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IN THE CIRCUIT COURT FOR  
THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY  
FLORIDA

CASE NO: 03-CA-1833

ROBERT R. ROSCOW and  
THEODORE E. BIERLY  
(a/k/a TEDDI BIERLY),

Plaintiffs,

v.

JOSE' ABREU,  
as Secretary of the  
FLORIDA DEPARTMENT  
OF TRANSPORTATION,

Defendant.

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**SUMMARY FINAL JUDGMENT**

This cause came before the Court on May 21, 2004 on the Plaintiffs' Motion for Summary Judgment and the Defendant's Motion for Summary Judgment or Partial Summary Judgment.

Having heard the argument of counsel, and having considered the pleadings, answers to interrogatories, admissions, supporting Affidavits, the deposition of Raymond Ashe, and the Factual Stipulation of the parties, and being otherwise fully advised in the premises, the Court finds as follows:

The Plaintiffs, Robert R. Roscow and Theodore E. Bierly (a/k/a Teddi Bierly), each own property in Citrus County, Florida, in an area where the Defendant, Florida Department of Transportation (“DOT”) is planning the proposed Suncoast Parkway 2 highway project (“Project”).

The Defendant, Jose’ Abreu, is the Secretary of the DOT, an executive branch agency of the State of Florida. See Section 20.23, Florida Statutes (2003). DOT’s operations are organized into seven districts and a Turnpike Enterprise, headed by an executive director. See Section 20.23(4)(a), Florida Statutes (2003). DOT, through the Turnpike Enterprise, formed and established the “Environmental Resource and Regulatory Agency Group” (“ERRAG”) in connection with the Suncoast Parkway Project. ERRAG is also referred to as the “Suncoast Parkway 2 Agency Team.”

To date, ERRAG has conducted five meetings in Florida, none of which was scheduled or conducted in accordance with Section 286.001, Florida Statutes, and Article I, Section 24 of the Florida Constitution (“the Sunshine Law”). ERRAG plans to meet in the future without scheduling or conducting the meetings in accordance with the Sunshine Law. The Court

finds that the Plaintiffs have an interest in, and have a genuine doubt about, whether Section 286.001, Florida Statutes, and Article I, Section 24 of the Florida Constitution authorize the Defendant to allow meetings of ERRAG to be closed, and held without public notice and minutes. Plaintiff Roscow's requests to attend ERRAG meetings have been denied by DOT.

DOT is a party to the ERRAG "Agency Agreement" which provides:

We, the members of the Suncoast Parkway 2 Agency Team, agree to partner in a collaborative effort to achieve a balance between Florida's environmental protection and the State's transportation needs. Our goals for the Suncoast Parkway PD&E study are to: *Identify economic, environmental, and social effects and their significance; Consider avoidance, minimization, and mitigation of economic, environmental and social impacts; Meet and/or exceed all local, state and federal requirements.* (emphasis supplied)

We agree to work together through mutual trust and respect, maintaining open and honest communications, fairness, and openness to new ideas; and holding ourselves accountable for the success of the team.

Pursuant to the ERRAG Agency Agreement, ERRAG meetings have

included, and will likely continue to include: the DOT, Federal Highway Administration, United States Army Corps of Engineers, Florida Department of Agriculture, United States Fish and Wildlife Service, Florida Department of Community Affairs, Florida Department of Environmental Protection, Florida Fish and Wildlife Conservation Commission, Southwest Florida Water Management District, and Citrus County. The reference in the ERRAG Agency Agreement to the "Suncoast Parkway 2 PD&E Study" ("PD&E Study") is to a "Project Development and Environmental Study" in which a broad general planning area for the Project is designated, and within that area, potential Project corridors and alignments are developed and evaluated.

According to DOT employee Raymond Ashe, DOT has not made the decision to apply for Federal highway funds for the construction of the Project, but DOT has decided to maintain the eligibility of the project for federal highway funding from the Federal Highway Administration. DOT is apparently planning the Project in accordance with Federal requirements for a draft Environmental Impact Statement (DEIS) under 23 Code of Federal Regulations ("CFR") Part 771. ERRAG was established, in part, as a means



of meeting the 23 CFR Part 771 requirements. If DOT ultimately decides not to apply for Federal funding for the Project, Mr. Ashe indicates that the PD&E Study would satisfy the State requirements for utilization of state funds or nonfederal funds.

ERRAG documents show that: (a) ERRAG developed an “action plan” for “litigation and funding challenges” including a plan for “resolution with legal” (DOT Legal staff) to “copy team’s progress to legal” and “submit draft documents for review;” (b) ERRAG “viewed alternative corridors” for the Project. (c) ERRAG members’ comments on, and objections to, the Corridor Analysis Report of the PD&E Study were provided for DOT’s consideration; (d) ERRAG identified alignment constraints in and around the recommended corridor; (e) ERRAG was asked to sketch ideas for potential Project alignments; (f) ERRAG suggested Project alignment criteria detailed under the headings – “avoidance, minimization, and mitigation” criteria; and (g) ERRAG discussed DOT’s draft Project alignments and suggested mitigation strategies for addressing possible impacts.

The Court has jurisdiction over the parties and the subject matter and

venue is proper in Leon County where DOT maintains its headquarters. DOT is a proper defendant before the Court by having been sued in the name of the agency head. See, *Wood v. Marston*, 442 So.2d 934 (Fla. 1983).

As is set forth above, there is no dispute of material fact in this cause.

Declaratory and other relief under Chapter 86, Florida Statutes, is therefore a proper means to resolve the parties' dispute over the applicability of the public notice and open meetings requirements in Section 286.011, Florida Statutes (2003), and of Article I, Section 24 of the Florida Constitution, to ERRAG and its activities in regard to the Project. See, *Rowe v. Pinellas Sports Authority*, 461 So.2d 72, 74 (Fla. 1984) and *Wood v. Marston*.

Article I, Subsections 24(b) and (c) of the Florida Constitution provide in relevant part:

(b) All meetings of any collegial body of the executive branch of state government.... at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public.... except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section is self-executing. The legislature, however, may provide by general law passed by two-thirds vote of each house for the ... exemption of meetings from the requirements of subsection

(b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law....

Section 286.001(1), Florida Statutes (2003), provides:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Collectively, Article I, Section 24 and Section 286.011, Florida Statutes (2003), are referred to as Florida's "Government in the Sunshine" provisions or as the "Sunshine Law".

The Sunshine Law was enacted in the public interest to protect the public from "closed door" politics and, as such, must be broadly construed to effect its remedial and protective purpose. *Wood v. Marston*, at 938 (citations omitted). Based on the facts of this case, resolution of the legal issues is controlled by *Wood v. Marston* and *Town of Palm Beach v.*



*Gradison*, 296 So.2d 473 (Fla. 1974). In a more recent case, the Florida Supreme Court has recognized the continued vitality of those decisions. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So.2d 373, 382-383 (Fla. 1999).

ERRAG is a collegial public body that operates as an advisory board or commission of DOT, with respect to the transaction of official acts or public business of that executive branch agency. Specifically, ERRAG is engaged in planning for the Project. The Court must therefore determine whether, in executing its responsibilities, ERRAG's activities come within either of the two "common law" exceptions to the Sunshine Law: the "staff exception" and the "remoteness from the decision-making process" exception, as those concepts are described in *Wood v. Marston*. See, *Wood v. Marston*, at 937-938.

Having reviewed the materials and stipulated facts submitted by the parties, the Court finds that ERRAG's activities are not exempt. ERRAG is not comprised solely of DOT staff; ERRAG is an *ad hoc* collegial body recognized by the Agency Agreement. Furthermore, ERRAG's activities are not remote from the Defendant's decision-making process regarding the



Project. According to the Agency Agreement, ERRAG is engaged in a “collaborative effort” with DOT with respect to the PD&E Study, and the mutual goals include: to “identify economic, environmental and social effects and their significance; consider avoidance, minimization, and mitigation of economic, environmental, and social impacts, meet and/or exceed all local, state and federal requirements.”

(ERRAG’s screening of potential Project alignments and development of criteria for screening and evaluation of potential Project alignments goes well beyond mere fact-finding and is analogous to the purpose of the faculty committee described in *Wood v. Marston*. In *Wood v. Marston*, a faculty committee was charged with soliciting and screening applications for a deanship, and then submitting a list of the best qualified applicants to the University president. Such activities are certainly similar to the siting functions being performed by the ERRAG. The Defendant argues that because it is not *bound* by ERRAG’s advice and recommendations regarding the Project and the PD&E Study for the Project, its meetings are not subject to the Sunshine Law. It is clear, however, that the Sunshine Law applies to *ad hoc* or other advisory bodies such as ERRAG.) See, *Wood v.*

*Marston*, at 938-939, and *Town of Palm Beach*. As in *Wood v. Marston*, nothing obligates DOT to make a final choice from the ERRAG recommendations regarding Project alignments or to build the Project at all. However, the “nature of the acts” performed by ERRAG involve the delegation of DOT’s decision-making functions in a “collaborative” design effort with regard to the Project. By necessity, ERRAG is therefore engaged in performing an “elimination function” with respect to alignments by considering the impacts of certain proposed routes. See, *Wood v. Marston*, at 939.

Defendant contends that ERRAG is merely advising the Defendant in a manner that complies with Federal Highway Administration regulations codified at 23 C.F.R. Part 771. Defendant also claims that since the ERRAG does not actually decide the alignment of the Suncoast project, its activities are exempt from the Sunshine Law. The Court finds this argument especially unpersuasive in light of the principles set forth in *Marston*, *Town of Palm Beach*, and *Lyon v. Lake County*, 765 So.2d 785 (Fla. 5<sup>th</sup> DCA 2000). By considering various conditions and criteria in arriving at route recommendations, especially insofar as such recommendations constitute an

environmental impact statement, the ERRAG can consider and ultimately reject possible routes. Such actions can only be characterized as an "elimination" function, no matter how well intended.

At the hearing on these motions, counsel for the Defendant expressed concern that if ERRAG meetings were open to the public, members would not be free to express their candid opinions about matters before them. In selecting possible routes for this major roadway, the ERRAG will of necessity consider private property acquisition, the presence of environmentally sensitive lands, evaluation of landowners' property values, and other compelling issues. The need for such views to be expressed publicly is essential, and fundamental to the purpose of the Sunshine Law. Defendant has made no compelling argument distinguishing ERRAG's duties from those set forth in *Marston, Town of Palm Beach*, and other authorities. Further, DOT has provided no basis for suggesting that ERRAG could not function effectively if its meetings were open to the public. As was discussed at the hearing, meeting in public does not mean that public testimony or objection must be heard; the only basic requirement is that such discussions take place in a public forum.



Notwithstanding DOT's argument to the contrary, this Court must conclude that ERRAG is subject to the Sunshine Law. It is therefore

ORDERED AND ADJUDGED that Plaintiffs are entitled to judgment as a matter of law. The declaratory relief requested is set forth above, and Plaintiffs are granted a permanent, mandatory injunction without bond requiring DOT to ensure that ERRAG's business is conducted in full compliance with Section 286.011, Florida Statutes. The Court will retain jurisdiction to provide any further orders necessary to effectuate this judgment and to enforce its terms. The Court will also retain jurisdiction to determine any remedy necessary to address actions taken at ERRAG meetings conducted prior to the entry of this summary final judgment, and to consider Plaintiffs' request for attorneys' fees and costs.

DONE AND ORDERED in Chambers, Tallahassee, Leon County, Florida this 6th day of August, 2004.

  
JANET E. FERRIS  
Circuit Judge