IN THE SUPREME COURT OF FLORIDA

FLO-SUN, INCORPORATED, OKEELANTA CORPORATION, and SUGAR CANE GROWERS COOPERATIVE OF FLORIDA,	)	
Petitioners,	)	Case Nos. 95,044 95,045
vs.	)	
FORMER GOVERNOR CLAUDE R. KIRK, individually and in the name of the State of Florida, et al.,	)	
Respondents.	)	

On Petitions to Review a Decision of
The District Court of Appeal, Fourth District

INITIAL BRIEF OF AMICUS CURIAE, MONROE COUNTY, FLORIDA, IN SUPPORT OF PETITIONERS

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SUMMARY OF THE ARGUMENT

Over the last three decades, the legislative and executive branches of state and federal government have created a detailed system of environmental regulation based upon ever more precise scientific standards and detailed scientific modeling and research. This system is implemented by a process of extensive environmental permitting whereby the impacts of a proposed project or activity, on a state, regional and local level are taken into account by the various levels of government. By dealing with such matters before a project or activity is undertaken, both the regulatory agencies and the regulated industry are given a precise set of readily-verifiable standards to apply.

The Fourth District decision casts aside these concepts of regulatory predictability, allowing (indeed, requiring) trial courts to second-guess the effects of projects long after they have been permitted and built, based upon a mere general allegation that government is corrupt. Upon such a claim, without more, the regulated party or the government itself will need to

“disprove@ the allegation of government complicity in order to have the issue presented to the appropriate regulatory body. The net effect of this holding will be to seriously diminish the value of a system built on scientific standards, by allowing courts to revert to general common-law concepts whenever a defendant cannot prove a negative: that government is not corrupt. Both regulators and the regulated require the verifiable standards and regulatory certainty that the current system provides.

The trial court’s order of dismissal was correctly decided in accordance with the every modern on-point precedent and should be reinstated.

ARGUMENT

1. THE RULE CREATED BY THE FOURTH DCA BELOW WILL HAVE A DETRIMENTAL EFFECT ON LOCAL GOVERNMENTS, BOTH AS REGULATORS AND AS REGULATED PARTIES.

The Florida Legislature and the Florida Department of Environmental Protection (DEP) and other state agencies have created a balanced system of environmental regulation that takes into account many, often conflicting, public and private, state, regional and local interests. This multi-tiered

regulatory system, administered by federal, state and local government agencies, provides for extensive control of environmental matters and should not be discarded in favor of arcane common law public nuisance adjudication whenever someone claims that the modern regulatory system is not working.

Local governments participate in the regulatory system both as regulators and, in their proprietary activities, as regulated parties. In both these roles regulatory certainty and verifiable standards are a necessity. The Fourth District's decision destroys this regulatory certainty by allowing anyone who disagrees with the environmental laws to make an end run around them. The ultimate effect is to make a mockery of the regulatory system, degrading its value to regulators and needlessly imposing enormous costs on the regulated.

1. Local Government as Regulator

1.

Local governments, such as Monroe County, participate as regulators through local pollution control programs, which are approved and supervised by DEP, and through the comprehensive land use planning

required by chapter 163, Florida Statutes (1999) and supervised by the Florida Department of Community Affairs. '' 403.182 and 163.3184, Fla. Stat. (1999). Local governments and state agencies cannot adequately administer the regulatory systems if the regulated parties are subjected to multifarious requirements from the executive and judicial branches. *See Coalition for "dequacy in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996) (recognizing the danger of multifarious pronouncements on the same issue by the various branches of government).

Recognizing the need for consistency, the present regulatory system is designed to insure that regulatory requirements are uniform among various levels of government. Federal regulatory authority is delegated to the states, with oversight by the Environmental Protection Agency (EPA) to insure that states adhere to the requirements of federal law. *See* 42 U.S.C. ' 7410; 33 U.S.C. ' 1313. And, the Florida legislature's environmental control programs in Chapters 373, 376 and 403, Florida Statutes, are crafted to follow the federal model set forth in statutes such as the Clean Air Act, 42 U.S.C. ' 7401, Clean Water Act, 33 U.S.C. ' 1251 and Solid Waste Disposal Act, 42 U.S.C. ' 6901.

Similarly, the state delegates authority to local governments to control environmental pollution, but these programs must be consistent with the requirements of state law and are subject to DEP oversight. ' 403.182, Fla. Stat. (1999); *Florida Rock Industries, Inc. v. Alachua County*, 721 So. 2d 741 (Fla. 1st DCA 1998). Local governments are also required under Chapter 163, Florida Statutes (1999), to enact comprehensive land use plans, which address environmental and other issues related to future development. Such planning must be consistent with the applicable strategic regional policy plan and the state comprehensive plan. ' 163.3184, Fla. Stat. (1999). As an Area of Critical State Concern, the Florida Keys must further comply with the Principles for Guiding Development established under chapter 380, Florida Statutes. Regional, state and federal concerns are taken into account in all environmental decisions due to the multi-tiered structure of the system. And, the Legislature has created special procedures to insure that the decisions made by local governments appropriately take into account regional effects beyond the local jurisdiction. *See*, ch. 380, Fla. Stat. (providing for regional, multi-disciplinary review of large scale local government development approvals); chapter 9J-2, Fla.

Admin. Code. (same). Because the regulatory structure insures consistency it provides a degree of coherence that simply cannot be achieved by *ad hoc* adjudication under public nuisance principles.

This consistency and regulatory certainty will be severely degraded by the decision below. Under the Fourth District's decision, anyone displeased with the regulatory system can seek to supplant it merely by claiming that a government decision resulted from some vaguely alleged conspiracy. Once such an allegation is made, a trial court must review the motivation for numerous acts of the state and federal agencies and/or local elected officials to determine if they resulted from undue political influence. And, if the alleged complicity is not disproved, the circuit court will be free to subsume the environmental regulatory role of government (federal, state and local), without regard for the substantive requirements of the legislatively created environmental law system. Of course, the trial judge will not take over government entirely. Instead, the court will merely take over regulation of a particular subject matter area for particular defendants, presumably without consideration of the extra-jurisdictional and regional effects of its decision, leaving the government whose jurisdiction was

supplanted and the various affected local governments to deal with the consequences.

Local governments spend an enormous amount of time and money complying with state planning and environmental regulatory requirements and developing and maintaining the expertise to do so. Are the courts now going to require even greater resource commitments whenever anyone alleges displeasure with past government decisions? Will this Court also allow anyone who so desires to put the state and local government on trial for failing to enforce the law, even if the complainant has never asked government to do anything at all? And, what of the effect on the local economy and the integrity of a regulatory system that depends on providing regulatory certainty to both regulators and those it regulates? The Fourth District failed to consider the effects of its decision by its nearsighted application of notice pleading requirements. Its decision must be reversed.

2. Local Government as a Regulated Party

While the detrimental effect on local government regulatory powers is great, it pales in comparison to the effect on local governments acting in their proprietary capacity as regulated parties. Local governments engage

in many activities that are subject to environmental regulation, operating power plants, street systems, municipal stormwater systems, sanitary sewers and solid waste disposal facilities. All of these activities are subject to comprehensive state and federal permitting. In reliance on those permits, Florida local governments collectively spend billions of dollars constructing facilities and related environmental control structures, most of which are funded through the issuance of bonds in the securities markets.

Under the Fourth District's decision any person who is displeased with a government facility can seek to have it separately regulated by the courts as a "public nuisance," notwithstanding its review in permit proceedings under applicable environmental rules and statutes, without ever presenting the issue to the regulatory agency. The ultimate effect of this will be to eliminate the certainty that comes with environmental permits and thereby to interject a significant degree of risk in any major public works project. With such risk come higher costs in the form of increased local bond interest rates and, ultimately, higher taxes and utility bills for the local residents.

In essence, the suggested application of public nuisance concepts in this case asks the court to create a new judge-made environmental

regulatory system for a particular group of defendants, supplanting the Legislative system entirely. This Court should not sanction a holding that will destroy regulatory certainty created under pre-determined environmental permits by allowing a trial judge to second guess (and potentially revoke by judicial fiat) the decision to issue such permits, long after the period for challenging the decision under Section 120.569, Florida Statutes (1999) has run.

2. THIS COURT SHOULD PRESERVE THE LEGISLATURE'S SOLUTION TO EVERGLADES WATER QUALITY AND WATER QUANTITY ISSUES, BY REQUIRING ADHERENCE TO THE PRIMARY JURISDICTION DOCTRINE.

Because of its location and history, Monroe County has a special appreciation for the natural environment in general, and the Everglades system in particular. The Florida Keys are one of the most environmentally-valuable regions in the state. Being just south of the Everglades system, the Keys and Florida Bay are significantly affected by water quantity and quality in the Everglades.

Monroe County strongly supports the ongoing efforts of the state and federal governments to improve water quality in the Everglades. This

program which is provided for in the Everglades Forever Act, section 373.4592, Florida Statutes (1999), will first undertake comprehensive hydrologic studies to determine the best system-wide solution to Everglades water quality. Then, through the Everglades Construction Project, the state and federal governments will undertake the largest-ever environmental cleanup of its kind. *Id.* This will (as it must) occur over the course of decades with careful monitoring of water quantity and water quality and detailed scientific data continually being gathered by regulatory agencies.

As the legislative preamble to the Everglades Forever Act clearly indicates, the issues involved are exceedingly complex and require a carefully developed scientific solution. ' 373.4592(1), Fla. Stat. (1999). Monroe County respectfully submits that trial courts are ill-equipped to regulate in this area. The issues that face the Everglades simply cannot be dealt with under general public nuisance concepts. Moreover, the creation of an alternate regulatory system by the courts would require policy judgments regarding the balancing of competing public, private and ecological interests that are best left to the political branches.

As various precedents clearly hold, the courts should defer to the

scientific expertise of the regulatory agencies in complex environmental matters. *See Bal Harbour Village v. City of North Miami*, 678 So. 2d 356 (Fla. 3d DCA 1996); *South Lake Worth Inlet District v. Town of Ocean Ridge,* 633 So. 2d 79 (Fla. 4th DCA 1994); *State v. SCM Glidco Organics Corporation*, 592 So. 2d 710 (Fla. 1st DCA 1991); *New England Legal Foundation v. Costle,* 666 F.2d 30 (2d Cir. 1981).

CONCLUSION

The Fourth District's meddlesome approach to dealing with the broad public policy issues presented in this case should not become the prevailing law of this state. If the Fourth District's decision is allowed to stand, the courts will invite any person that is dissatisfied with past governmental decisions to simply allege complicity, bypass the regulatory system, and ask the courts to create a new system governing only those persons that are parties to the suit. And, there will no longer be any requirement that such a plaintiff even attempt to have the Executive Branch address his concerns. The end result will be to significantly devalue a regulatory system carefully created over the last quarter century to deal with the increasingly complex environmental issues that have arisen as population and industrialization

have increased. Indeed, under the Fourth District's decision the courts will be reverting to the old common-law system, which the administrative regulatory scheme replaced. This Court should reverse the Fourth District's decision.

Respectfully submitted this 4th day of February, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2000, the original and five (7) copies of Petitioner's Brief were filed with the Clerk of the Supreme Court of Florida, and that a true and correct copy of the same was furnished by U. S. Mail to:

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