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IN THE SUPREME COURT
STATE OF FLORIDA

SANTA ROSA COUNTY, FLORIDA

Petitioner,

v.

ADMINISTRATION COMMISSION, DIVISION OF ADMINISTRATIVE HEARINGS, DON W. DAVIS, in his capacity as Hearing Officer for the Division of Administrative Hearings, and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents.

CASE NO.: 85,545
(First DCA Case No. 93-659)

SANTA ROSA COUNTY'S REPLY BRIEF

KENNETH G. OERTEL
Fla. Bar ID #128808

M. CHRISTOPHER BRYANT
Fla. Bar ID #434450

OERTEL, HOFFMAN, FERNANDEZ & COLE, P.A.
Post Office Box 6507
Tallahassee, Florida 32314-6507
(904) 877-0099

and

THOMAS V. DANNHEISSER
Fla. Bar ID #323942

County Attorney
Santa Rosa County
801 Caroline Street, S.E.
Suite J
Milton, Florida 32570-5978

Attorneys for Petitioner
Santa Rosa County

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OERTEL, HOFFMAN, FERNANDEZ & COLE, P. A., P. O. BOX 6507,TALLAHASSEE, FLORIDA 32314-6507

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SUMMARY OF THE ARGUMENT

Summary judgment was erroneously entered below on the issue of mootness, and erroneously affirmed below on the issue of standing. Santa Rosa County has standing to challenge the constitutional validity of growth management statutes and rules because they constrain the County's exercise of legislative discretion and judgment in fulfilling its comprehensive land use planning duties. The exercise of legislative discretion by the County, rather than the administration or execution of laws adopted by the legislature, distinguishes this case from the general rule that public officers and agencies cannot challenge statutes defining their duties. In addition, because compliance with the statutes requires the County to expend public funds, and because funds otherwise available to the County are placed at risk by the challenged statutes and rules, the "public funds" exception to the above-stated general rule applies to afford the County standing. Further, this case presents issues of the constitutionality of the executive branch reordering budgeting priorities, similar to what this Court invalidated in Chiles v. Children, 589 So. 2d 260 (Fla. 1991).

The case below was not moot, as ruled by the trial judge. While a settlement agreement had been entered into by the County and the Department of Community Affairs in a related administrative proceeding, the County was and is still required to comply with the unconstitutional statutes and rules. The issue is likely to recur because of the ongoing, continuous nature of the planning process,

and because of its widespread applicability to <u>all</u> local governments in Florida.

Summary judgment was not based on the absence of factual disputes on the merits of the County's claims, but only the threshold issues of standing and ripeness/mootness. The County should at least be given the opportunity to present its case in court, and public policy is not served by requiring compliance with unconstitutional laws.

ARGUMENT

I. SANTA ROSA COUNTY IS ENTITLED TO PROTECT SOURCES OF REVENUE BY CHALLENGING GROWTH MANAGEMENT STATUTES WHICH THREATEN THOSE REVENUE SOURCES

For the benefit of the Court, this appeal concerns the entry of summary judgment in a declaratory judgment action brought by the County to invalidate portions of the Local Government Comprehensive Planning and Land Development Regulation Act (Part II of Chapter 163, Fla. Stat.) and Department of Community Affairs Rule 9J-5 (collectively, the "Growth Management Act"). The challenged statutes and rules prescribe the substantive content of local government comprehensive land use plans ("comp plans"), such as Santa Rosa County's; require the compliance of such plans with regional policy plans and the state comprehensive plans; and threaten various sources of state funds to counties and municipalities if their plans are not "in compliance." The trial judge entered summary judgment against the County, holding that the County's action was moot following entry of a settlement agreement

in a related administrative proceeding concerning the compliance of the County's comp plan. The First District, reversed on the issue of mootness because of the importance and recurring nature of the questions presented, but affirmed the entry of summary judgment based on the lack of standing of "public officers and agencies" to challenge statutes defining their duties. Santa Rosa County v. Administration Commission, 642 So. 2d 618 (Fla. 1st DCA 1994).

In its Initial Brief, the County argued that an exception to the "public officers and agencies" doctrine exists (and applies here) where the challenged statutes concern "public funds." The Department argues in Point III.B. of its Answer Brief that those "public funds" cases, authorizing the state comptroller and county property appraisers to challenge statutes affecting revenue collection, do not apply to Santa Rosa County. The County, the Department argues, does not "collect" the revenues at issue, unlike the plaintiff officials in Green v. City of Pensacola, 108 So. 2d 897 (Fla. 1st DCA 1959) and Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4th DCA 1983), rev. den. 434 So. 2d 888 (Fla. 1983), who were found to have standing to challenge statutes affecting their duties.

The County disagrees. The revenue sources at issue in the County's challenge include state agency funding for roads, bridges, and water and sewer systems; community development block grants; recreation development assistance; and revenue sharing. These programs represent sources of funds that are given to (collected by) local governments, including counties. All funds are placed in

jeopardy by the sanctions provided in Section 163.3184(11). Contrary to the Department's position, counties clearly do "collect" such funds; they collect them from the various state agencies which distribute them, such as the Department of Revenue (for gasoline tax, cigarette tax, and sales tax revenue sharing); the Department of Community Affairs (for community development block grants); and the Department of Natural Resources (for recreation development assistance). See, respectively, Sections 206.60, 210.20, 218.61, 290.044, and 375.075, Fla. Stat.

That counties do not collect these funds directly from taxpayers is of no consequence. The theory behind standing to protect revenue sources through litigation, as evidenced by Green v. City of Pensacola and Markham v. Yankee Clipper Hotel, is the maximization of revenue for the public coffers, and the threat of the loss of these funds. On this basis, the County has standing to challenge provisions of the Growth Management Act.

II. THE "PUBLIC FUNDS" EXCEPTION TO THE GENERAL RULE GOVERNING CHALLENGES BY PUBLIC OFFICERS AND AGENCIES AUTHORIZES THE COUNTY'S LAWSUIT

The Department contends that, since the challenged statutes and rules do not increase the cost of planning, then the "public funds" exception does not apply to allow the County to challenge these statutes and rules. Answer Brief, Argument III.A. The public funds exception only serves to provide the County standing, not to limit the ability or extent of challenges to the statute.

The County has asserted that a conflict exists between the First District Court's decision in the instant case and this

Court's ruling in City of Pensacola v. King, 47 So. 2d 317 (Fla. 1950). In City of Pensacola v. King, the Railroad and Public Utilities Commission was held to have standing to challenge a statute because the Commission's duties under the statute might entail holding a hearing, thus involving the expenditure of public funds. In its discussion of that case, the Department suggests that, "if the Commission's challenge had been successful, the Commission would not have been required to expend public funds in order to hold the hearing." Answer Brief at p. 16.

The Department's argument, while clever, is not supported by an analysis of the laws at issue in City of Pensacola v. King. The challenged law in that case, Chapter 24806, Laws of Florida (1947), removed from the jurisdiction of the Commission, and granted to the City of Pensacola, the authority to regulate auto transportation companies within the suburban area surrounding the City of Pensacola. The size of the suburban area could be determined by the Commission, which "may" have required a hearing; however, if the Commission took no action, Chapter 24806 fixed the size of such area at "all territory within a distance of ten miles from the corporate limits" of the City. Chapter 24806, Section 2, Laws of Florida (1947).

Action by the Commission, then, was not mandated by Chapter 24806. The Commission would only take action, and only hold a hearing (also not mandated by the Act), if the size of the suburban area was to be altered. If Chapter 24806 had never been adopted, the Commission's duties and responsibilities would likely have been

greater, not less, as there would have been no legislatively-created boundary of Pensacola's suburban area.[1] For auto transportation companies coming within the Commission's jurisdiction, application to the Commission for a "certificate of public convenience" was required, as was a hearing on the application. Section 323.03, Official Revised Florida Statutes (1941). Public funds would be expended by the Commission with or without Chapter 24806 being on the books, with possibly even more funds being expended if the Commission's challenge succeeded.

The Department is therefore incorrect when it suggests that the potential for avoiding the expenditure of public funds was the basis for the "public funds" exception as applied in City of Pensacola v. King. The impact on public funds, whether greater or less than impacts that would exist in the absence of the challenged law, merely establishes the requisite level of interest to afford standing; it does not define or limit the issues that could be litigated, once standing is established.

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[1] Then-existing law granted to cities, and exempted from Commission jurisdiction and control, the authority to regulate compensated motor vehicle operators within the corporate limits "or the adjoining suburban territory" of a city. Section 323.29, Official Revised Florida Statutes (1941). Whether particular areas fell within the "adjoining suburban territory" of a city was by no means clear, as evidenced by litigation in which the Commission sought to establish its jurisdiction. See, e.g., Brack v. Carter, 37 So. 2d 89 (Fla. 1948) (City of Jacksonville); Pensacola Transit v. Douglass, 34 So. 2d 555 (Fla. 1948) (City of Pensacola); State ex rel City of Miami Beach v. Carter, 39 So. 2d 552 (Fla. 1949); Roberts v. Carter, 76 So. 2d 789 (Fla. 1954) (City of Tampa); Mercury Cab Owners Association v. Miami Beach Air Transport, 77 So. 2d 837 (Fla. 1955) (City of Miami Beach).

III. SANTA ROSA COUNTY HAS STANDING TO CHALLENGE CONSTRAINTS ON ITS COMPREHENSIVE PLANNING DUTIES BECAUSE THEY ARE LEGISLATIVE, NOT ADMINISTRATIVE, DUTIES.

The Department acknowledges in its Answer Brief that comprehensive planning is a legislative function of local government, and that the challenged portions of the Growth Management Act impose significant constraints on comprehensive planning by the County. Answer Brief at pp. 8, 5. The Department disputes, however, that these factors provide the County any relief from the general rule that public officers cannot challenge statutes affecting their duties.

Generally, and as discussed more fully in the County's Initial Brief on the Merits, the cases prohibiting public officials from challenging controlling statutes serve to maintain and reinforce the respective roles of the legislative and executive branches of government. The Legislature makes policy decisions and determines what the law is; the executive branch implements those policy decisions and enforces those laws. As this Court once stated:

> The people of this state have the right to expect that each and every. . . state agency will promptly carry out and put into effect the will of the people as expressed in the <u>legislative</u> act of their <u>duly elected representatives</u>.
>
> The state's business cannot come to a standstill while the validity of any particular statute is contested by the very board or agency charged with the responsibility of <u>administering</u> it. . .

<u>Barr v. Watts</u>, 70 So. 2d 347, 351 (Fla. 1953) (emphasis added).

The County's Board of County Commissioners, which must legislatively adopt and amend the County's comp plan, are elected policymakers, not administrators. The electorate of Santa Rosa County expects that the "will of the people" will be carried out by the County Commission in its planning efforts. Statutory and rule constraints on the County's exercise of legislative discretion and judgment do not carry out and put into effect the will of these people; instead, such constraints potentially thwart the will of the people.

The Department mischaracterizes the County's argument against the prohibition on public officers challenging statutes. The County does not believe that the prohibition applies only where "insignificant" legislation is involved (p. 6 of Answer Brief). It is the difference between administrative officers challenging the legislature's choices, and a legislative body (the Board of County Commissioners) seeking to protect their own ability to exercise discretion and judgment in a legislative area: comprehensive land use planning.

Even the Florida Legislature, in adopting and amending the Growth Management Act, recognized the "broad statutory and constitutional powers" of municipal and county officials "to plan for and regulate the use of land." Section 163.3161(8), Fla. Stat. Prior to the 1985 amendments to the Growth Management Act, Department approval of the substantive content of comprehensive plans was not required, except as to designated areas of critical state concern, Section 163.3184(6), Fla. Stat. (1983) When the

original, 1969 comprehensive planning statutes (Sections 163.160 - 163.315) were repealed in 1985, it was with the express legislative statement that such repeal "shall not be interpreted to limit or restrict the powers of municipal or county officials." Chapter 85-55, Laws of Florida, codified at Section 163.3161(8), Fla. Stat. But the limitation and restriction of the power of county officials is exactly the result of the challenged statutes and rules, and Santa Rosa County should have the opportunity to challenge those statutes and rules.

The Department, in support of its mootness argument, suggests that the County can avoid the monetary sanctions of the statute by delaying the effective date of plan amendments until they are determined to be "in compliance." Answer Brief at p. 29. ("In compliance" is defined by the Growth Management Act to mean compliance with the Act, the state comp plan, and the regional policy plan; such a compliance determination would be made by the Department or by the Governor and Cabinet, sitting as the Administration Commission). But this suggestion presupposes that all comp plan amendments will eventually be found to be in compliance. The only way this will occur is if the County surrenders its will and only adopts (or revises) comp plan amendments that the Department and the Administrative Commission view as being "in compliance." But this is exactly the usurpation of local planning discretion that the County sought to challenge in its declaratory judgment action! The Department is essentially saying that the County needn't ever worry about sanctions for

having a non-complying comp plan if the County will simply do what the Department says and only adopts amendments that are "in compliance." The logic is circular, and the suggestion illustrates the Department's indifference to the concerns of the County.

IV. THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT WAS BASED ON MOOTNESS, NOT LACK OF STANDING, AND THE DISTRICT COURT PROPERLY REVERSED THE DETERMINATION OF MOOTNESS.

In its Statement of the Facts and the Case, the Department disputes that summary judgment was entered by the trial court on the basis of mootness. Answer Brief, p. 1. In Argument Point V of its Answer Brief, however, the Department appears to recognize mootness as the basis for the trial court's ruling. The District Court reversed the trial court's determination of mootness, but affirmed entry of summary judgment on the basis of lack of standing. The Department argues for affirmance of the District Court's approval of entry of summary judgment, suggesting that the case is indeed moot and that there is no longer an actual controversy or a bona fide, present need for the declaration of invalidity of the statutes at issue. Answer Brief at p. 25.

The Department and the trial judge fell victim to the same error: confusing standing and mootness. The issue of standing concerns who is sufficiently affected by and has a substantial interest in a matter to bring a legal action regarding the matter; "mootness" addresses <u>when</u> an affected person may bring and maintain such an action. As explained by the First District Court of

Appeals in Montgomery v. Dept. of Health and Rehabilitative Services, 468 So. 2d 1014 (Fla. 1st DCA 1985):

> Mootness has been defined as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)'.

Id. at 1016. The trial judge and the Department opine that the case was moot when the County and the Department entered into a settlement agreement in an administrative proceeding. That proceeding concerned comprehensive plan amendments submitted by the County to the Department in April, 1990; specifically, whether such amendments were in compliance with the state comp plan, the regional policy plan, and Department Rule 9J-5.

But Santa Rosa's circuit court challenge was not limited to any particular finding of non-compliance of its comp plan amendments; indeed, such a challenge would be heard in the administrative forum. Rather, Santa Rosa's challenge was to the constitutionality of statute and rule provisions governing the planning and plan approval process.

As the First District Court noted in its opinion in this case, Santa Rosa will continue to have to comply with Chapter 163 and Rule 9J-5 in executing the comprehensive plan and in all plan amendment proceedings. Santa Rosa County v. Administration Commission, 642 So. 2d at 622. Even if the settlement agreement related to the County's comp plan amendments had been fully implemented, the constitutionality issues are not moot because of

the ongoing nature of growth management and comprehensive planning. Id. at 621. As the District Court correctly noted, and as this Court has previously held, a case is not moot if the law being challenged will have a recurring effect or if the problem leading to the case would be a recurring one. Id. at 622, citing inter alia, Nichols v. Nichols, 519 So. 2d 620, n. 1 (Fla. 1988) and Shelton v. Reeder, 121 So. 2d 145 (Fla. 1960). The issue is not moot, regardless of the settlement agreement in the administrative proceeding.

V. SUMMARY JUDGMENT WAS NOT ENTERED AS TO THE MERITS OF THE COUNTY'S CLAIM BELOW, AND THIS CASE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS

The Department errs in stating that summary judgment was properly entered in the absence of disputed issues of material fact. See Argument Point VI of the Department's Answer Brief. Summary judgment was entered below only on the mootness question, and affirmed only on the standing question, not on the merits of Santa Rosa's claim of unconstitutionality of the statutes and rules. If Santa Rosa has standing, and its argument is ripe for review, then its complaint should be heard by the trial court below.

The trial judge did not find that there were no disputed factual issues concerning the validity or invalidity of the challenged statutes and rules. He only found that there was no dispute over the existence of a settlement agreement in a related administrative proceeding, and from this he deduced that there was

no immediate, bona fide dispute requiring judicial determination. Whether the case should have been disposed of by summary judgment based on either mootness or standing is a question of a proper application of the law. See, Hancock v. Department of Corrections, 585 So. 2d 1068, 1071 (Fla. 1st DCA 1991); Wesley Construction Co. v. Lane, 232 So. 2d 649, 650 (Fla. 3d DCA 1976), cert denied, 336 So. 2d 1185 (Fla. 1976). Review of the trial judge's summary judgment is not restricted to an "abuse of discretion" standard, as suggested by the Department. See Answer Brief at pp. 30-31. Entry of summary judgment on either mootness or standing grounds would be erroneous as a matter of law, since the case is not moot and the County possesses the requisite standing, as discussed elsewhere in this Reply Brief and in the County's Initial Brief on the merits.

VI. THERE IS NO VALID PUBLIC PURPOSE SERVED BY DENYING SANTA ROSA COUNTY ACCESS TO THE COURTS

For purposes of this appeal it must be presumed all well pleaded allegations in the complaint are true. Every possible inference must be drawn in favor of the County, as the non-moving party. Willis v. Sears, Roebuck & Company, 351 So. 2d 29, 32 (Fla. 1977). Whether summary judgment should be entered on the basis of either mootness or standing is essentially a question of law. See, Hancock v. Department of Corrections, supra. With that in mind, for the summary judgment entered here to be affirmed, there should be a strong public purpose which prevents Santa Rosa County from seeking relief from an unconstitutional statute which supersedes

its traditional powers of determining appropriate land uses within its political boundaries. No such strong public purpose is served here.

This Court, in Chiles v. Children, 589 So. 2d 260 (Fla. 1991), has already determined that the executive branch cannot modify or withhold legislative budget enactments. Yet that is exactly what the statute in question here allows the Governor and Cabinet to do.

It would be odd to allow six foster children to challenge this power in Chiles v. Children, yet not permit an entire county to raise the same questions. The overwhelming public policy should be to allow affected parties complete access to the courts, particularly when such important questions are to be determined.

The concept that public officials should not "question their duty" is misplaced in this context. This is not an example of petulant bureaucrats questioning the wisdom of the Legislature. Nor will the government's business "come to a standstill" (Barr v. Watts, supra) while this case is being decided.

If the parts of Chapter 163, Florida Statutes, in question are truly unconstitutional, what public purpose does it serve to forbid those parties who are most affected by the law--local governments--to question its validity? If a county has no right to challenge the validity of the Growth Management Act, who does? It would be a curious legal policy that disallowed counties or cities from questioning parts of this law, in favor of perpetuating the application of an unconstitutional enactment.

Santa Rosa County has completely complied with all parts of Chapter 163, Part II, Florida Statutes. It has not disobeyed any part of the law, despite its steadfast belief that the law is flawed. The County only asks that it be entitled to an adjudication of the validity of this law.

CONCLUSION

The County's claim of unconstitutionality of growth management statutes and rules with which it must continue to comply is ripe for review, and the County possesses the requisite interest (standing) to litigate the claim. The summary judgment entered below, depriving the County of its day in court, should be reversed and the case remanded for further proceedings.

SERVED this 17th day of January, 1995.

for M. Christopher Bryant
THOMAS V. DANNHEISSER
Fla. Bar I.D. No. 323942

County Attorney
Santa Rosa County
801 Caroline Street, S. E.
Milton, FL 32570-5978
(904) 623-0135

M. Christopher Bryant
KENNETH G. OERTEL
Fla. Bar I.D. No. 128808

M. CHRISTOPHER BRYANT
Fla. Bar I.D. No. 434450

Oertel, Hoffman, Fernandez & Cole, P.A.
Post Office Box 6507
Tallahassee, FL 32314-6507
(904) 877-0099

Attorneys for Petitioner

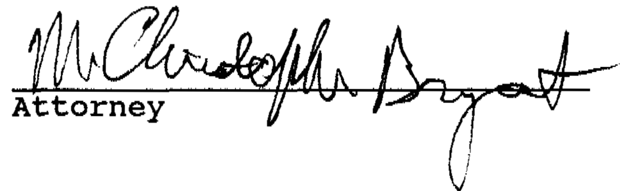
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies, and a 3 1/2 inch diskette of the foregoing Brief in Word Perfect format, have been filed by Hand-Delivery with the Clerk of the Supreme Court, and that true and correct copies of the foregoing have been furnished by U. S. Mail to:

Stephanie M. Callahan
Assistant General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, FL 32399-2100

Richard Grosso
1000 Friends of Florida
Civil Law Clinic
Shepard Broad Law Center
Nova Southeastern University
3305 College Avenue
Ft. Lauderdale, FL 33314

this 17th day of January, 1995.



Attorney