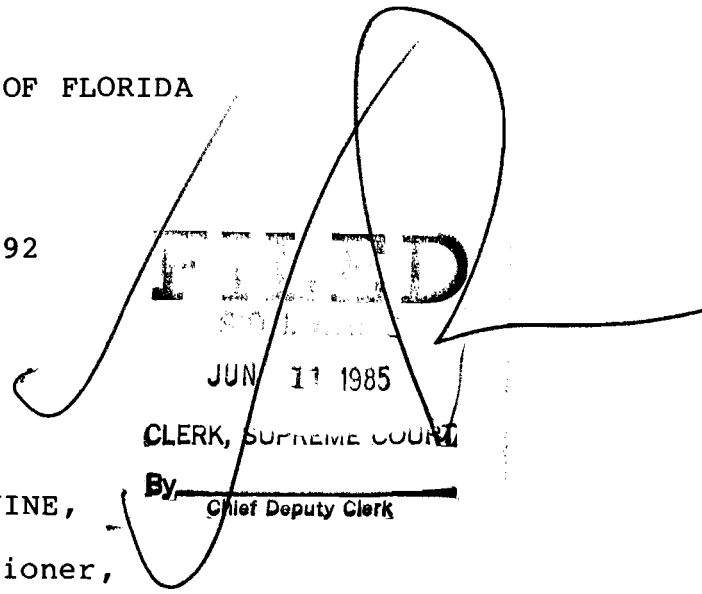
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,092



* * *

STEPHEN B. IRVINE,

Plaintiff, Petitioner,

v.

DUVAL COUNTY PLANNING COMMISSION
and the CITY OF JACKSONVILLE,

Defendants, Respondents.

* * *

PETITIONER'S BRIEF ON JURISDICTION

* * *

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STATEMENT OF THE CASE

This jurisdictional brief is filed pursuant to Rule 9.120(d), Florida Rules of Appellate Procedure. The jurisdiction of this Honorable Court is invoked pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, because the opinion of the First District Court of Appeal filed March 12, 1985, rehearing denied April 30, 1985, expressly and directly conflicts with decisions of other Florida courts on the same questions of law. The symbol "A" refers to the appendix filed herewith.

STATEMENT OF THE FACTS

On May 12, 1983, in conformance with §708.311 of the zoning code of the City of Jacksonville, Plaintiff/Petitioner, Stephen B. Irvine, filed an application to obtain a "permissible" use by exception. (A35-42) An exception is defined by the Code as follows:

> 708.101(hh) EXCEPTION: An "exception" is a use that would not be appropriate generally or without restriction throughout the zoning division or district but which, if controlled as to number, area, location or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity or general welfare. Such uses may be permitted in such zoning division or district as exceptions, if specific provision for such exception is made in this Zoning Code.

The exception was to allow the continued sale of beer and wine for consumption on premises. The subject property was zoned "commerical neighborhood - CN" pursuant to the cited section

and Irvine's application showed that the requested exception had been permitted to the prior operator of the business by a zoning exception granted on May 28, 1981. Irvine's application was duly processed by the Planning Department of the City of Jacksonville, which forwarded its Comments and Recommendations to the Duval County Planning Commission. (A 45) The Planning Department reported to the Planning Commission the following: that the proposed use would be compatible with the existing land use pattern in the area; that the application related to beer and wine consumption on premises in a facility having fifty-five (55) seats and two employees; that the exception was sought to be transferable with the title to the premises, and; that four applications, 1973, 1977, 1980 and 1981 for the same exception have been previously approved on the subject property. The Planning Department's report recommended approval of the requested zoning exception "for the reasons listed above." (A 45)

On June 16, 1983, the Duval County Planning Commission held a duly noticed public hearing to consider Irvine's application together with other matters on the Planning Commission's agenda. Irvine appeared in person and spoke on behalf of the requested use, pointing out that a bar and sandwich shop had been operated at the location for over forty years. (A 46) No one appeared before the Commission to speak in opposition to the application. (A 55-57) The Duval County

Planning Commission and the City of Jacksonville have stipulated that no testimony was presented in opposition to the requested exception. Although the Planning Commission made a tape recording of the public hearing, to avoid making the tape recording of the hearing a part of the record in Circuit Court, the Commission stipulated that no one appeared and testified at the hearing in opposition to granting the exception.(A55-57) In so doing the Commission effectively stipulated that there was no record evidence supporting any ground for denying the exceptions and going against the Planning Department's recommendations.

The city's zoning code requires that the Duval County Planning Commission make a record of the proceedings of "... sufficient degree to disclose the factual basis for its final determination with respect to such requests and appeals," §704.104(d), Jacksonville Municipal Code, "Procedures for Hearing Zoning Exceptions, Zoning Variances and Appeals." The minutes prepared by the Planning Commission reflect that the Chairman of the Commission stated that he had received telephone calls from an unspecified number of neighbors in opposition.(A 46) The Chairman did not state for the record the nature or specific source of any of the objections. The minutes (A 46) prepared by the Commission recite only the following:

> Mr. Stephen Irwine [sic], 300 Coronet Lane, spoke in favor of request. He stated that there has been a bar and sandwich shop there for 40 years.
>
> The Chairman stated that he had had telephone calls from neighbors in opposition.
>
> The Commission voted 7 to 0 to deny.

Thereafter, the Planning Commission entered its formal written order (A 47-49) in which it denied the application and made the following conclusions:

> WHEREAS, after considering the facts as determined by the Commission in its investigation of the application and the facts as presented at the public hearing, this Commission makes the following findings:
>
> 1. Applicant failed to sustain the burden of showing that the granting of the exception would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity or general welfare of the neighborhood.
>
> 2. Proposed use would not be compatible with other uses existing in District.

Neither the Planning Commission's record nor its order refer to any evidence of the facts said to have been determined from the Commission's "investigation." Likewise, Paragraph 2 of the Commission's order is in direct conflict with the Planning Department's finding that the proposed use <u>would be</u> compatible with the existing land use pattern in the area.

SUMMARY OF ARGUMENT

This Honorable Court has jurisdiction to consider the merits of Petitioner's case since the opinion of the First District Court of Appeal is in direct conflict with:

1. Rural New Town, Inc. v. Palm Beach County, 315 So.2d 478 (Fla.4th DCA 1975) and Conetta v. City of Sarasota, 400 So.2d 1051 (Fla.2nd DCA 1981);

2. McRae v. Robbins, 9 So.2d 284 (Fla. 1942), and its progeny; and

3. City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974).

ARGUMENT

THIS HONORABLE COURT HAS JURISDICTION BECAUSE THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER OPINIONS OF THIS HONORABLE COURT OR OF OTHER COURTS.

The District Court of Appeal held that "... it cannot be determined that the Commission, by placing the burden upon the petitioner to demonstrate that the exception would 'promote the public health, safety, welfare ...' (etc., see order quoted above), departed from the essential requirements of law" which holding directly conflicts with decisions of other district courts of appeal, specifically Rural New Town, Inc. v. Palm Beach County, Inc. v. Palm Beach County, 315 So.2d 478 (Fla. 4th DCA 1975) and Conetta v. City of Sarasota, 400 So.2d 1051

(Fla. 2nd DCA 1981). The decision of the First District Court of Appeal is squarely in conflict with the following language from Rural New Town, Inc. v. Palm Beach County:

> There is a distinction between seeking rezoning and seeking a special exception; each involves somewhat different considerations. In rezoning the burden is upon the applicant to clearly establish such right (as hereinabove indicated). In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the zoning authority to demonstrate by competent substantial evidence that the special exception is adverse to the public interest. Yokley on Zoning, Volume 2, Page 124. A special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards in the zoning ordinance that such use would adversely affect the public interest. 315 So.2d 478, 480.

Since the First District decision approved placing the burden upon Irvine, the decision conflicts with the Rural New Town holding that the burden is upon the Zoning Authority to demonstrate by substantial competent evidence that the exception is adverse to the public interest.

The opinion sub judice is also expressly and directly in conflict with McRae v. Robbins, 9 So.2d 284 (Fla. 1942), in which this Court stated:

> The evidence adduced at hearings in fixing rates and hours of service must be taken down and made a part of the record of the administrative proceedings, and specific findings based on such evidence must be made and entered in the record as a necessary predicate for the order made, so that such order together with the evidence and the findings thereon may be reviewed in appropriate judicial procedure. Such administrative orders made without a

> record of the evidence adduced in support thereof, are without legal effect, since it is the evidence adduced and the findings made thereon, and not merely the unsupported orders made, which show the validity or invalidity of the administrative orders made under delegated administrative authority for a governmental purpose. (emphasis added) Id., at 291.

Notwithstanding the requirement of 704.104(d)(2) of the Jacksonville Municipal Code that "... the Zoning Board shall establish such record in a sufficient degree to disclose the factual basis for its final determination with respect to such requests and appeals," the First District Court of Appeal approved the administrative agency order which was devoid of any factual findings whatsoever.

Essentially, the decision conflicts with the line of cases holding that the agency's failure to make adequate and specific findings of fact in the record and in its order constitutes a departure from the essential requirements of law. Gentry v. Dept. of Professional & Occupational Regulations, State Board of Medical Examiners, 283 So.2d 386 (Fla. 1st DCA 1973); Hickey v. Wells, 91 So.2d 206 (Fla. 1957); Laney v. Holbrook, 8 So.2d 465 (Fla. 1942); Harvey v. Nuzum, 345 So.2d 1106 (Fla. 1st DCA 1977); Edwards v. Div. of Bev., Board of Business Reg., 278 So.2d 659 (Fla. 1st DCA 1973); McCulley Ford, Inc. v. Calvin, 308 So.2d 189 (Fla. 1st DCA 1975); Ford v. Bay County School Board, 246 So.2d 119 (Fla. 1st DCA 1970); Powell v. Board of Public Instruction of Levy County, 229 So.2d 308 (Fla. 1st DCA 1970); Polar Ice Cream & Creamery Co. v. Andrews, 150 So. 2d 504 (Fla. 1st DCA 1963); Higgs v. Property Appraisal Adjustment

Board of Monroe County, 411 So.2d 307 (Fla. 3rd DCA 1982).

The holding of the District Court that the decision of the Commission could be based upon ex parte telephone calls received by the Chairman of the Commission without revealing the facts and details of those calls squarely conflicts with the City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974) and allows the hearing to become an ex parte "plebescite." The First District's decision ignores entirely the well established rules of administrative law and approves an administrative procedure which enables zoning to go on behind closed doors without a shred of evidence of record to support the decisions and entirely free from public scrutiny.

As the dissenting opinion of Judge Zehmer makes abundantly clear, David v. State, 369 So.2d 943 (Fla. 1979); Autrey v. Carroll, 240 So.2d 474 (Fla. 1970), the opinion of the First District announces rules of law which conflict with rules announced by this and other courts. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). The decisions cited cannot be reconciled. This Honorable Court should exercise its discretionary jurisdiction and accept the case for review.

CONCLUSION

For the reasons expressed herein the District Court's opinions expressly and directly conflicts with numerous decisions of Florida courts and this Honorable Court must

exercise its discretionary jurisdiction to consider the merits of Petitioner's case.

Respectfully submitted this 7th day of June, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to THOMAS E. CROWDER, Esquire, 1300 City Hall, Jacksonville, Florida 32202, by U. S. mail this 7th day of June, 1985.

_____
STEPHEN A. HOULD