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IN THE
SUPREME COURT OF FLORIDA

CASE NO. 79,720

5TH DISTRICT COURT OF APPEALS NO. 90-1214

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA,

Petitioner,

vs.

JACK R. SNYDER, ET UX.,

Respondents.
_____/

Discretionary Review of Decision
of the District Court of Appeal,
Fifth District

BRIEF OF ATTORNEY GENERAL STATE OF FLORIDA, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Attorney General, as chief legal officer of the State of Florida, has a vital interest in this appeal. The intent and purpose of the Local Government Comprehensive Planning and Land Development Regulation Act, Florida Statute §163.3161 et ux, would be severely impacted if the decision of the Fifth DCA is permitted to stand.

Local governments must be allowed to continue to make policy decisions with respect to the application of a local comprehensive plan, without their motives and reasons being documented and subjected to judicial scrutinty.

The Attorney General has an interest in seeing that the proper powers of self-government reserved to local governments in Art. VII, sec. 1 (Counties) and sec. 2 (municipalitites) of the Florida Constitution are preserved.

STATEMENT OF THE CASE AND FACTS

The amicus curiae, State of Florida, hereby adopts and incorporates the Statement of the Case and of the Facts submitted by Petitioner, Board of County Commissioners of Brevard County, Florida in its brief.

SUMMARY OF ARGUMENT

Zoning and rezoning decisions of County Commissioners in Florida have uniformily been classified as legislative, thus not requiring a full trial-type hearing with witnesses, cross-examination and written findings of fact.

The reason behind the legislative classification is because the local government must be accorded the right to make policy decisions on land use matters in applying a local comprehensive plan pursuant to Florida Statutes §163.3161.

The decision by the Fifth District Court of Appeals that the State of Oregon's philosophy on land use (as memorialized in the Fasano case) should by utilized in Florida is contrary to long-standing Florida law and is unworkable.

The new standard announced by the court below would require local governments to hold judicial-type hearings using evidence and sworn testimony and would require them to make findings of fact justifying the decision. This decision also seems to require that any rezoning application that is deemed consistent with the adopted comprehensive plan must be approved; this is so even if the proposed land use is not compatible with the existing uses. Such an unwarranted change represents a dilution of the constitutional power of local government.

ARGUMENT

UNDER FLORIDA LAW A DECISION BY A COUNTY COMMISSION ON A CHANGE OF LAND USE IS LEGISLATIVE ACTION

HISTORY OF ZONING AND REZONING IN FLORIDA

The Fifth District Court of Appeal by their opinion in this case has sought to change over sixty-five years worth of zoning law that has evolved in Florida.

The foundation for the principle of Florida zoning law that those decisions are legislative, is found in the opinion from the Supreme Court of the United States, Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 398, 47 S.Ct. 114, 71 L.Ed. 315 (1926).

The Ambler decision was cited by this Court as early as 1954 in City of Miami Beach v. Lachman, 71 So.2d 148, 150 (Fla. 1954), recognizing the "doctrine of legislative classification for zoning purposes." See also, Florida Land v. City of Winter Springs, 427 So.2d 170 (Fla. 1983).

In Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959), this Court held that:

> "it is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment of it was of different character." Schauer at p. 839.

As an adjunct of zoning and rezoning matters coming before a county or city commission being legally declared legislative, is the fact that the motives of the commissioners or council members voting on such issues cannot be inquired into by the courts.

Angle v. Chicago, 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893), cited in Schauer, supra at p. 839-840.

The Fifth DCA in Snyder by their newly suggested procedures for zoning matters is trying to require a lengthy record so that the "reasons" and motives of the legislative body can be explored in subsequent appellate proceedings. This also is contrary to a large body of law.

Schauer, supra, held that a municipality acting in a legislative capacity is afforded legislative immunity as to its motives and reasons for taking legislative action. Schauer at p. 840.

The above immunity was further discussed in City of Gainesville v. Scotty's, Inc., 489 So.2d 1196 (Fla.App. 1st 1986), where the issue was whether city commissioners could be deposed concerning their individual motives in voting for a zoning change which resulted in a lawsuit. The court made it clear that:

> "...the motives of municipal commissioners in enacting ordinances of a legislative character are irrelevant and are not the proper subject of judicial inquiry." Scotty's at p. 1197. See also City of Pompano Beach v. Big Daddy's, Inc. 375 So.2d 281 (Fla. 1979).

The Fifth DCA in Snyder mandated that the legislative body passing on a zoning or re-zoning matter, ie. county commission or city council, must prepare findings of fact on the zoning matter presented to them. Snyder at p. 80-81.

The above requirement of the Fifth DCA is again contrary to existing law as related in DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F.Supp. 1479 (M.D.Fla. 1989):

> "In this circuit, the actions of local zoning authorities are considered legislative in character...local zoning commissions are, therefore, not required to make findings of fact or state reasons for their actions and their actions are entitled to the presumption of validity accorded to other state legislation." DeSisto at p. 1498.

The Fifth DCA in Snyder also acted contrary to existing law by saying that in addition to zoning and re-zoning decisions not being legislative, the court then classified them as quasi-judicial. Snyder at P. 78.

In City of Tallahassee v. Poole, 294 So.2d 52, 53 (Fla.App. 1st 1974) the court specifically held that denial of a re-zoning petition was not quasi-judicial action.

A quasi-judicial hearing results from:

> "...a hearing to be held upon notice at which the affected parties are given a fair opportunity to be heard in accordance with the basic requirements of due process, including the right to present evidence and to cross-examine adverse witnesses." Board of County Com'rs v. Casa Development Ltd., 332 So.2d 651, 654 (Fla.App. 2d 1976).

The court in Casa Development, supra, commented that while there was a public hearing (as in Snyder), that did not transfer the matter to quasi-judicial in character. Casa Development at p. 654.

The Fifth DCA in Snyder is actually saying that zoning and re-zoning matters should be quasi-judicial hearings with the attendant procedures and restriction placed upon them, rather than being legislative matters for the appropriate council or commission to consider. That position has been rejected by the courts of Florida.

HISTORICAL REASONS FOR ZONING AND RE-ZONING ACTION BEING CLASSIFIED AS LEGISLATIVE

From the foregoing discussion, it can clearly be seen that the Florida courts have recognized zoning and re-zoning action to be legislative. That classification and the accompanying consequences did not simply happen without reason and justification.

The legitimacy of local zoning decisions being classified as legislative has been summarized in Stansberry v. Holmes, 613 F.2d 1285 (5th Cir. 1980) as follows:

> "The Supreme Court has recognized the key role that the zoning power can play in maintaining for citizens an acceptable quality of life. Zoning is the local community's most powerful weapon against a waive of commercialism that theatens to permeate not only the major thoroughfares but the quiet residential neighborhoods with their parks, trees, and children at play. Without the power to zone, every person would be at the mercy of the entrepreneur who chose to develop on the next corner. Zoning provides one of the finest and most basic of the rights of local control. Stansberry at p. 1288.

Under the Local Government Comprehensive Planning and Land Development Regulation Act, Section 163.3161, Florida Statutes (1985), municipalities and counties within the state are vested with the power and responsibility to adopt comprehensive land use plans to guide future development and growth. F.S. §163.3167(1).

Once a comprehensive plan has been adopted in conformity with the guidelines set out in the act, all future development undertaken by responsible governing bodies is required to be "consistent" with the plan. F.S. §163.3194(1).

The legislative process involved with the passage of a

comprehensive plan doesn't end with the passage of the plan. "[M]anaging growth under a comprehensive plan with such a wide array of elements may involve selecting between conflicting goals and priorities." Southwest Ranches v. Broward County, 502 So.2d 931, 939 (Fla.App. 4th 1987).

The selection "between conflicting goals and priorities," Southwest Ranches, supra, is the foundation for zoning decisions historically being classified as legislative. As stated by this Court in Josephson v. Autrey, 96 So.2d 784 (Fla. 1957):

> "...the individual property owner may be required to suffer reasonable restrictions in the use of his property in the interests of the general welfare. Obviously these restrictions are imposed by the exercise of the legislative authority. By the exercise of such authority the zoning ordiances come into existence." Josephson at p. 788.

The entire procedure for the governing body of a county or municipality deciding zoning and re-zoning matters has been established by the legislature of the State of Florida in Section 166.041, Florida Statutes, 1991. That procedure includes published notice, two public hearings, then a vote by a majority of the quorum of the governing body.

CONCLUSION

Several of the cases cited in Snyder are not applicable or have been misinterpreted by the appellate court. The court in Snyder cited Machado v. Musgrove, 519 So.2d 629 (Fla.App. 3d 1987) as a case applying the "Fasano standard of review where a zoning decision is challenged as violative of the Comprehensive

Land Use Plan," Snyder at p. 78. The court in Machado referred to Fasano only as to the burden of proof required.

More importantly, Snyder alluded to the fact that the court in Hirt v. Polk County Board of County Commissioners, 578 So.2d 415 (Fla.App. 2d 1991) "made a passing reference to rezoning decisions as being legislative in nature." The so-called "passing reference" couldn't have been more direct:

> "Thus, creating zoning districts and rezoning land are legislative actions, and as this court said in Naples Airport Auth. v. Collier Dev., 513 So.2d 247, 249 (Fla. 2d DCA 1987), trial courts are not permitted to sit as 'super zoning boards' and overturn a boards legislative efforts." Hirt at p. 417.

The court in Snyder alluded to its belief that "rezoning actions are not subject to effective judicial review" Snyder at p. 75. The petition filed by Brevard County seeking review in this Court cited twenty one cases involving zoning and re-zoning issues which reached the appellate courts of this state. It would appear that judicial review has been both active and effective.

The desire of the Fifth DCA in this case to change long-standing Florida law and procedure involving zoning decisions is not justified or needed.

This court should reverse and vacate the decision of the Fifth DCA, thereby upholding zoning decisions as legislative in scope, not subject to inquiry as to motive, but subject to the established and workable "fairly debateable" standard of review. Village of Euclid, Ohio v. Ambler Realty, co., supra, at p. 117; City of Miami Beach v. Lachman, supra at p. 150.

Respectfully submitted this 19 day of October, 1992.

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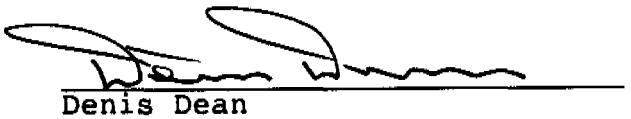

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