

The Court then asked, and answered it's own question:

> Should this court then, accept the invitation of appellants [Florida Land and Water Adjudicatory Commis-

> sion] to abandon the doctrine of non-delegation of legislative power . . . We believe stare decisis and reason dictate that we not. Askew v. Cross Key Waterways, 372 So.2d at 924.

Many of the development orders subject to appeal under Section 380.07 of the Florida Statutes (1987) are the result of the exercise of the legislative power of government.

There is established policy and a long line of case law upholding judicial review of the exercise of legislative power. In Manatee County v. Estech Gen. Chem. Corp., 402 So.2d 1251 (Fla. 2nd DCA, 1981) the Court validated shifting the initial review of . . . "local zoning laws and decisions" . . . from the Circuit Court to the COMMISSION by way of a Section 380.07 Florida Statutes (1987) Appeal. Manatee County, 402 So.2d at 1255. The Court stated that the COMMISSION could not . . . "arbitrarily ignore the local zoning laws or decisions". Manatee County, 402 So. 2d at 1256. For this Court to hold that the mere discretionary decision to file an appeal under Section 380.07 of the Florida Statutes (1987) invalidates a legislative decision of local government would violate the Separation of Powers Doctrine Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978).

As in Askew v. Cross Key Waterways, this Court is again being "invited" by the COMMISSION (and the DEPART-

MENT) to abandon the Doctrine of Non-Delegation of Legislative power. This Court is being asked to take the legislative power involved in issuing all local development orders including . . . . "zoning permit(s), plat approval(s) or rezoning, variance, or other action having the effect of permitting development from local elected legislative leaders." See, §380.031(4), Fla. Stat. (1987).

This Court is being "invited" to vest legislative powers including zoning, re-zoning, etc., in an appointed state administrative agency (the DEPARTMENT) and in an elected state administrative agency (the COMMISSION). Chief Justice England, in a Concurring Opinion in Askew v. Cross Key Waterways, 372 So. 2d at 925 stated;

> "Law giving, the power involved here, is a responsibility assigned to the legislature, and that body is prohibited from relegating its responsibility wholesale to persons, whether elected [COMMISSION] or appointed [DEPARTMENT], whose duties are simply to see that the laws are observed. (emphasis added).

An appeal by the DEPARTMENT to the COMMISSION fulfills the duty of the administrative branch of government to ". . . simply see that the laws are observed." If the DEPARTMENT carries its burden of going forward and persuading the COMMISSION that the laws (MCLDRs) are not being observed and that a specific development order is illegal, then - and only then - can the development order

be reversed or additional conditions and restrictions attached to it.

Zoning, rezoning, variances, etc., are clearly legislative functions of government. *See*, § 163.3213(5)-(a) and (b), Fla. Stat. (1987). Zoning Ordinances are laws and laws, by our definition, are restrictions on our previously unrestricted rights. Origination of law is a legislative function and origination of a rule (by an agency) is a quasi-legislative function. The legal issue to be addressed in this Court's determination of this question of "great public importance" is:

> Should legislative actions of local elected legislative representatives (County Commissioners) be accorded equal or greater weight or validity than quasi-legislative actions of administrative agencies?

In Manasota-88, Inc. v. Dept. of Env. Regulation, 567 So.2d 895 (Fla. 1st DCA 1990), it was pointed out that rule making by an agency is quasi-legislative and records of such proceedings are compiled in informal, non-adjudicatory settings without findings of fact. Manasota-88, 567 So.2d at 897. The first District pointed out that the record on appeal of quasi-legislative proceedings should include the agency's initial proposal [the development permit application or county proposal for a zoning change], written or oral replies of interested parties, [correspondence, transcripts of any public hearings, etc.], the final rule [the development order]

and a statement of relevant facts considered by the agency which should reveal if and how the agency considered each factor through the process of policy formation [the written or transcribed comment of the County Commissioners and/or their staff and local agency input and considerations]. Manasota-88, 567 So.2d at 898. The brackets above show the record available from a legislative proceeding giving rise to a development order which is subject to a Section 380.07 Florida Statutes (1987) Appeal.

In quasi-legislative proceedings, the agency action is final at the time the rule is adopted [the development permit is issued] and any adversely affected party [owner, developer, regional planning agency, DEPARTMENT] then has thirty (30) days from filing [forty-five (45) days from rendering/issuance] in which to seek judicial review [review by the COMMISSION by way of a Section 380.07 Florida Statutes (1987) Appeal]. Manasota-88, 567 So.2d at 89. In a review of quasi-legislative action, the Appellate Court must sustain the validity of the rule as long as it is reasonably related to the purposes of the enabling legislation and is not arbitrary or capricious. Manasota-88, 567 So.2d at 897. Does it make any sense to hold quasi-legislative action valid (if not arbitrary or capricious) and hold that legislative action has no presumptive validity?

CONCLUSION

This Court has a clear question to answer. It is of great public importance! The answer must be:

> In an appeal pursuant to Section 380.07 Florida Statutes (1987), the burden of going forward and the burden of persuasion rests on the Petitioner/Appellant . The development order issued by local government is presumptively valid.

Whether the local development order is legislative (zoning) or administrative (building permit), there must be some reason for the existence of local government. Citizens who pay ever increasing ad valorem taxes to support large county administrations and citizens who vote on county commissioners (legislative branch of local government) must have some control over their cost of living and restrictions on their individual rights.

Fundamental due process considerations and God-given common sense tell us that when an owner, developer, regional planning agency or the DIVISION makes the decision to appeal a development order pursuant to Section 380.07 of the Florida Statutes (1987), there is a corresponding duty to show to the COMMISSION why the order is "invalid" or should be "reversed" in whole or in part. (R-6)

Respectfully submitted,

DAVID PAUL HORAN & ASSOCIATES, P.A.

DAVID PAUL HORAN
For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished on this 15th day of February, 1991 to the offices of:

Randy Ludacer, Esq.
Monroe County Attorney
500 Whitehead Street
Key West, FL 33040

Deborah Hardin-Wagner
Assistant General Counsel
Office of the Attorney General
The Capitol - Room 209
Tallahassee, FL 32399

Diana M. Parker,
Sr. Attorney
C. Laurence Keesey,
General Counsel
Dept. of Community Affairs
2740 Centerview Drive
Tallahassee, Fl 32399-2100

Patricia Woodworth, Sec.
Florida Land and Water
Adjudicatory Commission
The Capitol
Tallahassee, Fl 32399

Respectfully submitted,

DAVID PAUL HORAN & ASSOCIATES, P.A.
608 Whitehead Street
Key West, Florida 33040
Telephone (305) 294-4585
Telefax (305) 294-7822

DAVID PAUL HORAN
For the Firm
FLA. BAR NO. 142474