IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT

1000 FRIENDS OF FLORIDA, INC., a Florida not-for-profit corporation, FLORIDA WILDLIFE FEDERATION, a Florida not-for-profit corporation and the JUPITER FARMS ENVIRONMENTAL COUNCIL, INC., a Florida not-for profit corporation d/b/a LOXAHATCHEE RIVER COALITION, AUDUBON SOCIETY OF THE EVERGLADES and MARIA WISE-MILLER, an individual,

Appellants,

Case No. 4D05-2068
Final Order DCA 05-GM-082
DOAH Case No. 04-4492 GM

v.

STATE OF FLORIDA, DEPARTMENT OF COMMUNITY AFFAIRS AND PALM BEACH COUNTY,

Appellees.
_____/

INITIAL BRIEF OF APPELLANTS

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ARGUMENT SEVEN: THE FINAL ORDER ERRED IN ALLOWING A VIOLATION OF THE MANDATORY ADEQUATE ROADWAY FACILITIES (CONCURRENCY) REQUIREMENT

The Final Order erred by allowing an unauthorized exemption from the mandatory traffic "concurrency" requirement. It approved roadway levels of service for the project which were set to match the amount of traffic generated by it, in violation of the terms and intent of the law.

A. Importance of Traffic Concurrency Requirements

Transportation is a major factor determining the appropriate use of land. City of Miami Beach v. Weiss, 217 So.2d 836 (Fla. 1969). This District has recognized the avoidance of traffic congestion as a rational basis for land use restrictions. Watson v. Mayflower Property, Inc., 223 So.2d 368 (Fla. 4th DCA 1969). The US Supreme Court is in accord, City of Memphis v. Greene, 451 U.S. 100, 126-29 (1981), as is the Eleventh Circuit. Corn v. Lauderdale Lakes, 997 F.2d 1369, 1375 (11th Cir. 1993).

The avoidance of undue traffic congestion is an important enough objective that this District has upheld a moratorium based on the lack of roadway capacity. WCI Communities, Inc. v. City of Coral Springs, 885 So.2d 912 (Fla. 4th DCA 2004). With the recognition that "timing" and "sequence" requirements are constitutional, transportation has evolved into a growth management tool which rivals the land use element in importance. Taub, Transportation and Parking Regulations as Growth

Management, 431 ALI-ABA 429(1989)(citing Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (1972)).

In *Citizen's Political Committee, Inc., et al v. Collier County et al*, the Administration Commission ruled that:

> "The strong language of Rule 9J-5.0055 is evidence that the concurrency requirement of the Act and Chapter 9J-5 plays a key role within the Act and Chapter 9J-5. The Act discloses that the concurrency requirement is . . . the 'teeth of growth management' that 'distinguishes growth management from mere planning.'" 1992 WL 880097(DOAH 1992)(FOF 21)
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> "Consequently," the Commission said:
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> > "the determination whether a plan provision is consistent with the concurrency requirement is vital." *Id.*(FOF 68)

B. The Statutory Concurrency Requirement

The Act mandates that all public facilities and services needed to support development be available concurrent with the impacts of such development. This "concurrency" requirement prohibits a local government from issuing development orders that would create traffic beyond an adopted level of service, and requires a concurrency management system meet this requirement. § 163.3177(10)(h), Fla. Stat; Rule 9J-5.0055, F.A.C.

C. The Levels of Service Are Inconsistent With Law

S. 163.3177(3)(a)3., Fla. Stat. requires "standards to ensure the availability of public facilities and the adequacy of those facilities, including acceptable levels of service." The

express "concurrency" requirement is found in S. 163.3177(10)(h) and 163.3180,Fla. Stat., and Rule 9J-5.005(3), F.A.C. S. 163.3177(10)(h)mandates that:

> "public facilities and services needed to support development shall be available concurrent with the impacts of such development...."

Rule 9J-5.019(4)(c), F.A.C, requires level of service standards that "ensure that adequate facility capacity will be provided ...."

D. The Inadequacy of the LOSS

Rule 9J-5.0055(2)(c), FAC mandates that level of service standards:

> "shall …ensure that adequate facility capacity will be provided ...." (Emphasis added).

The County's transportation engineer testified that, even with the new roads to be built to the project, several of the levels of service adopted as the standard for the project would exceed the capacity of the roads and intersections.[1] Appellants put on

[1] The County's expert testified that:

* The LOS for the segment of PGA Blvd. from the Turnpike to Central Blvd. is F, with volume exceeding capacity by 40-50%. (Jt. Ex. 2e, p. 4, ¶j; Tr. Vol. XIII @ 2076).

* The LOS for the segment of PGA Blvd. from Central Blvd. to Military Trail is F, with volume exceeding capacity by about 35%.(Jt. Ex. 2e, p. 4, ¶k; Tr. Vol. XIII @ 2076).

* The LOS for the segment of PGA Blvd. from I-95 to Alternate A1A is F. (Jt. Ex. 2e, p. 5, ¶m; Tr. Vol. XIII @ 2079).

significant evidence that the new levels of service significantly exceeded the capacity of the roads, and the opinion of their traffic expert that they were inadequate.[2] The regional planning council report found that the project "will overload the...roadway network (Pet Ex 20 @ 15), and that "even with roadway expansions, the magnitude of traffic impact is substantial" and "go significantly beyond the desired LOS and capacity normally considered acceptable by the county." (Pet. Ex. 20 @ 18). The ALJ did not make a finding that the levels of service were adequate, other than to find that the County

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* The LOS for the segment of Northlake Blvd. from Coconut Blvd. to SR 7 is F, with volume exceeding capacity by about 60%.(Jt. Ex. 2e, p.5, ¶q; Tr. Vol. XIII @ 2080-2081).

* The LOS for the segment of Northlake Blvd. from SR 7 to Beeline Highway is F, with volume double the capacity. (Jt. Ex. 2e, p. 5, ¶r; Tr. Vol. XIII @ 2083-2084).

* The LOS for the segment of Orange Blvd. from Coconut Blvd. to Royal Palm Beach Blvd. is E or F. (Jt. Ex. 2e, p.5, ¶z; Tr. Vol. XIII @ 2083-2084).

* The LOS for the segment of Coconut Blvd. from Northlake Blvd. to Orange Blvd. is F, with volume 67% over capacity. (Jt. Ex. 2e, p.6, ¶hh; Tr. Vol. XIII @ 2086-87).

* The LOS for the segment of Royal Palm Beach Blvd. from 60th St. to Persimmon Blvd. is F, with volume exceeding capacity by 80-90%. (Jt. Ex. 2e, p.6, ¶jj; Tr. Vol. XIII @ 2087-2088).

* Each of the 6 intersection CRALLS allowed by the amendments are for LOS F. (Tr. Vol. XIII @ 2088-2089)

[2] The Petitioner/ Appellants' expert testified that the adopted LOS are inadequate, and some are un-achievable. (Hall V6 @ 949-950,952-958, 960-961-966-968; Jt. Ex. 2e, p.5-6).

Engineer gave an opinion that they were "adequate". But his opinion is incompetent, as it is based on the following erroneous legal assumptions. The County Engineer admitted that 8 of the roadway segment traffic levels and all six of the intersection traffic levels authorized by the amendment would exceed the capacity of the affected roadway or intersection. (See footnote 17 at p. 45)

1. The Traffic Concurrency Requirement Is Mandatory and Cannot Be "Outweighed By Competing Considerations.

The ALJ found the CRALLS LOS to be appropriate because:

> "The County Engineer supported an exemption from this policy for the SCO because traffic considerations should not outweigh the economic and other land use goals the County is pursuing....." (R. 657)

The Final Order approved this approach:

> "In analyzing an LOSS for adequacy, a local government should consider both technical and policy issues. *** Policy issues involve comparing increased congestion to other planning principles, such as preventing sprawl, promoting economic development, and neighborhood opposition to wider roads. There is not a limiting list of planning principles to consider in evaluating adequacy." (R. 660-661).

There are three legal errors here. First, the "traffic considerations" the Order shrugs off are mandatory "concurrency" requirements, as explained above. Second, nowhere does the law indicate that the technical adequacy of a LOSS for roads can be a "policy" decision. Rules 9J-5.019(3)(a) and (f) identify only technical issues as relevant to a transportation LOS. Finally,

the only policy considerations allowed by law to impact levels of service do not apply here, as shown below.

Revealingly, the ALJ states that:

> "DCA and the County seemed to come close to defending the CRALLS in part on the ground that the County has absolute discretion to establish these CRALLS and that they are not even subject to review for adequacy. Such a legal position would be untenable."(R.656).

The ALJ's legal conclusion is correct, as shown above, but in recommending approval of the LOSS based on "policy considerations" he commits legal error. The CRALLS LOSS can only be upheld if the law is interpreted to either repeal the concurrency requirement or allow a local government to set any level of service it desires. The CRALLS designations are a subterfuge for an unauthorized exemption.[3]

The ruling that a violation of a mandatory, minimum requirement can be approved as a "policy" decision violates the Act, and is reversible error. The notion that a grossly over-capacity LOS can be approved as a "policy" decision to authorize development deemed beneficial on other grounds has no support in the law - except, quite importantly - for very specific exemptions created by the Legislature for policy considerations

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[3] The amount of traffic expected from the project was simply adopted as the LOS to allow a project desired by the County even though it could not meet the adopted level of service. (TR.v. XIII@ 2091, 2093-2094. Neither County nor Department experts could articulate how CRALLS differed from outright exemptions. (TR.v. XIII@ 2091, 2093-2094; TR.v.XX@ 3124).

enumerated in the Act. None of them apply here, as admitted by the Appellees, and as shown below.

The "CRALLS" LOS Are an Invalid Exemption from Transportation Concurrency Requirements. It Is Absurd to Approve Levels of Service That Are Lower Than Those Allowed by Statutory Exemptions That Are Not Applicable Here

The Legislature has spoken in establishing 4 instances where traffic levels of service can be waived or reduced, none of which apply here. Each requires specific criteria, regarding location, time limits, and measures taken to make impacts acceptable, or some combination thereof. It is an absurd result to rule that a plan amendment, as has been done here, can allow a development to proceed without meeting the existing level of service without having to meet any of those criteria or take the measures required for those mechanisms. Legislative direction on how something is to be done prohibits doing it any other way. Towerhouse Condominiums, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985); Devin v. City of Hollywood, 351 So.2d 1022, 1025 (Fla. 4th DCA 1976).

The transportation concurrency "flexibility" authorizations are found in s. 163.3180, Fla. Stat. S. 163.3180 (5)(a) says:

> "The Legislature finds that under limited circumstances dealing with transportation facilities, countervailing planning and public policy goals may come into conflict with the requirement that adequate public facilities and services be available concurrent with the impacts of such development. The Legislature further finds that often the unintended result of the concurrency requirement for transportation facilities is the discouragement of urban infill development and redevelopment. Such unintended results directly conflict with the goals and policies of the state comprehensive plan and the intent of this part.

> Therefore, exceptions from the concurrency requirement for transportation facilities may be granted as provided by this subsection."

In other words, transportation concurrency may discourage the very kind of urban development that is supported in the state's compact urban development policy. Home Builders and Contractors Ass'n v. Dep't. of Community Affairs, 585 So.2d 965 (Fla. 1st DCA 1991).

The first exemption is granted by S. 163.3180 (5)(b):

> "A local government may grant an exception from the concurrency requirement for transportation facilities if the proposed development is otherwise consistent with the adopted local government comprehensive plan and is a project that promotes public transportation or is located within an area designated in the comprehensive plan for:
> 1. Urban infill development,
> 2. Urban redevelopment,
> 3. Downtown revitalization, or
> 4. Urban infill and redevelopment under s. 163.2517."

The next is granted in S. 163.3180 (5)(c), and applies to developments within urban infill or redevelopment areas "which pose only special part-time demands."

The third exemption is granted in S. 163.3180 (7):

> "In order to promote infill development and redevelopment, one or more transportation concurrency management areas may be designated in a local government comprehensive plan. A transportation concurrency management area must be a compact geographic area with an existing network of roads where multiple, viable alternative travel paths or modes are available for common trips. A local government may establish an area wide level-of-service standard for such a transportation concurrency management area based upon an analysis that provides for a justification for the area wide level of service, how urban infill development or redevelopment will be promoted, and how

mobility will be accomplished within the transportation concurrency management area."

Finally, S. 163.3180(9) provides:

"(a) Each local government may adopt ... specially designated districts where significant backlogs exist. The plan may include interim level-of-service standards on certain facilities and may rely on the local government's schedule of capital improvements for up to 10 years as a basis for issuing development permits in these districts. It must be designed to correct existing deficiencies and set priorities for addressing backlogged facilities. It must be financially feasible and consistent with other portions of the adopted local plan, including the future land use map.

(b) If a local government has a transportation backlog for existing development which cannot be adequately addressed in a 10-year plan, the state land planning agency may allow it to develop a plan of up to 15 years for good and sufficient cause...."

The Legislature has specified the circumstances that allow reduced traffic levels of service or exemptions, and none of these apply here. It is absurd and contrary to the plain meaning of the law to approve permanently and significantly reduced levels of service for extensive areas of the County. The amendments are not "in compliance".