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IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA,

Appellant,

vs.

JACK R. SNYDER and GAIL K.
SNYDER, his wife,

Appellee.

Case No. 79,720

Fifth District Court of
Appeal Case No. 90-1214

BRIEF OF AMICI CURIAE
BROWARD COUNTY, HILLSBOROUGH COUNTY, AND FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC. IN SUPPORT OF APPELLANT, BREVARD COUNTY

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STATEMENT OF INTEREST OF AMICI CURIAE

The local governments participating in this amici curiae brief have an important interest in the instant case since they are charged, by statute, with the duty and authority to regulate land use in their locality. The Fifth District Court of Appeal's requirement that quasi-judicial proceedings be conducted for rezonings, site plans, platting, requests for variances and special exceptions and/or conditional use permits will have far-reaching effects which will inhibit the ability of local elected officials to perform the essential function of land use regulation.

SUMMARY OF ARGUMENT

The opinion of the Fifth District Court of Appeal, Snyder v. Board of County Commissioners, 595 So.2d 65 (5th DCA 1991), is in direct conflict with decades of Florida case law. It is well settled in Florida that land use regulations are legislative actions which are reviewed by the "fairly debatable standard." In addition, when reviewing the case at bar, the 1985 enactment of the Local Government Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes (the "Growth Management Act"), should be carefully considered since its purpose and intent are significant.

The decision of the Fifth District Court of Appeal is clearly inconsistent with the legislative intent and purpose of the Growth Management Act. The legislature specifically designated local governments as the entities to implement comprehensive plans, knowing full well that local governments would have the knowledge and expertise necessary to maintain land development controls in conformity with adopted comprehensive plans.

Since local governments are charged with the authority to implement and amend comprehensive plans, the Fifth District Court of Appeal's attempt to substitute its determination in place of the local government is an encroachment on the separation of powers doctrine.

If local governments are required to employ, as the Fifth District Court of Appeal's decision dictates, quasi-judicial proceedings to make decisions on rezoning, site plans approvals, platting, requests for variances and special exceptions and/or conditional use permits, such requirement will have a chilling

effect on not only the local government, but on the general public as well, since such proceedings will be costly and time-consuming, and will restrict ex parte communications among the parties.

ARGUMENT

I. THE CASE LAW IN FLORIDA IS WELL SETTLED THAT THE IMPLEMENTATION OF ZONING REGULATIONS BY LOCAL GOVERNMENTS IS A LEGISLATIVE ACT WHICH REQUIRES DISCRETION AND FLEXIBILITY.

Historically, this Court has taken the position that the zoning of private property, and the power to restrict the use of private property, involves an exercise of the local government's police powers. Josephson v. Autrey, 96 So.2d 784, 787 (Fla. 1957). This Court has also recognized that land use controls are imposed by the exercise of the legislative authority of the local government through its police powers. Id. at 788. In Josephson, this Court acknowledged that local governments are charged with the duty and responsibility of developing and implementing land use controls and development regulations.

In determining where a business district ends and a residential district begins, this Court stated that the process of implementing zoning regulations involves a "high degree of legislative discretion and an acute knowledge of existing conditions and circumstances." City of Miami Beach v. Wiesen, 86 So.2d 442, 445 (Fla. 1956). For that reason, this Court and the various district courts of appeal have continued to take the position that they will not interfere with decisions of a local government if the actions of the local government are "fairly debatable," and will not substitute their judgment for that of the local government unless and until those actions become arbitrary and unreasonable. City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953); City of St. Petersburg v. Aikin, 217 So.2d 315 (Fla. 1968); Southwest Ranches Homeowners Assoc., Inc. v. Broward County,

502 So.2d 931 (4th DCA 1987); Machado v. Musgrove, 519 So.2d 629 (3d DCA 1987); Lee County v. Morales, 557 So.2d 652 (2d DCA 1990).

This Court has also acknowledged that a property owner's expectations may not always be consistent with or in the best interest of a community as a whole. When a local government imposes land development controls that interfere with and are contrary to those expectations, an individual property owner may be required to endure regulations restricting the use of his or her property in the interest of the general public. Josephson, 96 So.2d at 787; City of Miami Beach v. Wiesen, 86 So.2d at 445.

Further, the separation of powers doctrine specifically prohibits the court from requiring a local government to zone a parcel of property in a particular manner or to interfere in decisions regarding zoning or rezoning unless they are arbitrary or unreasonable. City of Miami Beach v. Weiss, 217 So.2d 836, 837 (Fla. 1969). In quashing the lower court's direction to the City of Miami Beach to rezone the property that was the subject of the lawsuit in City of Miami Beach v. Weiss, this Court stated that:

> [T]he ultimate classification of lands under zoning ordinances involves the exercise of the legislative power, preventing the courts under the doctrine of separation of powers from invasion of this field.

Id. at 837.

In the past, courts have been reluctant to substitute their wisdom in place of local zoning authorities for fear that owners of property would request rezonings on a piecemeal basis and:

> [I]f the subject property be rezoned to business, the property to the north and across the street would have to be treated similarly and on and on as to other property until by a process of 'judicial erosion,' the entire zoning plan would be destroyed.

City of Miami Beach v. Wiesen, 86 So.2d at 446.

This concern is well founded since local governments are empowered to enact comprehensive plans that incorporate policy determinations and principles upon which local governments must rely. Zoning and rezoning regulations provide the detailed means by which those principles which are delineated in the local government's comprehensive plan are given effect. In order to effectuate these principles, and to avoid the erosion of an entire zoning plan by judicially required piecemeal amendments, local governments must be permitted to consider not just the effect on the property to be rezoned, but whether such zoning or rezoning would jeopardize or materially affect the comprehensive plan as a whole. For these reasons, the courts have been deferential in reviewing land planning decisions of the local governments.

In 1985, when the legislature enacted the Growth Management Act, the legislature placed the burden of land planning on the local governments and stated:

> [I]t is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local government in the establishment and implementation of comprehensive planning programs to guide and control future development.

§ 163.3161(2), Fla. Stat. (1991).

Now more than ever, zoning modifications affect all areas of land use which are of critical concern to the state and local governments. The legislature was fully cognizant of Florida's diminishing resources when it mandated that local governments adopt comprehensive plans containing, at a minimum, specific provisions for the use of land, water, open space, potable water wellfields, stormwater management, protection of environmentally sensitive

lands, and sufficient public services and facilities. § 163.3202, Fla. Stat. (1991).

It is of the utmost importance that local governments be permitted to retain the flexibility and discretion to determine whether, and to what extent, a land use change will impact such significant resources as water, wetlands, infrastructure and other public facilities. The judiciary should not place itself in the position of "second guessing" actions taken by a local government unless and until those actions are clearly arbitrary and unreasonable.

II. THE ZONING AND REZONING OF LAND IS A LEGISLATIVE FUNCTION BASED ON POLICY DETERMINATIONS, WHICH DETERMINATIONS, BY STATUTE, MUST CONFORM TO AND BE CONSISTENT WITH THE LOCAL GOVERNMENT'S COMPREHENSIVE PLAN.

The characterization of zoning actions as legislative is contemplated by, and consistent with, the Growth Management Act. In Southwest Ranches Homeowners Assoc., Inc. v. Broward County, 502 So.2d 931 (4th DCA 1987), the Fourth District Court of Appeal reviewed a County zoning decision that allowed the construction of a landfill and resource recovery facility. The court, considering whether the zoning ordinances were consistent with the adopted comprehensive plan, stated that "zoning decisions should not only meet the traditional fairly debatable standard, but should also be consistent with the comprehensive plan." Id. at 936. Even in the context of an adopted land use plan, the Fourth District Court of Appeal correctly recognized that zoning ordinances are still legislative acts.

The court in Southwest Ranches went on to discuss that the legislative intent of the Growth Management Act was to allow local governments flexibility in applying comprehensive plans. Id. at 937. The Fourth District Court of Appeal's analysis illustrates one of the issues the Fifth District misconstrued in the case below. The adoption of a zoning ordinance, including the rezoning of a parcel of land, is essentially a policy decision. Local government land use policy-making must, by statute, begin with the adoption of a comprehensive plan, but it does not end there. Counties and cities must further refine their comprehensive plan

policies by the adoption of land development regulations, including zoning regulations. §§ 163.3194, 163.3202, Fla. Stat. (1991).

If local zoning decisions are divested of their long-standing legislative character, local governments will lose the very flexibility contemplated by the legislature in the Growth Management Act. _See_ §§ 163.3194(4)(b), 163.3202(3), Fla. Stat. (1991). A typical comprehensive plan may designate a large land area for a generalized land use, such as "residential" or "industrial," as permitted by § 163.3177(6)(a), Fla. Stat. (1991). Those generalized land uses could permit a great variety of uses within certain density or intensity parameters. The broad and generalized nature of comprehensive plans requires the further creation of policies and the exercise of discretion for their implementation. One of the ways a local governing body may implement those broad guidelines is through zoning regulations. That discretion should be guided by the local governing body acting as legislators, not as judges. The quasi-judicial proceeding required by the Fifth District could essentially leave the implementation of comprehensive plans to the whims of whichever property owners could submit their rezoning petitions first.

III. THE REQUIREMENT THAT REZONINGS BE IMPLEMENTED BY QUASI-JUDICIAL PROCEEDINGS WILL HAVE A CHILLING EFFECT ON LOCAL GOVERNMENT AS WELL AS THE GENERAL PUBLIC.

The term "quasi-judicial" is defined in *Black's Law Dictionary* as:

> A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature.

Black's Law Dictionary 1121 (5th ed. 1979).

If local governments are required to employ quasi-judicial proceedings for rezonings, site plan approvals, platting, requests for variances and special exceptions and/or conditional use permits, the cost to both the local government and the applicant would be excessive, as well as exceedingly time-consuming. Each proceeding would entail the production of evidence, the testimony of witnesses, the cross-examination of witnesses, a verbatim record of the proceedings, and a written statement of the governing body setting forth its findings of fact and conclusions of law. Because modifications to land development regulations are the norm rather than the exception, local governing bodies would be placed in a position of sitting as a judicial tribunal on a routine basis.

Further, the implementation of development regulations by a series of quasi-judicial proceedings would largely deny the public access to the planning process. The Third District Court of Appeal has recently held that an ex-parte communication on a matter to be heard in a quasi-judicial proceeding could be a due process

violation. Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991).

Under the Fifth District's reasoning, local elected officials will be isolated from contact with the residents who elected them from the time a comprehensive plan is adopted until the land within the jurisdiction is built-out, except during the formal public hearing process for amendments, which are limited to twice a year. This drastic reduction in access to the local government planning process was clearly not contemplated by the legislature in the Growth Management Act. § 163.3181, Fla. Stat. (1991).

The intent of the legislature, in the enactment of § 163.3181, was to provide the public with many avenues with which to address concerns they might have regarding modifications to land development regulations. With the Fifth District Court of Appeal's declaration that these development regulations are quasi-judicial, and the holding in Jennings, the intent and purpose of the legislature to include the public in the comprehensive planning process mandated by § 163.3181 will be severely curtailed.

CONCLUSION

Local governments are justifiably alarmed at the potential ramifications of the decision of the Fifth District Court of Appeal that is being reviewed by this Court. The Fifth District Court of Appeal has placed itself in a position of substituting its judgment for that of the local governing body which possesses far greater knowledge of the needs of the community. The new standard of review suggested by the Fifth District's holding would have a severe, negative impact on local land use regulations. For this reason, and for all of the above and foregoing reasons, the opinion of the Fifth District Court of Appeal should be reversed.

Respectfully submitted,

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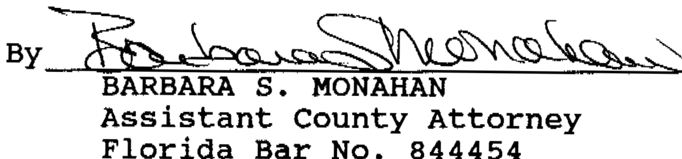
By 

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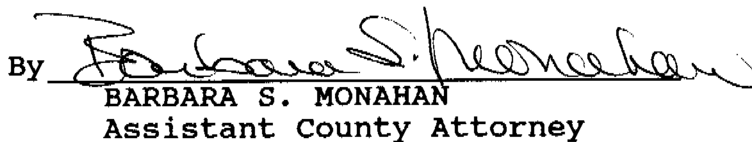
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Brief of Amici Curiae has been furnished by United States Mail to each of the persons on the attached mailing list this 16th day of October, 1992.



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